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[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—P. V. RAJAMANNAR, *Chief Justice*, MR. JUSTICE GOVINDARAJACHARI AND MR. JUSTICE GOVINDA MENON.

G. Narayanaswami Naidu and others .. *Petitioners**

v.

The Inspector of Police, Mayavaram .. *Respondent.*

Madras Maintenance of Public Order Act (I of 1947 *as amended by Ordinance II of* 1948), *sections* 16 *and* 16-*A—Validity, scope and effect—Section* 16-*A if applicable to pending petitions under section* 491, *Criminal Procedure Code (V of* 1898)—*Scope of jurisdiction under section* 491 *of Criminal Procedure Code—Government of India Act* (1935), *sections* 51 (4), 88, 104, 107 (2), 223 *and Schedule VII, List II, items* 1 *and* 2 *and List II, item* 2—*Applicability of.*

Ordinance (II of 1948) was promulgated on the 25th May, 1948, when the Legislature of the Province (having been prorogued on 24th May 1948), was not in session. Where it is not alleged or proved that the Governor was satisfied at some time when the Legislature was in session or that the Government had obtained the instructions from the Governor-General when the Legislature was still in session but all that is urged is that the interval between the prorogation of the Legislature and the promulgation of the Ordinance is so short that it was improbable that any of the steps required by section 88 (1) of the Government of India Act was taken after the prorogation of the Legislature, it cannot be said that the entire Ordinance is invalid on this ground. Sub-section (4) of section 51 of the Government of India Act completely prohibits the Court from going into the question whether or not any advice was tendered by the ministers to the Governor and that prohibition would equally apply to the question whether or not any advice required by section 88 (1) of the Government of India Act could have been tendered by the ministers to the Governor before promulgating an ordinance.

The subject-matter of section 16-A (inserted by Ordinance II of 1948 in Madras Act I of 1947) that is to say, the jurisdiction of the High Court under section 491 of the Code of Criminal Procedure, can properly fall within either item 2 of List III or items 1 and 2 of List II of Schedule VII to the Government of India Act. The word 'including' in item 2 of List III is used as a word of enlargement and not restriction and all matters whether relating to procedure or not included in the Code of Criminal Procedure on the date of the passing of the Government of India Act would be Concurrent Legislative Subjects. Accordingly item 2 of List III can properly be held to comprise the subject-matter of section 491 of the Code of Criminal Procedure.

Assuming it does not, then it must fall within items 1 and 2 of List II. In so far as section 16-A of Madras Act I of 1947 purports to affect the jurisdiction and powers of the High Court with respect to the matters in item 1, namely, preventive detention for reasons connected with the maintenance of public order and persons subject to such detention, the subject-matter falls directly within item 2 of List II. Having regard to these items both in List III and List II recourse to the powers conferred under section 104 of the Government of India Act is not necessary.

If the subject-matter of section 16-A of Act I of 1947 were to fall within the matters enumerated in items 1 and 2 of List II then the Provincial Legislature was undoubtedly entitled to legislate on it, and likewise the Governor could promulgate an Ordinnce. If, on the other hand, the subject-matter is covered by item 2 of List III, then the provision is no doubt in conflict with a provision in an existing law, namely, section 491 of the Code of Criminal Procedure, but it is not void by

* Cr.M.P. No. 1072, etc. 30th July, 1948.

reason of the instructions of the Governor-General obtained by the Governor under the proviso to section 88, reading it for this purpose along with sub-section 2 of section 107 of the Government of India Act. Any power of the Supreme Court, assuming it had, to issue a writ of *Habeas Corpus* was not preserved in the High Court after the enactment of section 148 of the Criminal Procedure Code of 1875. Section 223 of the Government of India Act provides for the jurisdiction of the High Courts being altered and interfered with by the appropriate Legislature by virtue of the powers conferred on them by that Act. Accordingly the Act or Ordinance cannot be impugned.

The right of a detained person to apply to the High Court under section 491, Criminal Procedure Code, for release cannot be treated as a matter of procedure. It is a substantive right and a very valuable right. Section 16-A of Act I of 1947 inserted by clause 4 of Madras Ordinance I of 1948, will not apply to pending proceedings under section 491, Criminal Procedure Code but will apply to petitions filed after 25th May, 1948 (the date of the promulgation of the Ordinance) even in respect of persons detained before that date.

Whether section 16 of Madras Act I of 1947 stands alone or there is in addition thereto the newly inserted provision section 16-A, the power and jurisdiction of the High Court to pass an order under section 491 of the Code of Criminal Procedure, remained the same and subject to the same conditions, qualifications and limitations. The addition of section 16-A " involves no change in the legal position." The residuum of power and jurisdiction of the High Court is the power to interfere and set at liberty a person who is being detained by an order which though purporting to be made under section 2 of Madras Act I of 1947 is not in fact such an order. This will be in the following circumstances :

(*a*) When the order is not duly authenticated as for example, when it is passed by an officer or authority not empowered under section 15 of the Act ;

(*b*) when the person detained in pursuance of the order is not the person detained that is to say, when there is a mistake of identity ;

(*c*) when there is a lack of *bona fides* ; and

(*d*) when it is established that the essential requirement of sction 2, namely, the satisfaction of the Provincial Government or an officer or other authority empowered under section 15 with respect to the particular person that he is acting or about to act in any manner prejudicial to the public safety or the maintenance of public order and with a view to preventing him it is necessary to direct him to be detained or otherwise dealt with under section 2 (1) of the Act, is not present. If it is established that neither the Provincial Government nor the officer or other authority empowered under section 15 has exercised its or his mind on the material placed before it or him, then an order of detention, though purporting to be passed under section 2 (2) must be deemed to be not an order under section 2.

If these grounds do not exist, the High Court cannot investigate the sufficiency of the material or the reasonableness of the grounds upon which the Government or the empowered officer or authority had been satisfied.

Once a duly authenticated order of detention is produced, it must be taken *prima facie* to have been properly made and that the requisite as to the belief of the Government or the detaining authority was complied with.

Section 561-A of the Code of the Criminal Procedure does not enlarge or add to the power of the High Court under section 491 of the Code.

(Case-law elaborately discussed).

Petitions under section 491 of the Criminal Procedure Code, praying that in the circumstances stated in the respective affidavits the High Court will be pleased to issue directions in the nature of a *habeas corpus* directing the respondents to produce the respective petitioners before the High Court for being set at liberty.

A. K. Pillai for *Messrs. Row and Reddy, Md. Asker Ali, A. A. S. Mustafa, B. Pokker, K. Krishnamurthy, R. Suryanarayana, N. S. Mani, S. Krishnamurthy, P. Rami Reddy, B. V. Subramanyam* for Petitioners.

The Advocate-General (*K. Rajah Aiyar*) and the Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court delivered the following

JUDGMENTS : *The Chief Justice.*—These are applications filed under section 491 of the Code of Criminal Procedure on behalf of certain persons ostensibly detained under the provisions of Madras Act I of 1947, praying that they may be set at liberty on the ground that they were being illegally and improperly detained. Some of the applications were filed on or before 25th May, 1948, while the rest of the applications were filed subsequent to that date. Objection was taken that the

applications were not maintainable on account of section 16-A of the Act which was inserted by clause 4 of Ordinance No. II of 1948 promulgated by His Excellency the Governor on 25th May, 1948. It runs thus :

"Nothing in section 491, sub-sections (1) and (2), of the Code of Criminal Procedure, 1898, shall apply to any person detained, or deemed to have been detained, under section 2 of this Act by the Provincial Government or any officer or authority authorized by them in that behalf."

In reply to this objection, learned counsel for the petitioners raised objections to the validity of section 16-A of the Act and also contended that in any event it would not apply to any of the petitions either actually pending on the date of the Ordinance or filed subsequently. He set forth his contentions in the following memorandum :

" In the matter of Criminal Miscellaneous Applications made under section 491 of the Criminal Procedure Code and awaiting disposal or in the process of filing in the Registry of the High Court Office, the New Madras Ordinance ' The last clause therein ' has been pleaded in Bar and some of the applications recently filed have been returned.

In support of the position, namely, that the High Court's jurisdiction notwithstanding the new Ordinance remains intact, the following legal submissions are sought to be made :—

1. The New Madras Ordinance, that part of which seeks to exclude the jurisdiction of the High Court under section 491, Criminal Procedure Code, is *ultra vires* of the Governor (and the Provincial Legislature) as the High Court's powers shall remain paramount subject only to the legislative Powers of the Governor-General in Council. The subject's rights under section 491 are substantive rights and not of the nature of the procedural rights and do not fall under either list 2 or 3 of the Government of India Act.

The clause numbered 16 (*a*) of the New Ordinance is manifestly repugnant to clause 44 of the Letters Patent as well as section 223 of the Government of India Act, 1935. It is also contrary to the spirit of the Instrument of Instructions to the Madras Governor.

2. In any event the New Ordinance limiting the powers of the High Court cannot affect the pending cases or the vested right under section 491, Criminal Procedure Code, of the persons already detained.

" If it was meant to apply to the pending cases, or in other words to operate retrospectively, the Ordinance would have stated it as the main Act itself has done in section 16, clause 2, where the pending cases have been expressly referred to.

Under all circumstances the High Court's Power cannot be taken away and must remain supreme in order to see, by directions of the nature of *habeas corpus*, that the particular person or persons detained or deemed to be detained actually fall under the provisions of the given Act. Where any case is seen to be outside the four corners of the Act or vitiated by *mala fides* on the part of the detaining authority, then High Court alone can set matters right under section 491, Criminal Procedure Code."

When the applications came on for hearing before Yahya Ali, J., during the vacation on 1st June, 1948, the learned Judge considered that as the objections raised appeared to be of vast constitutional and public importance, they should be heard and disposed of by a Bench rather than by him sitting singly. He therefore adjourned all the applications and directed that the papers may be placed before me for orders. I thought it desirable that the cases, in so far as it raised points of constitutional importance, should be heard by a Special Bench of three Judges. Accordingly, a Special Bench was constituted, and many points were argued at length by several learned counsel on behalf of the petitioners and by the learned Advocate-General on behalf of the Government.

As the validity of the Ordinance generally and clause 4 of the Ordinance inserting section 16-A in particular have been impugned, it is necessary to deal with these objections at the outset. The validity of the Ordinance as a whole is attacked on the ground that the conditions laid down by section 88, sub-section (1) of the Government of India Act have not been complied with. Section 88, sub-section (1) runs thus :

" If at any time when the Legislature of a Province is not in session the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinance as the circumstances appear to him to require : Provided that the Governor shall not, without instructions from the Governor-General, promulgate any such Ordinance if an Act of the Provincial Legislature containing same provisions would under this Act have been invalid, unless, having been reserved for the consideration of the Governor-General, it had received assent of the Governor-General."

The preamble to the Ordinance is as follows :—

"Whereas the Legislature of the Province is not in session, and the Governor of Madras is satisfied that immediate action is necessary for the purpose of amending the Madras Maintenance of Public Order Act, 1947;

And whereas the instructions of the Governor-General have been obtained in pursuance of the proviso to section 88, sub-section (1), of the Government of India Act, 1935;

Now, therefore, in exercise of the powers conferred by section 88, sub-section (1) aforesaid, the Governor hereby promulgates the following Ordinance."

Mr. A. K. Pillai, learned counsel for some of the petitioners developed his contention on this point in the following manner : The Legislature of a Province must be deemed to be in session till it is dissolved or prorogued. The Legislature of the Madras Province was prorogued only on 24th May, 1948. The Ordinance was promulgated on the next day, that is, 25th May, 1948. The action of the Governor under section 88 must be taken not in his individual discretion but on the advice of his Ministers. The Governor cannot seek or obtain the advice of his Ministers or instructions from the Governor-General till the Legislature ceases to be in session. Having regard to the short interval between the prorogation of the Legislature and the promulgation of the Ordinance, it was extremely improbable, if not impossible, that the Governor should have obtained the advice of his Ministers and then obtained instructions from the Governor-General, after the prorogation of the Legislature. At the beginning of the hearing, there was some doubt as to when exactly the two Chambers had last met, but the learned Advocate-General informed us that the Legislative Assembly met last on 28th April, 1948, and the Legislative Council met last on 3rd May, 1948, and the meeting of both Chambers stood adjourned *sine die*.

In answer to specific questions from the Court, learned counsel for the petitioners were unable to state that it was their definite case that the Governor had not obtained the advice of the Ministers or that the Governor did not obtain instructions from the Governor-General. On this point, the only allegations on record are to be found in the affidavit of Mr. N. S. Varadachari, a Member of the Legislative Assembly, filed before us on 14th July, 1948. The affidavit is as follows :

"1. I am a Member of the Legislative Assembly and closely follow the general events in the Province, particularly events in Madras of Public interest.

2. The promulgation of the Ordinance No. 2 of 1948, dated 25th May 1948, seeking to amend the Madras Maintenance of Public Safety Act, 1947, came as a surprise to me because the Legislature was then due to meet shortly.

3. It is significant that the notification in the Extraordinary Gazette of the 25th May, 1948, was meant to be in effect as from the 24th May, 1948. It was from this notification that we for the first time knew that the Legislature was not to meet as originally arranged, and has been prorogued.

4. I say that it is physically impossible for the various statutory steps including the meeting of the Cabinet for the formal consideration of the need for the Ordinance, advising the Governor thereupon and then for the Governor to take instructions from the Governor-General, I say that these steps which are statutorily necessary before the promulgation of the Ordinance could not possibly have been taken within less than 24 hours between the prorogation of the Legislature on the 24th May, 1948, and the actual promulgation of the Ordinance on the 25th May, 1948.

5. I say that to the best of my knowledge His Excellency the Governor of Madras was absent at Ootacamund on the 24th and 25th May, 1948".

There appears to be a slight inaccuracy in paragraph 3 of the affidavit because the Extraordinary Gazette in which the notification as to prorogation was published is dated the 24th of May, and not the 25th of May. It is clear from this affidavit that the deponent is unable to say that the steps which in his opinion are statutorily necessary before the promulgation of the Ordinance were not as a matter of fact taken. He only gives his opinion that the steps could not possibly have been taken.

The learned Advocate-General contended that in the absence of any definite allegation that any of the conditions contained in section 88, sub-section (1) of the Government of India Act were not fulfilled and in the absence of any evidence

on the point he was not called upon to meet any objection raised on that score. He also referred us to section 51 (4) of the Government of India Act which is in these terms :

> "The question whether any, and if so what, advice was tendered by minisers to the Governor shall not be inquired into in any Court."

Mr. Pillai, learned counsel for the petitioners, conceded that this Court had no jurisdiction to inquire into the question whether any advice was at all tendered by the Ministers to the Governor, but he contended that it was nevertheless open to this Court to hold that no advice could have been in the circumstances tendered because what he called the "time factor" made it most improbable. In other words, he asked us to give a finding on the probabilities on a question on which we are precluded from giving a finding after a regular inquiry. This contention must be stated only to be repelled. Sub-section (4) of section 51, in my opinion, completely prohibits the Court from going into the question whether or not any advice was tendered by the Ministers to the Governor, and that prohibition would equally apply to the question whether or not any advice could have been tendered by the Ministers to the Governor.

I agree with learned counsel for the petitioners that the Legislature must be deemed to be in session till it is prorogued or dissolved. Under rule 3 (*a*) of the Rules for the Madras Legislative Assembly, "A session of the Assembly is terminated by prorogation." The following passage from May's Parliamentary Practice, 14th Edition, is apposite :

> "A session is the period of time between the meeting of a Parliament, whether after a prorogation or dissolution, and its prorogation. . . . . During the course of a session either House may adjourn itself of its own motion to such date as it pleases. The period between the prorogation of Parliament and its reassembly in a new session is termed a 'recess' ; while the period between the adjournment of either House and the resumption of its sitting is generally called an 'adjournment.' A prorogation terminates a session ; an adjournment is an interruption in the course of one and the same session."

As the sessions of the Legislative Assembly and the Legislative Council were prorogued only on 24th May, 1948 (*vide* G.O. No. 1284 Public (Elections) dated 24th May, 1948), the Legislature of the Province must be deemed to have been in session till 24th May, though the meetings of the two Chambers were adjourned *sine die*. But actually the Ordinance was promulgated on 25th May at a time when the Legislature of the Province was admittedly not in session. It was also contended that the Governor must be satisfied that circumstances existed which rendered it necessary for him to take immediate action only when the Legislature was not in session and likewise he could seek and obtain instructions from the Governor-General only when the Legislature was not in session. It is not necessary to give a final opinion on this point because assuming that the petitioners' contention is correct, it has not been alleged anywhere, still less proved, that the Governor was satisfied at some time when the Legislature was in session, and equally it has not been alleged or proved that the Governor obtained the instructions from the Governor-General when the Legislature was still in session. All that has been pressed upon us is that the interval between the prorogation of the Legislature and the promulgation of the Ordinance is so short that it was improbable that any of the above steps was taken after the prorogation of the Legislature. Mr. Pillai frankly said that he cannot assert that the recitals in the preamble to the Ordinance were false. He only emphasised on the "time factor" and the general improbabilities in the circumstances set out above. It does not concern us to say whether the Ordinance should have been promulgated so soon after the prorogation of the Legislature. This Court is not concerned with questions of policy or the propriety of the action of the Governor, so long as the action is legal and not vitiated by any defect in procedure. I am therefore unable to agree with the contention on behalf of the petitioners that the entire Ordinance is invalid on this ground.

The main target of the attack by the petitioners was, of course, section 16-A inserted by clause 4 of the Ordinance. Various grounds were put forward during

the course of the arguments on which it was contended that the section was invalid and void, and I shall deal with them in their logical sequence.

First comes the large contention that it is not competent for the Provincial Legislature to make any law with respect to the subject-matter of section 16-A, that is to say, the jurisdiction of the High Court under section 491 of the Code of Criminal Procedure because the subject does not fall within any of the items set out in Lists II and III of the Seventh Schedule to the Government of India Act. Nor does it find a place in List I. The result is—so the argument ran—that the subject-matter came within the residual powers of legislation conferred on the Governor-General by section 104, sub-section (1) of the Constitution Act which so far as it is relevant for the purpose of this question is in these terms :

> " The Governor-General may by public notification empower either the Dominion Legislature the Provincial Legislature to enact a law with respect to any matter not enumerated in any of the Lists in the Seventh Schedule to this Act."

As admittedly there is no public notification as contemplated in that section, it is urged that the Provincial Legislature is not competent to enact in respect of that matter.

There can be no doubt that section 104 cannot be called in aid of the petitioners' argument unless we are driven to the conclusion that the subject-matter of section 16-A is not covered by any of the items in any of the Lists. On this point, the proper approach is to be found in the observations of the learned Chief Justice of India in *Manikkasundara Bhattar* v. *R. S. Nayudu*[1] :

> " We cannot believe that such a far-reaching curtailment of legislative powers would have been made in a sphere of legislation of such importance to British India by mere silent omission. Rather we should have expected, if such had been the intention of Parliament, to have found some express prohibition or curtailment of legislation on these subjects, such as is to be found in section 108 of the Act. We should moreover in any event prefer a construction which would enable legislation on a subject of such vital importance in India to be enacted by some legislative body rather than leave it to be dealt with under section 104. * * * *
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> But when there is a choice between two possible constructions of an entry or entries, one of which will result in legislative power being conferred by some entry or entries in the Lists and the other in a finding of no existing power, but if legislation is required that recourse must be had to section 104, the first construction should on principles analogous to those applied to the Canadian Constitution be preferred. . . . . .Lastly, such a construction should be preferred where there is actual legislation on the subject, in which case the Court will incline to a construction which will give validity to such legislation."

Now, are we driven to say that the subject-matter of section 16-A, that is, section 491 of the Code of Criminal Procedure is not covered by any of the items in the three Lists in the Seventh Schedule. I am clearly of opinion that we are not so driven. The subject-matter can properly fall within either item 2 of List III or items 1 and 2 of List II. Item 2 of List III is as follows: " Criminal Procedure including all matters included in the Code of Criminal Procedure at the date of the passing of this Act." *Prima facie* it would appear that this item covers the jurisdiction of the High Court under section 491 of the Code of Criminal Procedure because it was certainly a matter included in that Code at the material date. Mr. N. S. Mani, one of the learned counsel for the petitioners, strenuously contended that this item would not comprise section 491 because it was not a matter of mere procedure but a matter of a substantive right. Assuming that it is, nevertheless the question remains whether having been included in the Code of Criminal Procedure it would not fall within the item. Much controversy arose on the interpretation of the word " including." Mr. Mani's contention was that only matters of procedure included in the Code of Criminal Procedure would be comprised in the item. If that were so, the whole clause would be superfluous and otiose, because the expression, " criminal procedure " would be sufficient to connote them. The decision of the Judicial Committee relied on by him in *Rajah Bijoy Singh* v. *Surendra Narayan Singh*[2] has no bearing on the point. In that

1. (1946) 2 M.L.J. 17 : 9 F.L.J. 57 at 63. I.L.R. 56 Cal. 1 (P.C.).
2. (1928) 55 M.L.J. 456 : 55 L.R. I.A. 320 :

case, a *patni* lease was granted by a Zamindar. The document of lease contained the words, " The entire zamindari including all interests therein." It was contended that by these words it was intended to grant a lease not only of the surface of the land but also of the sub-soil with a right to use the same for any purpose which the grantee wished, even if such user caused substantial damage to the subject of the lease. This contention was repelled as in Their Lordships' opinion " including all interests therein " did not increase the corpus of the subject of the lease. Two other cases were cited by the learned Advocate-General which appears to me to be more relevant. In *Stewart* v. *Brojendra Kishore*[1] item 4 of the Concurrent List came up for construction. That item is similar to item 2 and runs thus :

> " Civil Procedure, including the Law of Limitation and all matters included in the Code of Civil Procedure at the date of the passing of this Act."

It was held by Mitter and B. N. Rau, JJ., that the provisions of the Civil Procedure Code itself, whether they are " Civil Procedure " in a limited sense or not, were specifically included in the entry, but there was no warrant for including in that entry any provisions which were not in the Code and which did not appertain to " Civil Procedure." In *Vishwanath Narayan Singh* v. *Sri Mahant Harihar Gir*[2], the same item 4 was the subject of interpretation. The learned Judges say :

> " This item makes ' Civil Procedure ' a Concurrent Legislative subject. ' Civil Procedure ' includes Law of Limitation and all matters included in the Code of Civil Procedure as it stood on the day the Government of India Act was passed. In other words, all matters whether relating to procedure or not included in the Code of Civil Procedure on the date of the passing of the Government of India Act are Concurrent Legislative Subjects. The words 'and all matters, etc.,' enlarge the subjects of Concurrent Legislation by including every matter included in the Code of Civil Procedure on the date of passing of the Government of India Act."

On this analogy, all matters whether relating to procedure or not included in the Code of Criminal Procedure on the date of the passing of the Government of India Act would be Concurrent Legislative Subjects. In my opinion, the word 'including' is used as a word of enlargement and not of restriction. As Lord Watson in *Dilworth* v. *Commissioner of Stamps*, *Dilworth* v. *Commissioner for Land and Income-tax*[3] says :

> " The word ' include ' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include."

In *Mellows* v. *Low*[4], McCardie, J., observed thus :

> " In my view the word ' includes ' as used in paragraph (*g*) is not a term of limitation or precise definition ; it means what it says—that it includes the matters thereafter mentioned ; in other words it is a word of enlargement rather than of restriction."

Item 2, therefore, can properly be held to comprise the subject-matter of section 491 of the Code of Criminal Procedure.

Assuming it does not, then it must fall within items 1 and 2 of List II. Items 1 and 2, so far as they are material, are as follows :

> " 1. Public order (but not including the use of His Majesty's naval, military or air forces in aid of the civil power) ; the administration of justice ; . . . . . . preventive detention for reasons connected with the maintenance of public order ; persons subject to such detention."
>
> 2. Jurisdiction and powers of all Courts except the Federal Court with respect to any of the matters in this List."

It was conceded on behalf of the petitioners that Madras Act I of 1947 as originally enacted and the provisions other than section 16-A inserted by Madras Ordinance II of 1948 are directly covered by item 1. The Act which is called the Madras Maintenance of Public Order Act was intended to provide for preventive detention, etc., for the maintenance of public safety and to prevent and put down disorders involving menace to the peace and tranquillity of the Province. In so far as section 16-A purports to affect the jurisdiction and power of the High Court

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1. A.I.R. (1939) Cal. 628.
2. (1938) I.L.R. 17 Patna 714 at 725.
3. (1899) A.C. 99 at 105, 106.
4. (1923) 1 K.B. 522 at 526.

with respect to the matters in item 1, namely, preventive detention for reasons connected with the maintenance of public order and persons subject to such detention, it would seem that its subject-matter falls directly within item 2.

Having regard to these items both in List III and List II, it is impossible to agree with the contention on behalf of the petitioners that the subject-matter of section 16-A is not covered by any of the items in any of the Lists and that recourse should be had to the powers conferred under section 104 of the Government of India Act before any Legislature could proceed to enact in respect of it.

The next alternative contention on behalf of the petitioners is based on section 107, sub-section (1) of the Government of India Act, which runs thus :

" If any provision of a Provincial law is repugnant to any provision of a Dominion law which the Dominion Legislature is competent to enact or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of this section, the Dominion law, whether passed before or after the Provincial law, or, as the case may be, the existing law, shall prevail and the Provincial law shall, to the extent of the repugnancy, be void."

The arguments of learned counsel on this aspect of the case were not consistent and were often difficult to follow. That section deals with repugnancy or inconsistency and not with incompetency. If the argument based on section 104 of the Government of India Act fails, and in my opinion, it should fail as I have already held, then there can be no question of the Provincial Legislature not being *competent* to enact section 16-A, whether its subject-matter falls within List II or List III. Though it was strenuously contended at one time that the subject-matter of section 16-A was not a matter enumerated in the Concurrent Legislative List, yet for the purpose of this part of the argument, it was evidently assumed by learned counsel for the petitioners that it was such a matter. On that assumption, it was contended that section 16-A was a provision of a Provincial law which was repugnant to a provision of an existing law with respect to one of the matters enumerated in the Concurrent Legislative List, that is, to section 491 of the Code of Criminal Procedure, and therefore void. As this was not sufficient for their purpose, learned counsel went further and contended that sub-section (2) of section 107 has no application to the case. This attitude they had to take perforce because of the proviso to section 88, sub-section (1) of the Act and to the fact that the proviso has been complied with. If section 107, sub-section (2), applied to the case, then any repugnancy would have been cured by the reservation of the Act for the consideration of the Governor-General and by his assent. The corresponding provision for an Ordinance is the proviso above referred to, and it would follow that the repugnancy would be equally cured. Section 107, sub-section (2) is in the following terms :

" Where a Provincial law with respect to one of the matters enumerated in the concurrent Legislative List contains any provision repugnant to the provisions of an earlier Dominion law or an existing law with respect to that matter, then, if the Provincial law having been reserved for the consideration of the Governor-General has received the assent of the Governor-General, the Provincial law shall in that Province prevail, but nevertheless the Dominion Legislature may at any time enact further legislation with respect to the same matter : Provided that no Bill or amendment for making any provision repugnant to any Provincial law, which, having been so reserved, has received the assent of the Governor-General shall be introduced or moved in the Dominion Legislature without the previous sanction of the Governor-General."

The implications of the argument may be developed thus : The two sub-sections of section 107 are not necessarily connected with each other. There may be cases to which section 107, sub-section (1) alone would apply but not sub-section (2) and this is such a case. This is supposed to follow from the difference in the language employed in the two sub-sections, namely, " any provision of a Provincial law " in sub-section (1) and " a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List," in sub-section (2). It was urged that Madras Act I of 1947 and the rest of the Ordinance after excluding section 16-A deal exclusively with matters enumerated in the Provincial List or in other words the pith and substance of the enactment was a matter exclusively falling within the

Provincial Legislative List. The Ordinance, therefore, would not be a Provincial Law with respect to one of the matters enumerated in the Concurrent Legislative List and sub-section (2) would not apply.

During the course of the argument, in answer to a question from one of us' learned counsel conceded that the Provincial Legislature could have validly dealt with the subject matter of section 16-A alone in a separate enactment, if the procedure in section 107, sub-section (2) had been followed. But he contended that in an enactment which in pith and substance dealt with a Provincial subject a provision which was repugnant to a provision of an existing law with respect to a matter in the Concurrent List could not be validly inserted even after following the procedure laid down in sub-section (2) of section 107. No direct authority or authority which would necessarily lead to this conclusion was cited on behalf of the petitioners.

Let as assume that the subject-matter of section 16-A is comprised in the Concurrent List and also assume that the other provisions of the Act fall exclusively within the Provincial List. Is there anything in any of the provisions of the Government of India Act or any general principle which would preclude the Provincial Legislature from dealing with both in the same enactment after taking care to comply with the procedure laid down in sub-section (2) of section 107 with respect to a provision which is inconsistent with, or repugnant to, a matter in the Concurrent List? There is no such provision or general principle.

In my opinion, sub-sections (1) and (2) of section 107 must be read together, and so read, they both deal with matters enumerated in the Concurrent Legislative List, and inconsistency between Provincial law on the one side and Dominion law and existing law on the other with respect to such matters. In my view, the words, "subject to the provisions of this section" which occur in sub-section (1) of section 107 support this construction. These words would have no meaning if sub-section (2) is dealing with something completely different from sub-section (1). The relative rights and disabilities of Provincial and Dominion Legislatures with respect to Lists I and II are dealt with in section 100 of the Act and section 107 deals only with conflicts which may arise in respect of matters in the Concurrent List. I agree respectfully with the following observations of Pal, J., in *Bikram Kishore* v. *Tafazal Hossain*[1] :

> "In my opinion the two sub-sections must be read together. In order to fall within the mischief of section 107 (1), Government of India Act, 1936, both the Provincial law and the existing Indian law must be with respect to the same matter and that matter must be 'one of the matters enumerated in the Concurrent Legislative List.' Sub-section (1) declares a provision to be void 'subject to the provisions of this section.' The invalidity imposed by sub-section (1) will not attach to the provision if the Provincial law in question is passed in the manner contemplated by sub-section (2). In my opinion, therefore, only that kind of the Provincial law is contemplated by sub-section (1) as is covered by sub-section (2). Sub-section (2) clearly contemplates only a Provincial Law with respect to one of the matters enumerated in the Concurrent Legislative List."

I also agree with that learned Judge that the expression "Provincial Law" does not necessarily mean and refer to the entire statute. Any provision of a Provincial Act or of a Provincial law will also be a Provincial law.

The following remarks of Varadachariar, J., in *United Provinces* v. *Mst. Atiqa Begum*[2] also throw light on another aspect of the matter :

> "It seems to me that the words 'with respect to' are not by any means less comprehensive than the words 'relating to.' (*Cf.* Observations in *The King* v. *Kidman*[3] at p. 449 ; Wynes : Legislative and Executive Powers in Australia, at pages 28, 29). The significance of these expressions may become important in a case where the impugned legislation contains a number of provisions relating to different matters and a question arises as to whether one set of provisions can be described as 'passed in respect of a forbidden subject' or can be considered as only incidentally affecting such a subject while forming part of an Act which in the main deals with an authorised subject."

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1. A.I.R. 1942 Cal. 587 at 591.
2. (1941) 1 M.L.J. (Supp.) 65 : 3 F.L.J. 97 : 1940 F.C.R. 110 at 182.
3. (1915) 20 Com.L.R. 425.

If as the petitioners contend the Ordinance is not a Provincial law with respect to one of the matters enumerated in the Concurrent List because in pith and substance it deals with a Provincial subject, then it must be held that section 107, sub-section (1) will have no application to any of its provisions. But if it is held that a part of the Act, namely, section 16-A deals with a Concurrent subject which is repugnant to a provision in an existing law, namely, section 491 of the Code of Criminal Procedure, then that repugnancy is cured by reason of the compliance with the conditions laid down in sub-section (2) of section 107 read with the Proviso to sub-section (1) of section 88 of the Government of India Act.

Mr. N. S. Mani, one of the learned Advocates for the petitioners, relied on the recent ruling of the Judicial Committee in *P. K. Mukherjee* v. *The Bank of Commerce, Ltd., Khulna*[1] as supporting to some extent this contention. But on a detailed examination of the decision, it appears to me that it practically negatives this contention. The validity of the Bengal Money-Lenders Act, 1940, arose for decision in that case. This Act whose provisions are similar to the Madras Act IV of 1938 *inter alia* limited the amount recoverable by a money-lender on his loans for principal and interest and prohibited the payment of sums larger than those permitted by the Act. It was contended that as some of the provisions of the Act dealt with banking and with promissory notes, matters solely within the Federal jurisdiction, it was *ultra vires*. It was also contended that some of the provisions in the Act were repugnant to the provisions of existing law, namely, the Negotiable Instruments Act. But the Act had received the assent of the Governor-General under section 107 (2) of the Constitution Act. The High Court held that the Act was valid in its entirety. But on appeal the Federal Court took a different view and thought that the Act was a clear interference with a subject in the Federal List and declared it *ultra vires*, in so far as it dealt with those subjects. There were two main contentions by the appellants in the appeal to the Judicial Committee against the decision of the Federal Court : One, the impugned Act is in pith and substance an Act with respect to money-lenders and money-lending, a Provincial subject, and is not rendered void in whole or in part because it incidentally touches upon matters outside the authorised field. Two, if money-lending was to be regarded as an incidence of contract, then the subject-matter lay in contract and it was in conflict with an existing Indian law, but inasmuch as the impugned Act had received the assent of the Governor-General it must prevail over the Negotiable Instruments Act. The respondents contended *inter alia* that if money-lending was to be regarded as an incidence of contract, then the Negotiable Instruments Act being an Act of the Government of India, had precedence over the impugned Act in those subjects with which they both dealt. Their Lordships held that the Act was valid because it dealt in pith and substance with money-lending and whether it be urged that the Act trenched upon the Federal List by making regulations regarding banking and promissory notes it would still be an answer that neither of those matters was its substance. Dealing with the other objection as to repugnancy, their Lordships say as follows—though they did not determine this issue :

"For instance it is no doubt true, as has been pointed out above, and has been accepted in the Courts in India that in the case of a matter contained in the Concurrent List, the Act of a Provincial Legislature which has been approved by the Governor-General prevails over an Existing Indian Law (*see* section 107 (2) of the Government of India Act, 1935). If then the impugned Act is to be considered as a matter of contract, it would prevail over the Negotiable Instruments Act if that Act or the part of it in respect of which repugnancy is alleged is also to be regarded as contractual and therefore coming within List III."

All this is on the assumption that the subject-matter of section 16-A is one of the matters enumerated in the Concurrent List. If, however, it is held that it is a matter enumerated in the Provincial List, item 2 read with item 1, then section 107 would have no application at all. Section 16-A is no doubt repugnant to a provision of an existing law but is not a law with respect to one of the matters

1. (1947) 2 M.L.J. 6: L.R. 74 I.A. 23 : 1947 F.L.J. 34 (P.C.).

enumerated in the Concurrent List. The insistence by the petitioners to exclud the subject-matter of section 16-A from item 2 of List III leads them to this impassee

Lastly, it was contended for the petitioners that the Provincial Legislature was not competent to take away the jurisdiction of the High Court under section 491 of the Criminal Procedure Code because under clause 44 of the Letters Patent it was only the Governor-General who had the power to affect the jurisdiction conferred on the High Court. Clause 44 is as follows :

"And we do further ordain and declare that all the provisions of this Our Letters Patent are subject to the Legislative powers of the Governor-General in Legislative Council, and also Governor-General in Council under section 71 of the Government of India Act, 1915, and also of the Governor-General in cases of emergency under section 72 of the Act, and may be in all respects amended and altered thereby."

I am unable to follow the argument of learned counsel for the petitioners based on this clause. Assuming that the powers and jurisdiction which the High Court obtained under the Letters Patent are saved from interference by any authority except the Governor-General and the Governor-General in Legislative Council, the important fact which cannot be overlooked is that the jurisdiction and power of the High Court now in question was not conferred on it by any of the provisions of the Letters Patent but by an Act of the Indian Legislature, namely, the Code of Criminal Procedure. Reliance was placed by Mr. N. S. Mani, learned counsel for some of the petitioners, on the ruling of the Full Bench of this Court in *District Magistrate, Trivandrum* v. *Mammen Mappillai*[1]. But I am unable to see anything in this decision which is of any assistance to the petitioners. It was decided therein that the High Court has no power to issue a writ of *habeas corpus* as known to the English Common Law ; its powers were confined in this respect to those conferred by section 491 of the Code of Criminal Procedure. After quoting clause 44 of the Letters Patent, Leach, C.J., who delivered the judgment of the Full Bench, said :

"It is manifest that the Court was given the same jurisdiction, power and authority which the Supreme Court possessed, but subject and without prejudice to the Legislative powers of the Governor-General in Council. Counsel who appears for the first respondent would have the Court hold that the Indian High Courts Act does not contemplate the abolition of the right to issue prerogative writs but only confers the power of regulating the issue. This contention ignores the express words of the statute and of the Letters Patent, and therefore is obviously fallacious. It is not necessary for the purpose of deciding the present application to consider whether the Supreme Court did in fact possess the power of issuing prerogative writs and I will assume that it had."

I do not see anything in this passage to suggest that any power of the Supreme Court, assuming it had, to issue a writ of *habeas corpus* was preserved in the High Court after the provisions of the Criminal Procedure Code of 1875, section 148 of which enacted *inter alia* that neither the High Court nor any Judge thereof shall thereafter issue any writ of *habeas corpus* for any of the purposes mentioned therein. I am further of opinion that section 223 of the Government of India Act clearly provides for the jurisdiction of the High Courts being altered and interfered with by the appropriate Legislatures by virtue of the powers conferred on them by that Act. On this part of the case,I need refer only to a judgment of the High Court of Bombay in *Hiraji Laxmidas* v. *Fernandez*[2]. Dealing with a similar contention, Stone, C.J., said :

"That brings us to the fourth ground, which is, whether the Provincial Legislature could have passed the 1944 Act. The only argument addressed to us on this point is founded on clause 44 of the Letters Patent, which declares that all the provisions of the Letters Patent, and it is clause 12 which gives the High Court jurisdiction, are subject to the legislative powers of the Governor-General as therein mentioned. There is nothing in this point, since by the conjoint effect of section 293 of the Constitution Act and sections 2 and 7 of the Government of India (Adaptation of Indian Laws) Order of 1937, the reference to the Governor-General in clause 44 of the Letters Patent refers to all other competent authorities."

Kania, J., as he then was, dealt with the argument thus :

"The last argument advanced under this heading was the same as the fourth contention advanced in a different form. The contention was that clause 44 of the Letters Patent can be altered only

1. (1939) 2 M.L.J. 135 : I.L.R. (1939) Mad. 708 at 717.

2. 8 F.L.J. 119 at 124 and 128 : A.I.R. 1945 Bom. 352.

by the Central Government and not by the Provincial Legislature, and therefore much less by the Governor acting under section 93. This contention overlooks the provision made in the Government of India (Adaptation of Indian Laws) Order, 1937. Section 293 of the Constitution Act is wide enough to cover the Letters Patent, as a law, according to the last sub-clause of that section. Under section 2 (2) of the Adaptation of Indian Laws, Order, 1937, 'Indian Law' includes every law which is covered by section 293 of the Constitution Act. Under section 7 of the Adaptation of Laws Order 'proper authority' is the authority entitled to legislate on the subject in question. Reading all these together, it is clear that the proper authority to legislate in respect of the matter in question is the Provincial Legislature. As the powers of the Provincial Legislature, by virtue of the Proclamation issued under section 93, are now vested in the Governor, the proper legislative authority is the Governor. This contention therefore must also fail."

There is no substance therefore in this contention on behalf of the petitioners.

To sum up, if the subject-matter of section 16-A were to fall within the matters enumerated in items 1 and 2 of List II, then the Provincial Legislature was undoubtedly entitled to legislate on it, and likewise, the Governor could promulgate an Ordinance. If, on the other hand, the subject-matter is covered by item 2 of List III, then the provision is no doubt in conflict with a provision in an existing law, namely, section 491 of the Code of Criminal Procedure, but it is not void by reason of the instructions of the Governor-General obtained by the Governor under the proviso to section 88, reading it for this purpose along with sub-section (2) of section 107. As all the objections raised as regards the validity of the Ordinance and of section 16-A of the Act inserted by clause 4 of the Ordinance fail, it must be held that section 16-A is valid.

The next question for consideration is whether section 16-A inserted by clause 4 of the Ordinance applies to all the petitions, petitions filed before the promulgation of the Ordinance and petitions filed after. Learned counsel for the petitioners contended that it applied to neither, while the learned Advocate-General contended that it applied to both.

I shall take the petitions pending in Court on the date of the promulgation of the Ordinance. The general rule is well established that when the law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action was begun, unless the new statute shows a clear intention to vary such rights. Jessel, M.R., laid down the rule thus in *Joseph Suche & Co., In re Ltd.*[1] :

"It is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. But there is an exception to this rule, namely, where enactments merely affect procedure and do not extend to rights of action."

In my opinion, it is impossible to hold that the right of a detained person to apply to the High Court under section 491, Criminal Procedure Code, for release, can be treated as a matter of procedure. It is a substantive right and a very valuable right. Examples of laws merely affecting procedure are given by Pollock, C.B., for instance,

"declaring what shall be deemed good service, what shall be the criterion to the right to costs, how much costs shall be paid, the manner in which witnesses shall be paid, or what witnesses the party shall be entitled to, and so on."

In the well-known case of *Colonial Sugar Refining Co., Ltd.,* v. *Irwing*[2], a right of appeal was held to be not a matter of procedure. Lord Macnaghten said :

"To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure."

I think it follows that the right of a suitor to have his pending application disposed of by a competent Court is equally a matter of right and not a matter of procedure. Section 8 of the Madras General Clauses Act also embodies this general rule of construction.

But it is equally well established that whenever the intention is clear that the Act should have a retrospective operation it must unquestionably be so construed

1. (1875) 1 Ch.D. 48. 2. (1905) A.C. 369.

even though the consequences may appear unjust and hard. (*Vide* Maxwell on Interpretation of Statutes, 8th edition, page 196.)

Before giving such a construction, one would require that it should either appear very clearly in the terms of the Act or arise by necessary and distinct implication, that is, when the result cannot be avoided without doing violence to the language of the enactment. The learned Advocate-General contended that it was a necessary implication from the language of section 16-A that it was intended to have a retrospective operation. To ascertain the intention of the Legislature, he said that we must also have regard to the general scope, object and purview of the statute. He also sought to invoke the aid of the rule of construction that the fact of a statute being remedial or designed to protect the public interest is a matter to which great weight is to be attached, and in such cases, the statute will be allowed to operate retrospectively. (Halsbury's Laws of England, 2nd edition, pages 514, 515 and Craies on Statute Law, page 342.)

The argument of the learned Advocate-General is not without force, but I do not find anything in the language of section 16-A which compels me to apply it to pending proceedings. The utmost that can be said is that the words, " detained and deemed to have been detained " are wide enough to cover the cases of persons so detained who have made applications to this Court. But that is not enough. The language must clearly establish that the intention of the Legislature is contrary to the sound and well-established canon of construction that an enactment is to be read as prospective generally. A statute is not to be construed so as to have a greater retrospective operation than its language renders necessary. (Per Lindley, L.J., in *Lauri* v. *Renad*[1].) If the enactment is expressed in language which is fairly capable of either interpretation it ought to be construed as prospective only. (Craies on Statutes, p. 331.) On this point, I agree with the learned counsel for the petitioners that there is one circumstance which supports their contention to a great extent. In Madras Act I of 1947 itself, we find a provision expressly having retrospective operation. Section 16 (2) of the Act runs thus :

> " If at the commencement of this Act there is pending in any Court any proceedings in which the validity of an order made under section 2 of the Madras Maintenance of Public Order Ordinance, 1947, is called in question, such proceeding shall not be continued and shall be discharged."

Here is an example of language which does not leave any room for doubt. It is highly unlikely that without such clear language it was intended that section 16-A should apply to pending proceedings and discharge them.

It was also contended by the learned Advocate-General that an order under section 491 of the Code of Criminal Procedure, was discretionary and that a suitor cannot be said to have a vested right in it. His contention was largely based on the use of the words, " may, whenever it thinks fit." I do not agree that the use of these words affects the legal position in any way. It has been so often decided as to have become an axiom that in such cases of statutes enacted for the public good and the advancement of justice, expressions which appear to belong to the language of mere permission like " may " have a compulsory force. (*Vide* Maxwell, on Interpretation of Statutes, 8th Edition, pp. 210 and 211.)

Finally, the learned Advocate-General argued that there was no question of retrospective operation in these cases, and the question really is whether at the time when a final order has to be made there is any power or jurisdiction in the High Court to pass the order. He cited the decision of the Federal Court in *Basanta Chandra Ghose* v. *The King-Emperor*[2] to show that the final order of the High Court must have relation to the circumstances at the date of the order and not to circumstances which might have existed at the time of the application. In that case, owing to doubts expressed as to the validity of the original order of detention a fresh order of detention was passed in the place of a prior order to avoid an argument being based on such defects during the pendency of an application

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1. (1892) 3 Ch. 402.
2. (1945) 1 M.L.J. 365 : 8 F.L.J. 40 at 44.

under section 491 of the Code of Criminal Procedure, and it was held that the Court could not release the detenu. Spens, C.J., observed thus at page 44 :

"The analogy of civil proceedings in which the rights of parties have ordinarily to be ascertained as on the date of the institution of the proceedings cannot be invoked here. If at any time before the Court directs the release of the detenu a valid order directing his detention is produced, the Court cannot direct his release merely on the ground that at some prior stage there was no valid cause for detention. The question is not whether the later order validates the earlier detention but whether in the face of the later valid order the Court can direct the release of the petitioner."

I do not think the principle of this decision applies by analogy to the present case. No doubt if the jurisdiction of the High Court had been completely abolished the argument might have been more compelling. But in this case the jurisdiction of the High Court under section 491 of the Code of Criminal Procedure remains. The only question is whether it shall not be exercised in favour of persons who have invoked that jurisdiction by reason of a subsequent enactment, namely, section 16-A. I am, therefore, unable to accept the learned Advocate-General's contention.

The next question, namely, whether section 16-A applies to applications filed subsequent to the promulgation of the Ordinance is not free from difficulty. It is common ground that there is no case before us in which the detention itself was after the date of the Ordinance. The limited contention, therefore, on behalf of the petitioners who had filed their applications after the 25th May, 1948, was that a person who was detained before the date of the Ordinance had a vested right to obtain his release by an order of the High Court under section 491 of the Code of Criminal Procedure and that vested right cannot be affected or taken away by a retrospective operation of section 16-A. The provisions of section 8 of the Madras General Clauses Act were relied on, in particular, clauses (*d*) and (*f*), which refer to a right accrued and a remedy in respect of such right.

The question must be approached from two aspects : (1) whether the person detained can be said to possess a vested or accrued right, and (2) whether there is language which expressly or by necessary intendment enforces retrospective operation.

Learned counsel for the petitioners relied on the ruling of this Court in *Rajah of Pittapur* v. *Venkata Subba Rao*[1] and on two decisions of the English Courts, *viz.*, *Hough* v. *Windus*[2], and *Knight* v. *Lee*[3]. *Hough* v. *Windus*[2] obviously has no application as the new enactment was passed when a proceeding was pending. In *Rajah of Pittapur* v. *Venkata Subba Rao*[1], Wallis, C.J. and Kumaraswami Sastri, J., held, Seshagiri Aiyar, J., dissenting, that section 211 of the Estates Land Act which prohibited the application of section 7 of the Limitation Act to suits under the Estates Land Act should not be applied retrospectively to a suit filed by a landholder for recovering arrears of rent due for faslis before the passing of the Estates Land Act within three years of his attaining majority but more than three years after the rents had become due. By the time he filed the suit, the Estates Land Act had come into force. The ground of the decision was that section 211 of the Estates Land Act should not be construed retrospectively so as to destroy or practically destroy rights of action existing on the date that Act came into force. In *Knight* v. *Lee*[3], the facts were these : Defendant employed the plaintiff, a betting agent, to make certain bets in his (the plaintiff's) name on the defendant's behalf. The bets having been made and lost, the plaintiff paid the amount of the losses on the defendant's account, and commenced an action to recover from the defendants the moneys so paid. But by that time the Gaming Act of 1892 had been passed which provided that no action shall be brought or maintained to recover any sum of money paid by any person under or in respect of a contract or agreement rendered null and void by an earlier Act. It was held that the Act was not retrospective and that the action might be maintained. It must be observed that in both these cases, the plaintiff had a right to recover money, in the one case as rent, in the other case as money paid by an agent on behalf of his principal. The question

1. (1915) 29 M.L.J. 1 : I.L.R. 39 Mad. 645.
2. (1884) 12 Q.B.D. 224.
3. (1893) 1 Q.B. 41.

in both the cases was whether such an existing right could be affected by a legislation passed before the right was sought to be enforced in a Court. Mathew, J., deals with this point thus :

" It would, however, be altogether contrary to principle to hold that the statute had a retrospective operation so as to take away a vested cause of action, unless the language clearly compels us to do so. The implied promise by the defendant to repay to the plaintiff the sums paid by him on the defendant's account, was a perfectly valid promise at the date when it was made, and the presumption is that the Legislature did not by subsequent legislation intend to deprive the plaintiff of his rights under that promise."

Bruce, J., said :

" Here the plaintiff had a vested right of action acquired before the statute came into force, and it cannot be supposed that the statute was intended to take such a right away."

Can a person detained be said to have acquired a right merely because of his detention ? No doubt he could have availed of the remedy given to him by section 491 of the Code of Criminal Procedure. But in my opinion the opportunity of availing himself of a statutory remedy cannot be treated as an acquired right.

" A mere right existing at the date of a repealing statute to take advantage of the provisions of the statute repealed is not a right accrued within the meaning of the usual saving clause providing that all rights accrued by virtue of the statute repealed are to be unaffected by such repeal."

(Halsbury's Law of England, Vol. 31, page 517.) In *Abbot* v. *The Minister for Lands*[1], the proposition is thus stated :

" The mere right (assuming it to be properly so called) existing in the members of the community or any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed a ' right accrued ' within the meaning of the enactment."

Certain decisions (*H. C. Proceedings No.* 1368, 30—7—1872[2] and In re *Chockalingam*[3],) were cited in which it was held that an offence under an enactment committed when it was in force could be the subject of a prosecution on a date when that enactment had ceased to be in force. The question as to whether an offence was committed or not was held to depend on the state of the law when the offence was committed and not on the law as it was on the date on which the prosecution was started. But I do not think these decisions have any bearing on the question now in issue. In my opinion, the persons detained before the date of the promulgation of the Ordinance who had not however applied to the Court under section 491, Criminal Procedure Code, did not possess any vested or accrued right which could not be affected adversely by section 16-A.

It is equally clear that as contended by the learned Advocate-General, the language of section 16-A reveals an intention that it should apply to such cases. The words used are " detained or deemed to have been detained." These latter words obviously have a reference to section 19 (1) and (2) of Act I of 1947 which runs thus :

" 19. (1) The Madras Maintenance of Public Order Ordinance, 1947, is hereby repealed.

(2) All orders made under the said Ordinance and in force immediately before the commencement of this Act, shall continue in force and be deemed to have been made, and shall have effect as if they had been made under this Act."

The persons deemed to have been detained are the persons who were detained under the Madras Maintenance of Public Order Ordinance, 1947. These words, to my mind, make it abundantly clear that it was intended that section 16-A should apply to persons detained even prior to the passing of the Ordinance and that its application should not be restricted only to persons detained after the passing of the Ordinance. The persons deemed to have been detained are persons who were necessarily detained long before the passing of the Ordinance. This shows unmistakably an intention to have a retrospective effect. I, therefore, hold

1. (1895) A.C. 425.
2. 1 Weir 781.
3. (1945) 2 M.L.J. 295

that section 16-A inserted by clause 4 of Madras Ordinance II of 1948 will apply to the petitions filed after 25th May, 1948, the date of the promulgation of the Ordinance, even in respect of persons detained before that date.

There remains only one contention relating to this aspect of the case based upon facts set out in the affidavit of one T. V. Janakiram Chetty, the head clerk of Messrs. Row and Reddy, Advocates, presented in Court on 13th July, 1948. According to this affidavit, the papers with respect to Criminal Miscellaneous Petitions Nos. 1309 to 1325 of 1948 were received by the office of Messrs. Row and Reddy only on 25th May, 1948, from the Chief Secretary to the Government of Madras and as the affidavits received were in manuscript form necessary copies had to be typed before filing them in the High Court together with the necessary petitions which could be filed only on the next Court day, that is, 31st May, 1948. These facts are not controverted, but I fail to see how they make any difference so far as the conclusion I have arrived at is concerned. It is stated in the affidavit that no unreasonable delay has been caused in filing the petitions. I am willing to assume that it is so. The point made by Mr. Pillai, learned counsel for the petitioners, was that the communications were received by the Chief Secretary, prior to 25th May, 1948, and the delay, if any, was caused by the Chief Secretary to whom the papers were sent by the Superintendent, Central Jail, Vellore. There is no allegation of any *mala fides* or deliberate withholding of papers for any considerable time, and I do not think that the observations of the Lahore High Court in *Baldev Mitter* v. *Emperor*[1], can be applied to this case. In the Lahore case, the Chief Secretary to the Government admitted that the petitions forwarded by the detenus were detained by the Provincial Government for about four months, because it was thought that the petitions did not lie to the High Court. The learned Judges say that the withholding of any petition addressed to the High Court could not be justified. But even assuming that there was an improper withholding, that may be a matter for comment or for censure, but cannot make any difference on the question of the applicability of section 16-A.

The next question which falls for decision and which was elaborately argued is, what is the scope of inquiry in (*a*) applications filed on or before 25th May, 1948, and (*b*) those filed thereafter. In this connection, it is necessary to set out another provision of Madras Act I of 1947 to which reference has not been made yet, and that is, section 16, sub-section (1) which runs thus :

"No order made, in exercise of any power conferred by or under this Act or deemed to have been made under this Act by virtue of section 19, shall be called in question in any Court."

Sub-section (3) of the same section is as follows :

"Where any such order as is referred to in sub-section (1) purports to have been made and signed by any authority in exercise of any power conferred by or under this Act the Court shall, within the meaning of the Indian Evidence Act, 1872, presume that such order was so made by such authority."

In dealing with applications falling under clause (*a*), the effect of this provision must be determined. It must next be considered whether the addition of section 16-A makes any difference by way of further curtailment of the powers of this Court.

Though the number of cases on enactments in *pari materia* or similar to the said provisions is legion, I do not think it necessary to refer to more than a few of these decisions which have the highest authority. The language of section 16, sub-sections (1) and (2) of the Defence of India Act is practically the same as that of section 16, sub-sections (1) and (3) of Madras Act I of 1947, and is as follows :

"16. (1) No order made in exercise of any powers conferred by or under this Act shall be called in question in any Court.

(2) Where an order purports to have been made and signed by any authority in exercise of any power conferred by or under this Act, the Court shall, within the meaning of the Indian Evidence Act, 1872, presume that such order was so made by that authority."

The power and jurisdiction of the High Court in an application under section 491 of the Code of Criminal Procedure in the face of such a provision as the above,

1. (1944) 7 F.L.J. 149 at 159 (F.B.).

have been clearly defined and declared by their Lordships of the Judicial Committee in *King-Emperor* v. *Sibnath Banerjee*[1]. After setting out the section, their Lordships say:

"Sub-section (1) assumes that the order is made in exercise of the power, which clearly leaves it open to challenge on the ground that it was not made in conformity with the power conferred, heavily though the burden of proof may lie on the challenger . . . . . Sub-section (2) raises a presumption of fact which may be displaced, though here again the burden is likely to be heavy . . . . Accordingly, the contention of the Crown that the Court has no jurisdiction to investigate the validity of the orders fails."

On what grounds, then, can an order of detention be attacked in spite of section 16 of Madras Act I of 1947? It was conceded by learned counsel on behalf of the petitioners that if it appears that the Provincial Government or the officer or authority empowered under section 15 of the Act is satisfied on materials placed before them with respect to a particular person that he is acting or about to act in any manner prejudicial to the public safety or the maintenance of public order, then this Court cannot inquire into the sufficiency or otherwise of the grounds on which they were so satisfied.

It follows from what was laid down by the Judicial Committee in construing section 16 of the Defence of India Act that if an order of detention is established to have not been made in conformity with the power conferred, the Court will have power under section 491 to direct the release of a person detained by reason of such an order. Examples of orders not in conformity with the power conferred by the Act are furnished by the cases of respondents Nos. 1 and 5 in the appeal before the Judicial Committee in that case. These two persons were detained under orders signed by Mr. Porter, Additional Home Secretary to the Bengal Government and *ex facie* they were regular and proper. But it became apparent from the affidavit filed by Mr. Porter that they were issued not on an independent consideration by Mr. Porter himself on the materials before him but that they were issued as a matter of course in pursuance of a "routine order" issued earlier by the Home Minister which directed that on receipt of a report of arrest under rule 129 of the Defence of India Rules together with a recommendation of the police for detention under rule 26, orders of detention under rule 26 should at once be issued as a matter of course. Applying that test to orders under the Public Safety Act, if it is established that the order of detention was made not on the Provincial Government or the authorised officer being satisfied on the material placed before them or him but purely on the recommendation or report of the police, then the order of detention would be bad.

Considerable light on these matters is thrown by the speeches of the several Law Lords who decided the case of *Liversidge* v. *Sir John Anderson*[2]. The relevant statutory provision there was Regulation 18-B of the Defence (General) Regulations, 1939, the material paragraphs of which are the following:

"Para. 1. If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm or in the preparation or instigation of such acts and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained."

"Para 8: Any person detained in pursuance of this regulation shall be deemed to be in lawful custody and shall be detained in such place as may be authorised by the Secretary of State and in accordance with instructions issued by him."

The case arose out of a suit filed by one Liversidge who had been detained by an order made by Sir John Anderson as Home Secretary under the above Regulation for a declaration that his detention was unlawful and for damages for false imprisonment. In that suit, Liversidge applied for particulars (*a*) of the grounds on which the respondent had reasonable cause to believe the appellant to be a person of hostile associations, and (*b*) of the grounds on which the respondent had reasonable cause to believe that by reason of such hostile associations it was necessary to exercise control over the appellant. The Master, the Judge in

1. (1945) 2 M.L.J. 325 : 8 F.L.J. 222 (P.C.). 2. (1942) A.C. 206.

chambers, and the Court of Appeal, successively refused to grant the application and the matter came up before the House of Lords finally, and the decision of the Court of Appeal was affirmed, Lord Atkin dissenting. It was held that the Court could not compel the Secretary of State to give particulars of the grounds on which he had reasonable cause to believe the plaintiff to be a person of hostile associations or that by reason of such hostile associations it was necessary to exercise control over the plaintiff. It was further held that the production by the Secretary of State of an order of detention made by him and *ex facie* regular and duly authenticated constituted a defence to an action for damages for false imprisonment unless the plaintiff discharged the burden of establishing that the order was invalid. Their Lordships discussed the scope of the provisions of the Regulation at considerable length, and the principles laid down by them would apply to a case of an application for the writ of *habeas corpus*, which is evident from their succeeding decision in *Greene* v. *Secretary of State for Home Affairs.*[1]

The order of detention passed against Liversidge was in the following terms :

"DEFENCE (GENERAL) REGULATIONS, 1939.

DETENTION ORDER.

Whereas I have reasonable cause to believe Jack Perlzweig *alias* Robert Liversidge to be a person of hostile associations and that by reason thereof it is necessary to exercise control over him : Now, therefore, I, in pursuance of the power conferred on me by Regulation 18-B of the Defence (General) Regulations, 1939, hereby make the following order : I direct that the above mentioned Jack Perlzweig *alias* Robert Liversidge be detained.

(Signed) JOHN ANDERSON,

One of His Majesty's Principal Secretaries of State."

Beyond the production of this order, the Secretary of State who made the order did not make an affidavit in the action. It was contended *inter alia* that the mere production of an order signed by the Secretary of State was not a sufficient *prima facie* defence and the onus lay on the respondent to give evidence at the trial to prove that Sir John Anderson had reasonable grounds for the belief recited in the order. Viscount Maugham sums up his conclusion thus :

"The result is that there is no preliminary question of fact which can be submitted to the Courts and that in effect there is no appeal from the decision of the Secretary of State in these matters provided only that he acts in good faith."

In support of this conclusion, the learned Lord relies on four circumstances : First, that it was a matter for executive discretion and the possibility of the action of the Secretary of State being subject to the discussion, criticism and control of a Judge in a Court of Law could not have been contemplated ; secondly, that the Home Secretary could act on hearsay and was not required to obtain any legal evidence and therefore the Home Secretary was not acting judicially in such a case ; thirdly, that in many cases he will be acting on information of a most confidential character which could not be communicated to the person detained or disclosed in Court without the greatest risk of prejudicing the future efforts of the Secretary of State in this and like matters for the defence of the realm ; and fourthly, that the person who is primarily entrusted with the duties under the Regulation is one of the Principal Secretaries of State and a member of the Government answerable to Parliament for the proper discharge of his duties.

Dealing with the question whether the onus was thrown on the Secretary of State who made the order for detention to give evidence to show that he had reasonable cause, his Lordship said :

"In my opinion, the well-known presumption *omnia esse rite acta* applies to this order, and, accordingly, assuming the order to be proved or admitted, it must be taken *prima facie*, that is unless the contrary is proved, to have been properly made and that the requisite as to the belief of the Secretary of State was complied with. It will be noted that on the view I have expressed as to the construction of the regulation it is the personal belief of the Secretary of State that is in question, and that, if the appellant's contention on this point were correct, the same question would arise in the numerous cases where an executive order depends on the Secretary of State or some other public officer being 'satisfied' of some fact or circumstance. It has never, I think, been suggested.

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1. (1942) A.C. 284.

in such cases that the Secretary of State or public officer must prove that he was so 'satisfied' when he made the order."

These last observations have a great bearing in this case, because the language of section 2 (1) of Madras Act I of 1947 is :

"The Provincial Government, if satisfied with respect to any particular person that he is acting or about to act in any manner prejudicial to the public safety or the maintenance of public order . . ."

Lord Macmillan states the rival views on the subject thus :

"Before he exercises the power confined to him of making a detention order against any individual the Secretary of State must have reasonable cause to believe certain things about that individuals. Does this mean that the Secretary of State must have such cause of belief regarding the relevant facts as a Court of Law would hold sufficient to induce belief in the mind of any ordinary reasonable man ? Or does it mean that he must have such cause of belief as he himself deems to be reasonable ? To require that a cause of belief shall be reasonable necessarily implies a reference to some standard of reasonableness. Is the standard of reasonableness which must be satisfied an impersonal standard independent of the Secretary of State's own mind, or is it the personal standard of what the Secretary of State himself deems reasonable ? Between these two readings there is a fundamental difference in legal effect. In the former case the reasonableness of the cause which the Secretary of State had for his belief may, if challenged, be examined in a Court of Law in order to determine whether he had such cause of belief as would satisfy the ordinary reasonable man, and to enable the Court to adjudicate on this question there must be disclosed to it the facts and circumstances which the Secretary of State had before him in arriving at his belief. In the latter case it is for the Secretary of State alone to decide in the forum of his own conscience whether he has a reasonable cause of belief, and he cannot, if he has acted in good faith, be called on to disclose to anyone the facts and circumstances which have induced his belief or to satisfy anyone but himself that these facts and circumstances constituted a reasonable cause of belief."

In discussing those rival views, the learned Lord refers to the following rule of construction :

"The purpose of the regulation is to ensure public safety, and it is right so to interpret emergency legislation as to promote rather than to defeat its efficacy for the defence of the realm. That is in accordance with a general rule applicable to the interpretation of all statutes or statutory regulations in peace time as well as in war time."

After stating that a Court of Law manifestly could not pronounce on the reasonableness of the Secretary of State's cause of belief, the learned Lord finally pronounces the following opinion :

". . . . . In my opinion, the production by the Secretary of State of an order of detention by him *ex facie* regular and duly authenticated, such as the House has before it in this case, constitutes, a peremptory defence to any action of false imprisonment and places on the plaintiff the burden of establishing that the order is unwarranted, defective or otherwise invalid."

Lord Wright meets the argument pressed before the House based on the liberty of the subject and to the suggestion that the House was being asked "to countenance arbitrary, despotic or tyrannous conduct." Notwithstanding all his prejudices in favour of upholding the liberty of the subject, he came to a clear conclusion which agreed with that of the Court of Appeal, though his Lordship was inclined to hold that the Court may no doubt be called on to decide questions of *bona fides* or mistaken identity, if they should ever arise.

Lord Romer poses the question for decision thus :

"Before an order can be made by the Secretary of State is it necessary that there should in fact exist reasonable grounds for his belief, or is it sufficient that there are grounds for his belief that appear to him to be reasonable ?"

and he accepted the contention of the respondent, that it is the second alternative which is a condition precedent. At page 282, he says :

"It is also to be noticed that the words of para. 1 are not 'if there *is* reasonable cause to believe,' but, 'if the Secretary of State *has* reasonable cause to believe' . . . . . . Not only is the belief to be his. The estimate of the reasonableness of the causes that have induced such belief is also to be his and his alone."

The decision in *Greene* v. *Secretary of State for Home Affairs*[1] turned on a construction of the same Regulation, but it directly arose out of an application for a writ of *habeas corpus*. It was held that the production of the Home Secretary's order of detention, the authenticity and good faith of which were not impugned,

1. (1942) A.C. 284.

constituted a complete answer to an application by the appellant for a writ of *habeas corpus*, and no affidavit by the Home Secretary justifying his cause of belief was necessary, and the decision in *Liversidge* v. *Sir John Anderson*[1] was followed. Viscount Maugham states the two propositions laid down in the *Liversidge's case*[1] thus :

" Your Lordships there decided that the words, in the context in which they are found, refer simply to the belief of the Secretary of State based on his view as to there being reasonable cause for the personal belief which justifies the detention order. . . . . . . Your Lordships also expressed the opinion that the Secretary of State could not be called on to disclose his information or grounds of belief if he took the view that it would be contrary to the public interest to do so."

He held that the order itself was a sufficient answer and that it must be presumed that the Secretary of State had what he considered reasonable cause for his belief.

The following observations from the speech of Lord Macmillan are to the same effect :

" The Secretary of State is not bound to disclose or to justify to any Court the grounds on which he conceived himself to have reasonable cause to believe that the appellant was a person of hostile associations and that by reason thereof it was necessary to exercise control over him. The result, in my opinion, is that the production of the Secretary of State's order, the authenticity and good faith of which is in no way impugned, constitutes a complete and peremptory answer to the appellant's application."

There is an interesting account of the history of the writ of *habeas corpus* in the speech of Lord Wright, and the use of the writ to secure freedom from arbitrary or unlawful arrest, both by Government and by private parties. The learned Lord answers the main question in the appeal, namely, whether there is a legal cause of detainment, in the following manner, after referring to *Liversidge's case*[1] :

" It is enough here to say that the regulation gives to the Secretary of State a plenary discretion to make a detention order against the appellant if he has in his own mind and according to his own judgment reasonable cause to believe that the appellant is a person of hostile associations and that by reason thereof it is necessary to exercise control over him . . . . The order relied on by the respondent is *ex facie* good and valid. Its authenticity is not disputed. It is not said that the appellant is not the person intended. The order itself justifies the detention."

Again, at page 307 :

" In the present case there are no facts to inquire into. The only possible inquiry of fact, when once the authenticity of the order and its application to the appellant is conceded or established, is whether the Home Secretary had in his own mind what appeared to his mind to be reasonable cause."

It is more than of passing interest to refer to the following passage in Lord Macmillan's judgment in the *Liversidge's case*[1] referring to the advisory committees constituted under the Regulation which are very similar to the advisory council constituted under Madras Act I of 1947 :

" Were the person detained left without any safeguard, this might be an argument against holding that an absolute discretion has been conferred on the Secretary of State, but the argument is the other way when it is found, as it is in this regulation, that elaborate provision is made for the safeguarding of the detained person's interests. I refer to the constitution of advisory committees to which any person aggrieved by a detention order may make representations. The duty is imposed on the chairman to inform the objector of the grounds on which the detention order has been made and to furnish him with such particulars as are in the chairman's opinion sufficient to enable him to state his case. I say nothing as to the efficacy of this safeguard, for I do not know how it operates in practice, but I emphasise the significance of its presence in the regulation. It suggests that this special procedure was introduced for the very reason that review by the law Courts was excluded".

I next come to the class of cases to which section 16-A would apply. With respect to this class the case in *Basanta Chandra Ghose* v. *King Emperor*[2], a decision of the Federal Court, is instructive in so far as it dealt with Ordinance No. III of 1944. Section 10 (1) of that Ordinance ran as follows :

" No order made under this Ordinance, and no order having effect by virtue of section 6 as if it had been made under this Ordinance, shall be called in question in any Court, and no Court shall have power to make any order under section 491 of the Code of Criminal Procedure, 1898 (V of 1898) in respect of any order made under or having effect under this Ordinance, or in respect of any person the subject of such an order."

1. (1942) A.C. 206.
2. (1944) 2 M.L.J. 167 : 1944 F.L.J. 203 : 1944 F.C.R. 295 (F.C.).

Dealing with this provision, Spens, C.J., observed thus :

" But it does not follow from this that the Court can no longer consider the validity of an order which on the face of it appears or purports to have been passed under rule 26. It is on this aspect of the case that the judgment of the Bombay Full Bench is of assistance. We respectfully agree with the learned Judges that the Ordinance does not protect a document which is not really ' an order under rule 26 ' though it may appear on its face to be the order of an authorised officer. Clauses (1) and (3) of section 10 of the Ordinance have not introduced any new principle of immunity. Except for the reference to section 491 of the Criminal Procedure Code, they only re-enact clauses (1) and (2) of section 16 of the Defence of India Act, and they had to be so re-enacted because all future orders of detention would be made under the Ordinance itself and could not therefore attract the benefit of section 16 of the Defence of India Act. The addition in clause (1) of section 10 of the words which preclude the exercise of the power under section 491 of the Criminal Procedure Code involves no change in the legal position. That part of the clause is only consequential upon and must be held to be co-extensive in operation with the preceding part of the clause. Its scope is also limited by the repetition of the words ' any order having effect under this Ordinance'."

" In our judgment, no further curtailment of the power of the Court to investigate and interfere with orders for detention has been imposed by Ordinance III of 1944. The Court is and will be still at liberty to investigate whether an order purporting to have been made under rule 26 and now deemed to be made under Ordinance III or a new order purporting to be made under Ordinance III was in fact validly made, in exactly the same way as immediately before the promulgation of the Ordinance. If on consideration the Court comes to the conclusion that it was not validly made on any of the grounds indicated in any of the long line of decisions in England and this country on the subject, other than the ground that rule 26 was *ultra vires*, section 10 of Ordinance III will no more prevent it from so finding than section 16 of the Defence of India Act did. Such an invalid order, though purporting to be an order, will not in fact be an ' order made under this Ordinance ' or having effect by virtue of section 6 as if made under this Ordinance at all for the purposes of section 10."

The grounds indicated in the long line of decisions in England referred to by the learned Chief Justice of India are those discussed in the speeches in the House of Lords in *Liversidge* v. *Sir John Anderson*[1].

The effect of this decision of the Federal Court is that in the present case it may be said that the addition of section 16-A does not make any material difference in the curtailment of the powers of this Court to interfere with orders of detention passed under the Act, though of course only on the grounds indicated in *Liversidge* v. *Sir John Anderson*[1].

This decision, however, does not stand alone. There is a subsequent decision of the Federal Court in *Ex-Rana Birpal Singh of Bhajji State* v. *The King-Emperor*[2]. That case related to a person detained under the provisions of Bengal Regulation III of 1818. Section 491 of the Code of Criminal Procedure contains in sub-section (3) thereof the following provision :

" Nothing in this section applied to persons detained under the Bengal State Prisoners Regulation, 1818."

Learned counsel appearing for the person detained contended *inter alia* that the appellant was still *de jure* the ruler of Bhajji State and as such not within the category of persons in respect of whom any warrant of commitment could be issued under the Regulation and also that the form of the warrant did not on the face of it sufficiently indicate that it was a warrant issued by the Central Government as required by section 7-A of Regulation III and that positive evidence that the matter had been considered and orders given for its issue by the appropriate officials was required before a Court could hold a warrant a valid warrant under Regulation III. These contentions were rejected by the Federal Court. The learned Chief Justice dealt with these contentions thus :

" It is however in our judgment clear that once the Court is satisfied that a person is being detained under Regulation III, there is no jurisdiction under section 491 which the Court can exercise in the matter. And throughout there has been no suggestion that there is any other jurisdiction which could be exercised by the Court in these proceedings. Accordingly, in our judgment, the material question in this case is : Is the appellant a person detained under Regulation III ? If he is, this application must fail. The jurisdiction under section 491 is wholly statutory and governed by the terms of the section. Moreover, it must be appreciated that the very basis of

1. (1942) A.C. 206.
2. (1946) 1 M.L.J. 322 : 9 F.L.J. 1 : I.L.R. 1946 Lah. 96 (F.C.).

jurisdiction under sub-section (1) (*b*) of section 491, which is the only 'sub-section under which the Court could be asked to assist the appellant in this case, is expressed to be, illegal or improper detention in public or private custody,' and yet by virtue of sub-section (3) in cases of persons detained under Regulation III, sub-section (1) (*b*) has no application. It seems to us therefore to follow that, something more than allegations that a person is being 'illegally or improperly' detained under Regulation III is necessary before the Court can get over the bar to jurisdiction under the section imposed by sub-section (3). Complaints as to the illegality or impropriety of the detention, if the detention be under Regulation III, can be dealt with under the procedure laid down in sections 3, 4 and 5 of Regulation III and may well be the basis of other claims which a Court can properly entertain, but such allegations cannot in our judgment be sufficient to give the Court jurisdiction under section 491. If on the facts of the case it is clear that a person is being detained under Regulation III, even though a Court might think if it investigated those facts, it might find that the detention was illegal or improper, still the Court cannot in our judgment interfere under section 491. In this case it is clear that the Government has been claiming to detain the appellant from the 9th September, 1940, onwards under Regulation III."

The learned Chief Justice then went on to decide the only point raised on behalf of the appellant which could possibly have enabled the Court to exercise jurisdiction under section 491 and that was if in fact the appellant was a person to whom Regulation III does not or cannot apply at all. The appellant claimed to have still the status of a ruler of Bhajji State, but this claim was negatived. It was held that there was no jurisdiction under section 491 of the Criminal Procedure Code which the Court could exercise in the case. The other questions were not gone into. The learned Chief Justice says :

" We do not propose to go into the other questions raised and argued by Mr. Gauba. At most they amount to allegations of illegal or improper detention under Regulation III which even if substantiated would not for the reasons earlier explained give the Court jurisdiction under section 491.'"

It is true it may appear difficult to reconcile these two decisions of the Federal Court. But after careful consideration, I am of the opinion that the Federal Court did not intend to depart from the rule which they had laid down in the earlier case of *Basanta Chandra Ghose* v. *The King-Emperor*[1]. The decision in the *Bhajji case*[2] must be taken along with the special facts and the contentions on behalf of the petitioner in that case. The detention was made under the provisions of Regulation III of 1818. The material portions of this Regulation are as follows :

" Whereas reasons of state, embracing the due maintenance of the alliances formed by the British Government with foreign powers, the preservation of tranquillity in the territories of Indian princes entitled to its protection, and the security of the British Dominions from foreign hostility and from internal commotion, occasionally render it necessary, to place under personal restraint, individuals against whom there may not be sufficient ground to institute any judicial proceeding, or when such proceeding may not be adapted to the nature of the case, or may for other reasons be unadvisable or improper ; and whereas it is fit that, in every case of the nature herein referred to, the determination to be taken should proceed immediately from the authority of the Governor-General in Council ; . . . . .

(1) When the reasons stated in the preamble to this Regulation may seem to the Governor-General in Council to require that an individual should be placed under personal restraint, without any immediate view to ulterior proceedings of a judicial nature, a warrant of commitment under the authority of the Governor-General in Council, and under the hand of the Chief Secretary to Government, shall be issued to the officer, in whose custody such person is to be placed.

(2) The warrant of commitment shall be in the following form : (The form is not relevant.)

(3) The warrant of commitment shall be sufficient authority for the detention of any state prisoner in any fortress, jail, or other place within the territories subject to the presidency of Fort William."

In the case before the Federal Court, it was neither alleged nor established that the warrant of commitment was not in the prescribed form or not in conformity with the provisions of the Regulation. A warrant duly signed by R. Tottenham, Additional Secretary to the Government of India, and containing the statement that the Governor-General in Council for good and sufficient reasons, being reasons connected with the discharge of the functions of the Crown in its relations with the Indian States, has seen fit to determine that Birpal Singh, Ex-Rana of Bhajji State shall be placed under personal restraint at Simla was produced. It was

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1. (1946) 1 M.L.J. 322 : 9 F.L.J. 1 : I.L.R. 1946 Lah. 96 (F.C.).

2. (1944) 2 M.L.J. 167 : 1944 F.L.J. 203 : 1944 F.C.R. 295 (F.C.).

not even suggested that any of the grounds on which the Court could in the circumstances treat the order of detention as invalid existed in the case. The only point raised on behalf of the petitioner was that he was still *de jure* the ruler of Bhajji State and as such not within the category of persons in respect of whom any warrant of commitment could be issued under the Regulation. The learned Chief Justice of India who delivered the judgment was inclined to the view that if in fact the petitioner was a person to whom the Regulation did not or could not apply at all, then it might be possible to hold that there was no detention at all (legal or illegal, proper or improper) under Regulation III.

It follows, therefore, that whether section 16 of Madras Act I of 1947 stands alone, or there is in addition thereto the newly inserted provision, section 16-A, the power and jurisdiction of this Court to pass an order under section 491 of the Code of Criminal Procedure, remained the same, and subject to the same conditions, qualifications and limitations. The addition of section 16-A " involves no change in the legal position." (*Vide* 1944 F.C.R. 295 at 316.)

What then is the residuum of power and jurisdiction of this Court? It is the power to interfere and set at liberty a person who is being detained by an order which though purporting to be made under section 2 of Madras Act I of 1947, is not in fact such an order. This will be so in the following circumstances :

(*a*) when the order is not duly authenticated, as for example, when it is passed by an officer or authority not empowered under section 15 of the Act;

(*b*) when the person detained in pursuance of the order is not the person intended to be detained, that is to say, when there is a mistake of identity;

(*c*) when there is lack of *bona fides*; and

(*d*) when it is established that the essential requirement of section 2, namely, the satisfaction of the Provincial Government or an officer or other authority empowered under section 15 with respect to the particular person that he is acting or about to act in any manner prejudicial to the public safety or the maintenance of public order and with a view to preventing him it is necessary to direct him to be detained or otherwise dealt with under section 2 (1) of the Act, is not present. If it is established that neither the Provincial Government nor the officer or other authority empowered under section 15 has exercised its or his mind on the material placed before it or him, then an order of detention, though purporting to be passed under section 2 (2) must be deemed to be not an order under section 2.

These, then, are the only grounds on which in spite of section 16 and section 16-A of Madras Act I of 1947 this Court can exercise the power conferred on it by section 491 of the Code of Criminal Procedure. If these grounds exist, in respect of any detained persons, such a person will not be a person detained or deemed to have been detained under section 2 of the Act.

If these grounds do not exist, it is well established on the highest authority that this Court " cannot investigate the sufficiency of the material or the reasonableness of the grounds " (*vide* 1944 F.C.R. 1 at 20) upon which the Government or the empowered officer or authority had been satisfied. It is not competent for this Court to call upon the Government or the detaining authority to disclose the information and material on which it or he was satisfied as to the necessity for the detention of the person concerned. The satisfaction required by the section is the satisfaction of the Government or the empowered authority and not the satisfaction of this Court. There is no question of fact which can be submitted to this Court in this matter. This position was fairly conceded by learned counsel appearing on behalf of the petitioners.

It is equally clear from the authorities which have been cited above that once a duly authenticated order of detention is produced, it must be taken *prima facie* to have been properly made and that the requisite as to the belief of the Government or the detaining authority was complied with. The burden of proof will lie on

the challenger and, of course, the burden is likely to be heavy. (*Vide* 1945 F.C.R. 195 at 217.)

Mr. Asker Ali, learned Advocate for some of the petitioners, relied stronlgly on section 561-A of the Code of Criminal Procedure but in my view that section does not enlarge or add to the power of this Court under section 491 of that Code.

The above petitions will be disposed of in the usual course in the light of the observations made above.

Govindarajachari, J.—I agree, but in view of the importance and complexity of the questions involved, I desire to state my reasons and conclusions in my own words.

These are a batch of applications filed under section 491 of the Code of Criminal Procedure which by sub-section (1), clause (*b*) provides that any High Court may, whenever it thinks fit, direct that a person illegally or improperly detained in public or private custody within the limits of its appellate criminal jurisdiction be set at liberty. In view of a certain contention which has been raised at the hearing of these applications and to which I shall in due course refer, the material portion of sub-section (3) of the above section may also be set out. It is in the following terms:

"Nothing in this section applies to persons detained under the Bengal State Prisoners Regulation, 1818."

The orders of detention complained of in these applications were made under the powers conferred by an Act of the Provincial Legislature, Madras Act I of 1947. Under section 2 (1) (*a*) of the Act:

"the Provincial Government, if satisfied with respect to any particular person that he is acting or about to act in any manner prejudicial to the public safety or the maintenance of public order and with a view to preventing him, it is necessary so to do, may make an order directing that he be detained."

Section 15 provides for the delegation of the powers and duties of the Provincial Government under the Act to such officers or authorities as the said Government may by order specify. Section 2 (2) directs that when any order is made under sub-section (1) of section 2 by an officer or authority empowered under section 15 that officer or authority shall forthwith report the fact to the Provincial Government together with the grounds on which the order has been made and such other particulars as, in the opinion of such officer or authority have a bearing on the necessity for or expediency of the order. Section 3 (1) provides that whenever an order in respect of any person is made by the Provincial Government or by any officer or authority subordinate to them the Provincial Government shall communicate to the person affected by the order the grounds on which the order has been made against him and such other particulars as are in their opinion sufficient to enable him to make if he wishes a representation against the order. Under section 3, sub-section (3), the Provincial Government is directed to constitute an advisory council whenever necessary. Sub-sections (2) and (4) of section 3 provide for the placing of all the material papers by the Provincial Government before the advisory council which is directed to make a report to the Provincial Government after considering the materials placed before it, and if necessary, after calling for such further information from the Provincial Government or from the person concerned.

After considering the report of the advisory council the Provincial Government may confirm, modify or cancel the order made under sub-section (1) of section 2. [*See* section 3, sub-section (5).] The maximum duration of an order under section 2 is fixed by section 4, sub-section (1) at six months from the date on which such order is confirmed or modified under sub-section (5) of section 3, but the Provincial Government may cancel the order at any time before the expiry of that period. Section 4 (2) lays down the procedure where the continuance of an order made under section 2 beyond the period of six months aforesaid is considered necessary or expedient by the Provincial Government.

Madras Act I of 1947, received the assent of the Governor-General on 11th March, 1947, and we have been told by the learned Advocate-General that it received such assent after having been reserved for the consideration of the Governor-General as contemplated by section 107 (2) of the Government of India Act, 1935.

The orders of detention in all the applications before us were made before 25th May, 1948, the materiality of which date will presently appear. Some of the applications were filed before and some after that date.

It is common ground that the Provincial Legislature which is bicameral was in session till 24th May, 1948, and that it was prorogued by the Governor on that day. On the next day was promulgated Ordinance, No. II of 1948 which is entitled "An Ordinance to amend the Madras Maintenance of Public Order Act, 1947." It is necessary to quote the preamble which is in the following words :

> "Whereas the Legislature of the Province is not in session, and the Governor of Madras is satisfied that immediate action is necessary for the purpose of amending the Madras Maintenance of Public Order Act, 1947 :
>
> And whereas the instructions of the Governor-General have been obtained in pursuance of the proviso to section 88, sub-section (1), of the Government of India Act, 1935 ;
>
> Now, therefore, in exercise of the powers conferred by section 88, sub-section (1), aforesaid, the Governor hereby promulgates the following Ordinance."

There is no need to make any detailed reference to the provisions of this Ordinance apart from section 4. Section 2 provides for the insertion of new sections 2-A and 2-B in Madras Act I of 1947 which render penal the harbouring or concealing of persons ordered to be detained and the reproducing or publishing of statements made by persons so ordered. Power to seize and search for copies of documents which have been forfeited is conferred by the new section 12-A the insertion of which is provided for by section 3 of the Ordinance. Then occurs section 4 of the Ordinance round which a considerable portion of the arguments centred. It may be set out *in extenso.*

> "4. After section 16 of the said Act, the following section shall be inserted, namely :—
>
> 16-A. Nothing in section 491, sub-sections (1) and (2), of the Code of Criminal Procedure, 1898, shall apply to any person detained, or deemed to have been detained, under section 2 of this Act by the Provincial Government or any officer or authority authorized by them in that behalf."

The validity of the Ordinance generally and of section 4 in particular was disputed by the several learned counsel who appeared for the applicants. It was said that the whole of the Ordinance is invalid as the requirements of section 88 (1) of the Government of India Act, 1935, were not and could not have been satisfied. It may at once be stated that there is no proof whatever that the Governor did not obtain the instructions of the Governor-General as recited in the preamble to the Ordinance or that the Governor did not receive or act upon the advice of his ministers, in promulgating it, the argument being that the power conferred on the Governor by section 88 (1) of the Government of India Act, 1935, is a power exercisable by him not in his individual judgment but only on the advice of his ministers. The argument as to invalidity went no farther than a suggestion, which was much emphasised, that, having regard to the close proximity in time between the prorogation of the Legislature and the promulgation of the Ordinance there is very little likelihood of the Provincial Cabinet or the concerned minister having tendered the necessary advice to the Governor and of the Governor having obtained the requisite instructions from the Governor-General.

Section 88 (1) clearly requires that the Legislature should not be in session when an Ordinance is promulgated. It is not denied that this requirement is satisfied as the Legislature had been prorogued the previous day and was therefore not in session on the 25th of May. Section 88 (1) further requires that the Governor should be satisfied that circumstances exist which render it necessary for him to take immediate action. Assuming that the Governor is for this purpose to act on the advice of his ministers, the satisfaction contemplated by section 88 (1)

would in that view be, in effect the satisfaction of the Governor on such advice. Satisfaction in accordance with the wording of section 88 (1) is recited in the preamble, and there is no proof to the contrary. Under section 51 (4) of the Government of India Act :

" the question whether any and, if so, what advice was tendered by ministers to the Governor shall not be inquired into in any court."

This excludes all discussion of an allegation that no advice was or could have been tendered, but even assuming otherwise there is nothing offered by the applicants by way of proof of such an assertion.

The gravamen of the charge finally reduces itself to an attack on the propriety of issuing an order of prorogation on the 24th. If the Legislature was in session on the 24th, it was pointedly asked why was not the Legislature immediately summoned to consider the necessity or desirability to legislate in the terms of what has now been promulgated in the shape of an Ordinance? It was emphasised that the prorogation was just on the eve of the promulgation of the Ordinance and was made, it was suggested, with a view to avoid a discussion by the Legislature, at any rate, at that stage, of the somewhat drastic provisions of the intended legislation.

The propriety or otherwise, however, of the order of prorogation is not a matter for consideration by this Court. Assuming its impropriety, that would in no way, furnish a legal ground for invalidating the Ordinance that has been issued.

Presuming, as we must, the correctness of the recitals in the preamble to the Ordinance and in the absence of any admissible evidence that any of those recitals is inaccurate, we must hold that the conditions laid down in section 88 (1) of the Government of India Act are satisfied and that the attack on the validity of the Ordinance on this ground falls.

The next contention was that section 4 of the Ordinance is, in any event, invalid. It was said that section 4 deals with a matter not enumerated in any of the Lists in the Seventh Schedule to the Government of India Act and that consequently there can be no valid legislation in respect of it by the Provincial Legislature or by the Governor acting in the place of the Provincial Legislature under section 88 in the absence of a public notification by the Governor-General empowering the Provincial Legislature to enact a law with respect to it as required by section 104 (1) of the Government of India Act. This argument necessarily invites a discussion as to whether the subject-matter of section 4 of the Ordinance falls outside all the items in the several Legislative Lists in the Seventh Schedule. On behalf of the Crown it was argued that the matter would fall under item 2 read with item 1 of the Provincial Legislative List. (List II). Item 2 is :

"Jurisdiction and powers of all Courts except the Federal Court, with respect to any of the matters in this List,"

and item 1 includes *inter alia* " public order " and preventive detention for reasons connected with the maintenance of public order ; and " persons subjected to such detention." In any event it was said that section 4 of the Ordinance deals with a matter which would fall under item 2 of Part I of the Concurrent Legislative List (List III) which is in the following terms :

" Criminal Procedure, including all matters included in the Code of Criminal Procedure at the date of the passing of this Act."

On behalf of the detenue it was argued that section 491, Criminal Procedure Code is not, strictly speaking, concerned with a purely procedural matter, that it confers on the other hand a substantive and valuable right on the citizen, and that item 2 of the Concurrent Legislative List must be read so as to include only those provisions in the Code of Criminal Procedure which can be strictly regarded as pertaining to procedure. I am unable to accept this argument . As a matter of statutory construction the word " include " with all its grammatical variations has always been read as widening the scope of the definition so as to bring in what would not otherwise

be comprised in it. Delivering the judgment of the Judicial Committee in *Dilworth* v. *Commissioner of Stamps*[1], Lord Watson said :

> " The word ' include ' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute ; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include."

My construction of item 2 of List III receives support from the decision of the Patna High Court in *Vishwanath* v. *Sri Mahant*[2] where it was held referring to item 4 of the same List which is in similar terms that

> " all matters whether relating to procedure or not included in the Code of Civil Procedure on the date of the passing of the Government of India Act are concurrent legislative subjects,"

and that the words " and all matters, etc." enlarge the subjects of concurrent legislation to the extent stated above. The decision in *Rajah Bejoy Singh* v. *Surendra*[3], cited on behalf of the detenus in which it was held that the expression in a patni lease " including all interests therein " does not increase the corpus of the subject of the lease, is in my opinion distinguishable. Drawing attention to the essential characteristic of a lease, namely, that the subject is one which is occupied and enjoyed and the corpus of which does not in the nature of things and by reason of the user disappear which characteristic was pointed out in their earlier decision in *Shashi Bhushan* v. *Jyoti Prashad*[4], the Privy Council held that the corpus was sufficiently ascertained as the surface of the land and did not include the sub-soil and the lessee had therefore no right to use the lands leased for making bricks. The words " including all interests therein " only carried with the corpus all rights appurtenant thereto such as rights of passage, water or the like. The decision of the Privy Council is also based on a consideration of all the terms of the lease and on the absence of anything to suggest that the land included therein was to be put to any use other than that to which the zemindari lands were subject at the time of the lease.

In my opinion the words " all matters included in the Code of Criminal Procedure " emphasise that any provision contained in that Code can be varied or repealed by either the Dominion or the Provincial Legislature subject of course to the statutory conditions and procedure laid down in regard to legislation on matters falling within the Concurrent Legislative List. It would indeed be odd if the Parliament altogether overlooked section 491, notwithstanding that a reference is made to all matters included in the Code of Criminal Procedure in item 2 of List III and if it made no provision for the matter comprised in that section in any of the Lists. But this is what the argument on behalf of the applicants involves. As held by the Federal Court in *Manikkasundara* v. *R. S. Nayudu*[5] :

> " When there is a choice between two possible constructions of an entry or entries, one of which will result in legislative power being conferred by some entry or entries in the lists and the other in a finding of no existing power, but if legislation is required that recourse must be had to section 104, the first construction should on principles analogous to those applied to the Canadian Constitution be preferred."

It is unnecessary to decide whether item 2 of the Concurrent Legislative List should be read along with items 1 and 2 of the Provincial Legislative List so as to allot section 491 to the former sphere or whether it should be held to fall within the scope of item 2 of the Provincial Legislative List read with item 1, there being to that extent a subtraction out of item 2 of the Concurrent Legislative List. As observed by the Privy Council in *Profulla Kumar* v. *The Bank of Commerce, Ltd.*[6] :

> " it is not possible to make so clean a cut between the powers of the various Legislatures : they are bound to overlap from time to time."

For the purpose of the present contention it is sufficient to hold that the matter falls under either the one or the other of the items referred to above. In this view the argument based on section 104 (1) must be rejected.

1. (1899) A.C. 99.
2. (1938) I.L.R. 17 Pat. 714 at 725.
3. (1928) 55 M.L.J. 456 : L.R. 55 I.A. 320 : I.L.R. 56 Cal. 1 (P.C.).
4. (1916) 32 M.L.J. 245 : L.R. 44 I.A. 46 : I.L.R. 44 Cal. 585 (P.C.).
5. (1946) 2 M.L.J. 17 at 22 : 9 F.L.J. 57.
6. (1947) 2 M.L.J. 6 at 13.

Alternatively, it was argued that section 4 is invalid as it is a provision of a Provincial law which is repugnant to a provision of an existing law (namely, section 491, Criminal Procedure Code) with respect to one of the matters enumerated in the Concurrent Legislative List, and that consequently the Provincial law is to the extent of the repugnancy void. Reliance was placed for this argument on sub-section (1) of section 107. It was part of the argument that section 107 (1) is absolute, and that section 4 of the Ordinance would not fall under section 107 (2) which provides for the enactment of a Provincial law so as to prevail over an existing law with respect to one of the matters enumerated in the Concurrent Legislative List. The material portions of section 107 (1) and (2) may be usefully quoted :

" 107. (1) If any provision of a Provincial law is repugnant . . . . . to any provision of an existing law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of this section, ... the existing law shall prevail, and the Provincial law shall, to the extent of the repugnancy, be void."

(2) Where a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provision repugnant . . . . . to an existing law with respect to that matter, then, if the Provincial law, having been reserved for the consideration of the Governor-General has received the assent of the Governor-General the Provincial law shall in that Province prevail, but nevertheless the Dominion Legislature may at any time enact further legislation with respect to the same matter."

Learned counsel appearing for the detenus strenuously contended that there is a difference between the language of section 107, sub-section (1) and the language of section 107, sub-section (2). For the purpose of the question under consideration I am unable to see any difference. The subject common to both the sub-sections is the repugnancy between a provision of a Provincial law and a provision of an existing law with respect to one of the matters enumerated in the Concurrent Legislative List. Sub-section (1) lays down generally that where there is such a repugnancy the existing law shall prevail and the Provincial law shall be void. This however is statedly " subject to the provisions of this section." This would bring in sub-section (2) which provides that if the procedure therein laid is followed, the Provincial law shall prevail over the existing law in the Province concerned, and it is then stated that even in such a case the Dominion Legislature may at any time thereafter enact further legislation with respect to the same matter. The argument that section 107 (1) is absolute is, I think, answered by the language of the sub-section itself which provides that it operated " subject to the provisions of this section," the only relevant provision for this purpose being sub-section (2). On my reading of section 107 the present case falls under section 107 (2) and the procedure laid down in that sub-section or rather what is equivalent to it under section 88 (1), namely, the obtaining of instructions from the Governor-General having been satisfied, section 4 of the Ordinance would prevail over section 491, Criminal Procedure Code and its validity cannot be questioned on this ground even if section 4 is assumed to relate to a matter in the Concurrent Legislative List. Whether and how far section 4 is retrospective and whether and how far it affects the jurisdiction of the High Court in dealing with applications under section 491 are quite different matters which I shall in due course deal with.

The point was also raised that section 4 of the Ordinance is invalid by reason of clause 44 of the Letters Patent of the High Court. By a reference to the wording of that clause it was said that the provisions of the Letters Patent are subject only to the " Legislative powers of the Governor-General in Legislative Council." Section 223 of the Government of India Act, however, provides that the jurisdiction of any existing High Court and the respective powers of the Judges thereof in relation to the administration of justice in the Court shall be the same as immediately before the establishment of the Dominion and that they should further be subject to the provisions of any Act of the appropriate Legislature enacted by virtue of powers conferred on that Legislature by the Constitution Act. That the High Court has no power to issue a prerogative writ of *Habeas Corpus* as known to English Law in matters contemplated by section 491, Criminal Procedure Code, and that it had no such power immediately before the establishment of the Dominion cannot

possibly be disputed in view of the decision of the Full Bench in *District Magistrate, Trivandrum* v. *Mammen Mapillai*[1], which was affirmed by the Privy Council in *Mathen* v. *The District Magistrate of Trivandrum*[2]. That being so, the question again comes back to what has already been discussed, namely, whether section 491, Criminal Procedure Code, has been validly varied or affected by the Ordinance in accordance with the provisions of the Government of India Act, 1935.

An argument based on section 561-A of the Criminal Procedure Code though it bears not on the validity but on the effect of section 4 of the Ordinance or section 16-A of the Act may conveniently be referred to here, as it is in my opinion answered by the decision in *District Magistrate, Trivandrum* v. *Mammen Mapillai*[1] to which reference has just been made. There was no claim in that case that the High Court had at any time any inherent power to deal with cases of illegal or improper detention other than the power to issue a writ of *Habeas Corpus* or the statutory power under section 491. No case has ever asserted the existence of any such power. Moreover, it is clear law that where a power is given expressly there is no scope for the exercise of an inherent power.

The question has next arisen as to whether section 16-A would apply to the applications before us which for this purpose would fall into two groups, namely, those which were filed before and were pending on 25th May, 1948, when section 16-A came into operation and those which were filed subsequent to 25th May, 1948, though in respect of orders of detention which had been passed prior to that date.

The argument on behalf of the Crown goes so far as to claim that the jurisdiction under section 491 ceases to be exercisable on the promulgation of the Ordinance and that this is indicated by the sweeping reference to " any person detained or deemed to have been detained " under section 2 of the Act.

There was a learned discussion as to how in America a person can be deprived of his liberty only by judicial process by reason of the interpretation placed by the American Courts on what are known as the Fifth and Fourteenth Amendments, and how the constitutional position in India is different. It was pointed out that according to Dicey the rule of British jurisprudence that no member of the Executive can interfere with the liberty of a British subject except on the condition that he can support the legality of his action before a Court of justice is still a principle of " private law " and is not a part of the Constitution. But as has been pointed out by the Federal Court in *Baburao* v. *King-Emperor*[3] all this does not mean that the well-established principle of British jurisprudence as to the sacredness of personal freedom is not part of the law of British India.

Though at one stage the learned Advocate-General referred to the use of the word ' may ' in section 491 and to the discretionary nature of the jurisdiction of the High Court under that section, he did not finally maintain that the right of a citizen to prosecute his application under section 491 is not a substantive right. It is certainly more and not less important than a right of appeal in respect of a pending suit, which has been held not to be a mere matter of procedure and which can be taken away retrospectively like other vested rights only by the express language or the necessary intendment of an act of the Legislature. (See *Sadar Ali* v. *Dalimuddin*[4].) As stated in Maxwell on Interpretation of Statutes, 9th edition, page 222 :

> " No rule of construction is more firmly established than this that retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is capable of either interpretation it must be construed as prospective only."

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1. (1939) 2 M.L.J. 135 : I.L.R. 1939 Mad. 708.
2. (1939) 2 M.L.J. 406 : L.R. 66 I.A. 222 : I.L.R. 1939 Mad. 744 (P.C.).
3. (1944) 1 M.L.J. 305 : 6 F.L.J. 187 : I.L.R. 1944 Nag. 300 (F.C.).
4. (1928) I.L.R. 56 Cal. 512 (S.B.).

I shall deal first with applications filed after 25th May, 1948. The reference in section 16-A to persons deemed to have been detained under the Act, by which expression are meant persons detained under section 2 of the Madras Maintenance of Public Order Ordinance, 1947, which preceded Madras Act I of 1947, seems to me to indicate that section 16-A is meant to apply to orders of detention passed before 25th May, 1948 and that it was not meant only to apply to detentions made after that date. It was argued by the learned counsel who appeared in this group of applications that by virtue of the very orders of detention their clients obtained a right to apply under section 491 which right they characterised as a vested right. The argument was sought to be supported by a reference to section 8, clauses (*d*) and (*f*) of the Madras General Clauses Act I of 1891 which provides that:

"where any act to which this Chapter applies repeals any other enactment, then the repeal shall not affect any right accrued . . . . under any enactment so repealed; or affect any . . . remedy in respect of any such right . . . . ."

This is, however, answered by the decision of the Privy Council in *Abbott* v. *The Minister of Lands*[1], where it was held that a mere right existing at the date of a repealing statute to take advantage of the provisions of the statute repealed is not a right accrued within the meaning of the usual saving clause in an interpretation statute. In any event, as I have already indicated, there would be no content whatever for the words "persons deemed to have been detained under the Act", if section 16-A is to operate only in regard to persons detained after 25th May, 1948. The legitimate inference would, therefore, be that persons whether detained under the Act before 25th May, 1948, or deemed to have been detained under the Act by virtue of orders passed before the Act of 1947 under the Ordinance then in force would be affected by section 16-A if they made no applications before the promulgation of the Ordinance.

The next question is, would pending applications also be affected? The language of section 16-A is susceptible of two constructions: (1) The provisions of section 491, sub-sections (1) and (2) shall not apply to the applications filed after 25th May, 1948; and (2) the applications filed even before 25th May, 1948, shall be dealt with as if section 491, sub-sections 1 and 2 do not apply to them. There is considerable force in the argument on behalf of the detenus pointing out the sharp contrast between the language of section 16-A and the language of section 16 (2) which in terms provides that proceedings pending at the commencement of the Act questioning the validity of orders made under the Madras Maintenance of Public Order Ordinance, 1947, shall not be continued and shall be discharged. On the principle laid down in *The Colonial Sugar Refining Company, Ltd.* v. *Irving*[2] and *Sadar Ali* v. *Dalimuddin*[3] and applying the well-established rule of interpretation that:

"a statute is not to be construed to have a greater retrospective operation than its language renders necessary."

I hold that section 4 of the Ordinance and section 16-A of the Act must be so read, as to leave applications filed before 25th May, 1948, and pending on that date altogether untouched.

It was claimed that applications despatched by the detenus before 25th May, 1948, but which could be filed into Court only after that date by reason of the delay occasioned by the exigencies of communication and transmission through official channels should be regarded as standing on the same footing as applications presented before 25th May, 1948. But if as we have held, a right accrues only on the filing of an application, the material date would be the date of filing and not any earlier date when preparations had been or were being made for such filing.

We have heard elaborate arguments in regard to the nature and extent of the jurisdiction of the High Court and of the Superior Courts generally in dealing with applications challenging the legality and propriety of detentions under statutes similar to Madras Act I of 1947. One preliminary observation must here be made.

1. (1895) A.C. 425.
2. (1905) A.C. 369.
3. (1928) I.L.R. 56 Cal. 512 (S.B.).

The challenge in every one of the cases involved in the batch of applications before us is a challenge against the order of detention itself and not that even if the order was valid at its inception the continuance of the detention has become illegal or improper in view of what happened subsequently or by reason of what the Government subsequently did or failed to do. I say this merely to guard myself against being understood as having decided anything more than what is strictly required by the applications under consideration.

The broad division of the applications into two categories, namely, (1) those which were filed before 25th May, 1948, and (2) those which were filed thereafter has, as already been indicated, to be borne in mind in determining whether there is any and if so what difference in our jurisdiction in dealing with each of the two groups. If section 4 of the Ordinance is not to be construed so as to render section 16-A of the Act applicable to pending applications, it follows that these applications have to be dealt with in the light only of section 16 (1) of the Act but not in the light of section 16-A. Applications filed after 25th May, 1948, must, by reason of our judgment that section 4 of the Ordinance makes section 16-A applicable to them, be considered on the footing that they are governed both by section 16 (1) and section 16-A of the Act.

The argument of the several learned counsel for the applicants regarding the latter batch of applications is that section 16-A of the Act does not repeal section 491, Criminal Procedure Code and should not be read as negativing the jurisdiction of the High Court altogether in regard to orders of detention which purport to have been made under the Act. The argument of the Advocate-General on the other hand is, in effect, that once an order expressed to have been passed under the Act is produced, section 491 is completely excluded or in other words we must proceed on the footing that there is no section 491.

The question falls to be decided in the light of certain decisions of the Federal Court to which I shall immediately refer. In *The King-Emperor* v. *Benoari Lal Sharma and others*[1], the Federal Court had to consider the effect of section 26 of the Special Criminal Courts Ordinance (II of 1942) which provided, *inter alia*, that no Court is to have authority to revise any order or sentence of a Court constituted under the Ordinance or to transfer any case from such Court or to make any order under section 491. The language of the section was undoubtedly wide. Referring to the Ordinance generally and to section 26 in particular, Varadachariar, Officiating C.J., described their true effect in the following passage which seems to be apposite :

" The Ordinance ",

he said :

" has not repealed the Criminal Procedure Code in whole or in part or declared it or any of its provisions inoperative in any part of the country or in respect of any defined categories of crimes . . . Even the provision in section 26 excluding the powers of revision, *habeas corpus*, transfer, etc., is governed by words referring to the acts of or proceedings in the Special Courts."

The judgment of Varadachariar, O.C.J., which was concurred in by Zafrullah Khan, J., was reversed by the Privy Council in *The King-Emperor* v. *Benoari Lal Sharma and others*[2], the Privy Council agreeing with the views of Rowland, J., of the Federal Court and of Derbyshire, C.J. and Khundkar, J., of the Calcutta High Court in regard to certain questions which have no bearing on the point now under discussion ; there is however no disagreement expressed by the Privy Council with what Varadachariar, O.C.J. and Zafrullah Khan, J., stated on this particular aspect, namely, the real scope and bearing of the provisions of the Ordinance on the jurisdiction and powers of the High Court.

In *Basantha Chandra Ghose* v. *The King-Emperor*[3], Sir Patrick Spens, C.J., who delivered the judgment of the Federal Court first quoted the language of section

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1. (1943) 2 M.L.J. 207 : 1943 F.C.R. 96 : 6 F.L.J. 79 (F.C.).
2. (1945) 1 M.L.J. 76 : L.R. 72 I.A. 57 : 1945 F.C.R. 161 : 1945 F.L.J. 1 (P.C.).
3. (1944) 2 M.L.J. 167 : I.L.R. 23 Pat. 678 : 7 F.L.J. 203 (F.C.).

10 (1) of the Restriction and Detention Ordinance 3 of 1944 which was in the following words:

"No order made under this Ordinance and no order having effect by virtue of section 6 as if it had been made under this Ordinance, shall be called in question in any Court, and no Court shall have power to make any order under section 491 of the Code of Criminal Procedure (V of 1898), in respect of any order made under or having effect under this Ordinance or in respect of any person subject to such an order."

He then pointed out that:

"section 10 does not purport to repeal section 491 of the Criminal Procedure Code"

and that:

"section 491 of the Criminal Procedure Code confers a certain power or jurisdiction on the High Court and all that section 10 of the Ordinance does is to interdict the High Court from exercising that power or jurisdiction in a certain class of cases."

The position is stated in language which is even more explicit in a later judgment of the Federal Court in *Basantha Chandra Ghose* v. *The King-Emperor*[1], where the same provision of law, namely, section 10 of the Restriction and Detention Ordinance (III of 1944) had to be considered. How the jurisdiction of the High Court under section 491 is retained notwithstanding the sweeping language of section 10 and the grounds on which that jurisdiction will be exercised were categorically stated by Sir Patrick Spens, C.J., in a passage which may usefully be set out. The learned Chief Justice said:

"It was no doubt open to the detenu to show that the order was not in fact made by the Governor of Bihar or that it was a fraudulent exercise of the power. The observations in *Liversidge* v. *Anderson*[2] and *Greene* v. *Secretary of State for Home Affairs*[3] establish that the burden of substantiating these pleas lies on the detenu. In the words of Viscount Maugham, once the order is proved or admitted 'it must be taken *prima facie*, that is, until the contrary is proved, to have been properly made and that the requisite as to the belief of the Secretary of State (here, the Governor) was complied with' . . . . . The mere fact that the detenu challenges the factum or the *bona fides* of the order or the fact that the officers of Government must naturally be in possession of information on the subject cannot be said to be 'proof to the contrary' so as to make it incumbent on the Government to adduce evidence in support of the order. In *Greene's case*[3] Goddard, L.J. (as he then was) referred to the possible ignorance of the detenu as to the reasons for his internment and said that that would not shift the burden of proof because 'it in no way shows that the Secretary of State had not reasonable cause to believe or did not believe' that it was necessary to detain the person."

Some reliance was placed by the learned Advocate-General on the judgment of the Federal Court in *Birpal Singh* v. *The King-Emperor*[4], as supporting his contention that the jurisdiction under section 491 is altogether excluded. The Federal Court was there dealing with an application under section 491 by a person who was detained under the Bengal State Prisoners Regulation (III of 1818) which is one of the Regulations referred to in sub-section 3 of section 491. In rejecting the application the Federal Court made certain observations which may, at first sight, seem to go so far as to hold that if the Government claims to have passed an order under the provisions of that Regulation there is no more jurisdiction in the High Court under section 491 to consider any matter arising out of or in relation to the detention. If the judgment of the Federal Court is to be so read it may seem to be in conflict with the view expressed by the Federal Court in *Basanta Chandra Ghose's case*[1]. On a close reading however of the judgment in *Birpal Singh* v. *The King-Emperor*[4], popularly known as the Bhajji case, I think the Federal Court did not go to the extent of denying the jurisdiction of the High Court in those respects in which it had affirmed such jurisdiction in the case of *Basanta Chandra Ghose*[1]. Particular reference must be made to the limited scope of the contentions raised by Mr. Gauba, counsel for the detenu in the Bhajji case. At page 28 of the Report the Federal Court sets out as (*a*), (*b*), (*c*) the points which he argued. Of these, point (*a*) alone is material for the present discussion and it is to the effect that the detenu

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1. (1945) 1 M.L.J. 365 : I.L.R. 24 Pat. 187 : 8 F.L.J. 40 (F.C.).
2. (1942) A.C. 206.
3. (1942) A.C. 284.
4. (1946) 1 M.L.J. 322 : 1946 F.L.J. 1 : 1946 F.C.R. 21 (F.C.).

"was still *de jure* the ruler of Bhajji State and as such not within the category of persons in respect of whom any warrant of commitment could be issued under the Bengal State Pr soners Regulation (III of 1818)."

After setting out points (*a*), (*b*) and (*c*) the Federal Court observed that :

"At one stage Mr. Gauba also urged that the form of the warrant of the 11th April, 1941, did not on the face of it sufficiently indicate that it was a warrant issued by the Central Government as required by section 7-A of the Regulation III, and that positive evidence that the matter had been considered and orders given for its issue by the appropriate officials was required before a Court could hold the warrant a valid warrant under Regulation III."

There was evidently no evidence offered on behalf of the detenu to substantiate the argument of Mr. Gauba in this respect and as the burden of proof in regard to allegations of that description undoubtedly lies on the challenger there need be no surprise if the Federal Court did not say anything further in their judgment in respect of this argument. From the manner in which the Federal Court refers to this particular argument it looks as if the counsel made a passing reference to it at one stage of his argument without emphasising it. As to what is described as point (*a*), the Federal Court observed that this point was legitimately open to the detenu and proceeded to deal with it on its merits.

The observations of the Federal Court to which pointed attention is drawn on behalf of the Crown are the following :

"Once the Court is satisfied that a person is being detained under Regulation III there is no jurisdiction under section 491 which the Court can exercise in the matter."

and again,

"In our judgment the material question in this case is : Is the appellant a person detained under Regulation III ? If he is, his application must fail."

In the light of what I have already said I am not inclined to regard these observations as excluding the preliminary jurisdiction of the High Court to decide, if the contention should be raised, whether the order was not in fact made by the concerned officer or authority, and did not represent his or its belief, and secondly, whether the order constituted a fraudulent exercise of the power. These questions are concerned with ascertaining whether the order under challenge is really one made by the concerned individual or body of individuals under the statutory power conferred on him or them. They are in a sense preliminary or collateral questions and seek to decide whether the order could at all be said to be one under the relevant statute. If those questions are decided adversely to the detenu we reach the position that the order is one which can be said to have been passed by the Government in the exercise of its statutory power. After that it may not any longer be open to the person concerned to show that the detention is either illegal or improper. After making the observations which I have quoted above, the Federal Court goes on to state that :

"something more than allegations that a person is being illegally or improperly detained under Regulation III is necessary before the Court can get over the bar to jurisdiction under the section imposed by sub-section (3)——, if on the facts of the case it is clear that a person is being detained under Regulation III, even though a Court might think if it investigated those facts, it might find that the detention was illegal or improper, still the Court cannot in our judgment interfere under section 491."

In my opinion in speaking of a person detained under Regulation III the Federal Court was contemplating a person who has been detained by an officer duly empowered in that behalf by an order which is not a fraudulent exercise of power and which is based on the satisfaction of the officer that its issue is necessary or expedient.

The conclusion which I have indicated above receives considerable support from the decisions of the Federal Court in *King-Emperor* v. *Sibnath Banerji and others*[1] and of the Privy Council in *Sibnath Banerji's case*[2]. The detentions in that case were under rule 26 of the rules framed under the Defence of India Act which provided that

1. (1943) 2 M.L.J. 468 : 1943 F.L.J. 151 : 1944 F.C.R. 1.

2. (1945) 2 M.L.J. 325 : 8 F.L.J. 222 (P.C.).

"the Central Government or the Provincial Government if it is satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to the defence of British India it is necessary so to do may make an order . . . . (*b*) directing that he be detained."

All the Judges of the Federal Court were agreed that it was a condition precedent to the valid exercise of the power of detention conferred by rule 26 that the Provincial Government should have applied its mind and been satisfied that such detention was necessary for preventing the person proceeded against from acting in a manner prejudicial to the matters mentioned therein and that therefore orders of detention made in pursuance of a " routine order " that if the Police recommended detention of any person under rule 26 such person may be detained were invalid. All the Judges were again agreed in holding that a mere recital in the order that the Provincial Government is satisfied to the effect stated in rule 26 cannot prevent the Court from enquiring into its accuracy and if there is sufficient material, from coming to the conclusion that the recital is inaccurate though the presence of the recital in the order will place a difficult burden on the detenu to produce admissible evidence to controvert it. There is a presumption attaching to an order regular on the face of it that it has been properly made ; but this is a rebuttable presumption. Relying on *Liversidge* v. *Anderson*[1] and *Greene* v. *Secretary of State for Home Affairs*[2], the Federal Court held that the Court could enquire whether there was not any consideration by or any satisfaction on the part of any properly authorised person before the orders for detention were made.

The Judgment of the Judicial Committee in *Sibnath Banerji's case*[3] approves of the judgment of the Federal Court in the above respect. It was maintained for the Crown before the Privy Council :

" that the orders being on their face regular and in conformity with the language of the rule, it was not open to the Court to investigate their validity any further."

Their Lordships quote section 16 (1) of the Defence of India Act which it would appear, was not brought before the Federal Court, and which provides that no order made in exercise of any power conferred by or under this Act shall be called in question in any Court, and go on to observe that the said provision :

" assumes that the order is made in exercise of the power, which clearly leaves it open to challenge on the ground that it was not made in conformity with the power conferred, heavily though the burden of proof may lie on the challenger."

Their Lordships conclude that :

" accordingly, the contention of the Crown that the Court has no jurisdiction to investigate the validity of the order fails."

Agreeing with the unanimous conclusion of the Federal Court that the orders of detention in the case of two of the respondents were proved to have been issued on the basis of police reports without any examination of the available materia by the Provincial Government or in other words that there was substitution of the recommendation by the Police in the place of the satisfaction of the Governor prescribed by rule 26, their Lordships set aside those orders.

Section 16 (1) of the Defence of India Act is almost identical with section 16 (1) of Madras Act I of 1947, but the Defence of India Act contained no provision corresponding to section 16-A of the Madras Act, and there was no specific reference to the jurisdiction of the High Court under section 491. Section 16-A however makes, in my opinion, no real difference. The jurisdiction of the High Court is in no way limited or restricted by section 16-A beyond what was done by section 16 (1), so that even in regard to applications filed after 25th May, 1948, the scope of the enquiry by this Court is no narrower than the scope of the enquiry in applications filed before that date.

The only point remaining to be considered is as to the grounds on which the orders of detention are open to challenge. Most valuable guidance is afforded

1. (1942) A.C. 206.
2. (1942) A.C. 284.
3. (1945) 2 M.L.J. 325: 8 F.L.J. 222 (P.C.).

on this subject by three well-known decisions of the House of Lords in *Halliday's case*[1], *Liversidge's case*[2], and *Greene's case*[3]. The first of these was concerned with regulation 14-B of the Defence of the Realm (Consolidation) Regulations, 1914, issued under the Defence of the Realm (Consolidation) Act of 1914, section 1, sub-section (1). The regulation empowered the Secretary of State to order the internment of any person :

> " of hostile origin or association where on the recommendation of a competent naval or military authority it appears expedient for securing the public safety or the defence of the realm.".

The other two decisions arose out of orders of detention under the Defence (General) Regulations, regulation 18-B, issued under the Emergency Powers (Defence) Act, 1939, section 1, sub-section 1, para. (1) of the regulation was in the following terms :

> " If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations or to have been recently concerned in acts prejudicial to public safety or the defence of the realm or in the preparation or instigation of such acts and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained."

By para. (8) :

> " Any person detained in pursuance of this regulation shall be deemed to be in lawful custody."

Notwithstanding the differences in the enactments of 1914 and 1939 all the three decisions embody certain common statements of principle.

The decisions of the Privy Council and the Federal Court to which I have had occasion to refer are in great part based upon these three decisions and interpret what is therein stated. There is no need to quote from any of these decisions at any length and it will suffice to set out briefly the grounds which have been recognised in them as grounds on which a detenu can impeach the validity of the order of detention against him.

(1) At the very outset lies the authenticity of the order which it is open to the detenu to disprove, if he can successfully do so. It is sufficient to refer in this connection to the speeches of Lord Macmillan and Lord Wright in *Greene's case*[3] where they refer to authenticity as a fact to be enquired into if impugned.

Section 16, sub-section (3) of Madras Act I of 1947 provides that where any order purports to have been made and signed by any authority in exercise of any power conferred by or under the Act, a Court shall presume that such order was so made by such authority, but the presumption is obviously one which may be rebutted.

(2) It is settled by the decision of the Privy Council in *Sibnath Banerji's case*[4] that the detenu may show if he can that the officer or authority purporting to issue the order of detention did not apply his mind to the necessity or expediency of issuing such an order and was not and could not have been satisfied in regard thereto as required by the statute. *Sibnath Banerji's case*[4], affords a concrete illustration of how this may happen.

(3) I am clear though the decisions do not directly refer to it that it will be open to a detenu to prove that the officer issuing the order is not legally empowered to do so.

(4) The detenu may also show that he is not the person intended : or in other words that it is a case of mistaken identity—*See* per Lord Wright in *Liversidge's case*[2] and in *Greene's case*[3].

(5) There is a considerable body of judicial opinion that the order should have been made in good faith by the officer or authority concerned, the *bona fides* of the order being presumed. There are several references to this in *Liversidge's case*, *Greene's case* and in *Sibnath Banerji's case*[4]. In *Halliday's case*[1] Lord Wrenbury states that the statutory authority must be exercised honestly. It may be difficult for the

1. (1917) A.C. 260.
2. (1942) A.C. 206.
3. (1942) A.C. 284.
4. (1945) 2 M.L.J. 325 : 8 F.L.J. 222 (P.C.)

detenu to establish the absence of *bona fides*, but it cannot be doubted that it is a ground of challenge which is open to him where he can, for instance, show that the order was not issued in the public interest but was actuated by personal malice or spite or is the result of political animosity.

(6) Negatively it can be said that the sufficiency of the available material or information to justify the order of detention and the question whether the officer concerned could be said to have reasonable grounds for the issue of the order in question are not matters which are within the cognizance of the Court. The satisfaction is the satisfaction of the officer. He is the sole Judge and once the conclusion is reached that he was satisfied the detenu cannot invite the Court to go behind it and dissect the reasons which weighed with the officer and find out for itself whether the order should have been issued. While the satisfaction of a properly constituted authority is a condition precedent to the issue of an order of detention, whether the circumstances called for the issue of such an order is a matter entirely for its consideration and nobody else's.

It may no doubt be asked as it was asked in the cases which went up to the House of Lords whether apart from the challenge in a superior court of law, on the grounds which have been detailed above there is any other effective safeguard against the encroachment by the executive on the liberty of the citizen. As said by Lord Wright in *Liversidge's case*[1] :

> " the safeguard of British liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved."

Later on in his speech in that case, His Lordship refers to the provision that the detenu should be informed of the grounds of his detention and should be given such other particulars as may be considered sufficient to enable him to present his case, the constitution of an advisory committee with powers of recommendation and advice which however the Home Secretary may decline to follow and the requirement that the Home Secretary should report to the Parliament periodically as to the action he has taken on the advice of the committee as providing some check though not a very effective check on an unreasonable exercise of the power. The ultimate remedy however is to be sought only in public opinion, expressed through recognised democratic channels. To quote His Lordship's words once again :

> " If the sense of the country was outraged by the system or practice of making detention orders, or indeed, by any particular order, it could make itself sufficiently felt in the press and Parliament to put an end to any abuse and Parliament can always amend the regulations."

However that may be the jurisdiction of this Court established and defined by the above precedents remains unimpaired and unaffected by anything contained in the Madras Ordinance and these applications will have to be dealt with accordingly.

Govinda Menon, J.—As the facts and circumstances that led to the hearing of these petitions by this Full Bench have been exhaustively considered by my Lord the Chief Justice and my brother Govindarajachari, J., I need not set them out at any length : but in view of the importance of the constitutional subjects arising for decision and the elaborate arguments addressed to the Court, I may as well state shortly in my own words the reasons for my concurrence with the judgments now delivered.

As a preliminary step, the learned Counsel appearing for the various petitioners have contended that Madras Ordinance II of 1948 promulgated by H. E. the Governor of Madras on 25th May, 1948 is *ultra vires* ; because the necessary prerequisites for the validity of such a law not only do not exist, but that the essential conditions precedent to the promulgation of such an ordinance have also not been complied with. Though no specific authority has been cited before the Court, it can be clearly assumed, that after the 15th August, 1947, the position of the Governor, *vis-a-vis.*, the Council of Ministers, is that he acts entirely as a constitutional head. That means the Governor *suo motu* or of his own initiative will

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1. (1942) A.C. 206.

not take any effective steps in the administration of the Province without being previously advised by the Ministry—to that extent I do not feel that there can be any doubt and therefore the argument of the petitioners' Counsel is that under the circumstances that existed on the 25th May, 1948, as a matter of fact between the afternoon of 24th May, 1948, and the time of the promulgation of Ordinance II of 1948, the Governor was not advised by the ministers because there was hardly any time for the Council of Ministers to meet, discuss the matter and place their conclusion before the Governor. It is said that after the Legislature was prorogued by a notification (G. O. No. 1284—Public Elections) dated 24th May, 1948, and before the Ordinance was issued on the 25th May, 1948, not even 24 hours had elapsed which time would not have been sufficient for the Cabinet to meet and discuss the situation and advise the Governor to promulgate the Ordinance. It is next pointed out that even if during this short period of nearly 24 hours the Cabinet of the Madras Government conferred together and advised the Governor to promulgate the Ordinance there existed the physical impossibility of obtaining the instructions of the Governor-General during this short interval. There was also a feeble contention put forward without any attempt to substantiate it that during this relevant period His Excellency the Governor of Madras was not in the City of Madras but was residing in Ootacamund and that since the Council of Ministers did not meet in Ootacamund it would not have been possible for the Governor to have taken their advice. The argument outlined above was contested by the learned Advocate-General appearing for the Government of Madras on the ground that all these matters raise questions of fact, for the elucidation of which the petitioners have taken no steps by letting in evidence. He contends that the petitioners are prohibited from raising any question of fact on which evidence would have been necessary. It is further pointed out that under section 114 of the Evidence Act there is a presumption of legality in favour of the Ordinance and the party who impugns its legal nature should prove his contention. The Ordinance itself recites that the Legislature of the Province is not in session, that the Governor is satisfied that immediate action is necessary for the purpose of amending the Madras Maintenance of Public Order Act of 1947 and that the instructions of the Governor-General have been obtained in pursuance of the proviso under section 88 (1) of the Government of India Act, 1935. The correctness of these recitals cannot be questioned before this Court without any material to prove the contrary. Reference was also made to sub-section 4 of section 51 of the Government of India Act, 1935, for negativing the contention of the petitioners regarding the absence of advice by the Council of Ministers. According to this sub-section the question whether any, and if so, what advice was tendered by the ministers to the Governor shall not be inquired into in any Court. Further the learned Advocate-General brought to our notice that though the Madras Legislature was in session till the 24th May, 1948, the last day on which the Madras Legislative Assembly met was on the 28th April, 1948, after which the Assembly was adjourned *sine die*. The last meeting of the Legislative Council prior to the promulgation of the Ordinance was on the 3rd May, 1948, after which this House was also adjourned *sine die*. Therefore on the day when the Legislature was prorogued there was no likelihood of any immediate meeting of either House of the Legislature. Before the Legislature could meet, intimation has to be sent to the members thereof to assemble on a specified date and ordinarily sometime must elapse between the summoning and the meeting of the Legislature. In addition, the Advocate-General argued that on a proper construction of section 88 all that is necessary is that the Governor should be satisfied when he promulgated the Ordinance, that immediate action was necessary and that it is not essential that his decision must be *eo instanti* with the promulgation. It may be that he might have thought about it earlier, come to a decision, got the previous instructions from the Governor-General and promulgated the Ordinance at a time when he thought that immediate action was necessary.

It seems to me that the argument addressed by the Advocate-General on this aspect has to be accepted. The recital in the preamble to the Ordinance that the Governor was satisfied that immediate action was necessary and that the instructions of the Governor-General have been obtained must be accepted as correct especially since nothing has been shown to the contrary. I do not see how it can be successfully urged that the provisions of section 88 of the Government of India Act have not been properly complied with. On the 25th May, 1948, the Legislature was not in session. The Ordinance recites that the Governor is satisfied that immediate action is necessary. I am not prepared to agree with the contentions of the petitioners regarding the impossibility of tendering advice to the Governor by the Council of Ministers or that no advice was tendered. Mere assertions in Court by the petitioners' Counsel cannot be taken as proof of those statements. Applying the following dictum of Viscount Maugham in *Liversidge* v. *Sir John Anderson*[1], it has to be concluded that in the absence of any evidence to the contrary all the necessary conditions contemplated by section 88 of the Government of India Act, 1935, have been complied with.

"In my opinion, the well known presumption *Omnia esse rite eta* applies to this order, and accordingly, assuming the order to be proved or admitted, it must be taken *prima facie*, that is until the contrary is proved, to have been properly made and the requisite as to the belief of the Secretary of State was complied with.

It cannot also be successfully contended that since the Ordinance does not make mention that the instructions of the Governor-General have not been obtained under section 107 of the Government of India Act, the Ordinance in so far as it affects the existing law is *ultra vires*. The fallacy in the line of reasoning is that section 107 deals with an Act and since an Ordinance has all the essentials of an Act, it is unnecessary to make specific mention of section 107 at all. In the face of express provisions contained in sub-section 4 of section 51 of the Constitution Act, we will not be justified in embarking upon an enquiry as to whether the Council of Ministers ever met at all or that any advice was tendered to the Governor even if they met, or what that advice was. If this Court is precluded from investigating whether any advice was tendered, it necessarily follows, that the contentions regarding the *ultra vires* nature of the Ordinance on the ground that no advice was tendered to the Governor cannot be accepted. It is also in my opinion not within the province of this Court to find out why the Legislature was prorogued or whether it could have been possible to have convened a meeting of the Houses of Legislature before the Ordinance was promulgated unless the petitioners can show that the whole action was fraudulent and constituted a fraud upon the power exercised. I need hardly add that no attempt was made to substantiate any of those allegations.

As an alternative, if not, the main argument, counsel for the petitioners have raised the important question that even if the entire Ordinance is *intra vires*, clause 4 dealing with section 16-A to be inserted in Madras Act I of 1947, by this Ordinance is repugnant to an existing law and so the latter law will have to prevail on account of section 107 of the Government of India Act. Mr. N. S. Mani appearing for some of the petitioners contends that as the power of the Governor to promulgate an Ordinance in times of emergency is similar to that of the Provincial Legislature to pass an act, even if section 16-A had already been enacted in Madras Act I of 1947, still, that would be repugnant to an existing law and hence void on account of the provisions of section 107 of the Constitution Act. The argument is put this way. The object of the Ordinance being to amend the Madras Maintenance of Public Order Act of 1947, it was a matter which came directly with in entry No. 1, List II, Provincial Legislative List of 7th schedule of the Constitution Act and therefore the subject was one which was entirely within the jurisdiction of the Provincial Legislature. One has therefore to look at the pith and substance of the Ordinance about which there can be no doubt; and according to that test, the Ordinance by its preamble and object falls within entry No. 1 (List II). But section 16-A does not at all concern with public tranquillity, but with a provision

1. 1942 A.C. 206 at page 224.

of the Criminal Procedure Code, section 491. If that is so, then according to the petitioners, sub-section (1) of section 107 is applicable; in that a portion of a provincial law, *viz.*, section 16-A is repugnant to one of the matters enumerated in the Concurrent List (List No. 3) *viz.*, entry No. 2 therein. Then it follows that the portion of the Provincial Law to that extent is repugnant and void. Two recent decisions of the Privy Council reported in *P. K. Mukherjee* v. *The Bank of Commerce Limited, Khulna*[1], as well as an earlier decision in *Governor-General in Council* v. *The Province of Madras*[2], were referred to. In those decisions, their Lordships of the Privy Council have held that the Lists in the 7th Schedule are bound to overlap from time to time, that it is not possible to make a clean cut between the powers of the various Legislatures and therefore the existence of a Concurrent List has made it easier to distinguish between those matters which are essential in determining to which list the particular provision should be attributed and those which are merely incidental. They further point out that it is possible that the Provincial Legislature may invade into the realm of the Federal Legislature and the provisions of a particular statute may advance therefore into the Federal territory as to show that its true nature is not concerned with Provincial matters; but the question is not, has it trespassed more or less, but is the trespass, whatever it be, such as to show that the pith and substance of the impugned Act is a Provincial subject or a Federal subject. If that question is determined, then the Act falls on one or other side of the line and can be seen as valid or invalid according to its true content. It was further pointed out that the pith and substance of the Bengal Money Lenders Act was money lending and therefore it was within the competence of the Provincial Legislature even if some portions of it related to Negotiable Instruments. Their Lordships held that the particular Act in question was *intra vires* the Provincial Legislature. The question was also raised whether such an Act could interfere with transactions in which promissory notes formed a part, in order to make such transactions valid only subject to the provisions of the Money Lenders Act. The Federal Court had already decided on this point that where the liability in the promissory note had passed into a liability under a decree, there was nothing to prevent the decree being affected by the provisions of the Money Lenders Act and hence in such cases it would be valid where judgments were sought to be reopened, but invalid where no judgment had been obtained and the borrower's liability was still secured by the promissory note. The Judicial Committee left the question open and did not pronounce any decision on the soundness of this view. The other decision cited *Governor-General in Council* v. *The Province of Madras*[2] also dealt with a similar topic and the conclusion of their Lordships is that it is not the name of the tax but its real nature, *viz.*, its pith and substance, which must determine whether it can be levied by the Federal or Provincial Legislature. I am not able to see how these decisions support the argument of learned Counsel. If at all, the decision in *P. K. Mukherjee* v. *The Bank of Commerce, Limited, Khulna*[1], is, as I read it, against his contention. Their Lordships did not declare any portion of the Bengal Money Lenders Act repugnant to any existing law. The dictum of Sir Maurice Gwyer, C.J., in *Subramania Chetty* v. *Muthuswami Goundan*[3], was quoted with approval in the judgment of the Judicial Committee to the effect that the rule which has been evolved is that the impugned Act has to be examined to ascertain its pith and substance for the purpose of determining whether it is legislation with respect to matters in this list or in that list. I am unable to find any clear pronouncement in any of these cases to the effect that, if the pith and substance of an enactment is within the purview of a Provincial List even though it trenches upon some incidental or ancillary matter in the Concurrent List, that part of the legislation which trenches upon the Concurrent List is invalid or inoperative. Moreover the conflict in these cases was between Lists I and II and not between Lists II and III. It has further to be observed that sub-section (1) of section 107 is subject to sub-section (2) as is specifically mentioned therein. Sub-section (2) is in the nature

1. (1947) 2 M.L.J. 6 : L.R. 74 I.A. 23 : 1945 F.L.J. 69 (P.C.).
1947 F.L.J. 34 (P.C.).
2. (1945) 1 M.L.J. 225 : L.R. 72 I.A. 91 :
3. (1941) 1 M.L.J. (Supp.) 1 (F.C.).

of a proviso to sub-section (1) and therefore one has to consider the matter by a joint application of both the sub-sections together and not by applying the provisions of sub-section (1) alone literally.

It is next contended that sub-section (2) alone is to be taken into consideration and then also section 16-A is repugnant and therefore void. The argument is that the entire Ordinance cannot be said to deal with a matter in the Concurrent List but only a portion of it, and therefore section 107 (2) has no application. This argument overlooks the important circumstance that the word " Provincial Law " does not necessarily mean the whole of the Provincial Law. The learned Counsel admitted that a portion of the Provincial Law is also a Provincial Law within the meaning of section 311 of the Constitution Act. If that is so, then sub-section (2) is clearly applicable because if section 16-A of the Ordinance relates to a matter in the Concurrent List, that is entry No. 2 and even though it is repugnant to the existing law still since the previous assent of the Governor-General has been obtained the Provincial Law shall prevail in the Province. Moreover the words used are " with respect to." These words do not necessarily mean that the entire Provincial Law should relate to one or more of the matters in the Concurrent List. If any portion of a Provincial Law relates to such a matter, then it is certainly *with respect* to one of the matters in the Concurrent List. It seems to me therefore that if section 16-A dealt with a matter in the Concurrent List then sub-section (2) of section 107 is applicable and the law is valid so far as the Province is concerned.

At one stage of the argument, some of the learned Counsel while conceding that if the Governor or the Provincial Legislature had promulgated an Ordinance or passed an Act as the case may be, solely confined to the matter contained in section 16-A, then, such Ordinance or Act will be valid, urged that it is the admixture of a Provincial subject with a Concurrent List subject that made the impugned Ordinance inoperative and void. This defect, if at all is merely one of form and not substance.

The learned Advocate-General contended that the subject-matter of section 16-A is one coming within the ambit of entry No. 2 in List II, *viz.*, jurisdiction and powers of all Courts except the Federal Court with respect to any of the matters in List II. Section 491 being one of the provisions of the Code of Criminal Procedure dealing with the jurisdiction and powers of the High Court is a matter subject to the legislative jurisdiction of the Province. We have therefore to ascertain under what basis and authority, the writs in question are to be issued, if such an action is at all called for. Mr. Asker Ali one of the Counsel for certain petitioners went to the extreme length of urging that under section 561-A of the Criminal Procedure Code, this Court is vested with the jurisdiction and power to issue the writ. It is unnecessary to dilate on this contention, because there has been a long catena of cases of this and other Courts that section 561-A does not enlarge the powers of a Criminal Court just as section 151, Civil Procedure Code does not add to the powers of a Civil Court. The question has to be viewed in the light of other relevant provisions of the Criminal Procedure Code.

It seems to be that the act of issuing a writ is the exercise of a power of jurisdiction and not the strict following of a specific procedure and I would uphold the contention of the Advocate-General to that extent.

The applicants have invoked the jurisdiction of this Court to issue directions in the nature of *Habeas Corpus* only under section 491 of Criminal Procedure Code. It cannot be disputed, therefore, that the power of this Court to issue the writ is to be ascertained from the jurisdiction vested under section 491, Criminal Procedure Code. What enables the High Court to take action, where a person is illegally or improperly detained within the limits of the appellate jurisdiction of the High Court, is the direct result of the jurisdiction and power conferred by section 491. Such being the case, in my opinion, such power or jurisdiction is a matter about which the Provincial Legislature has power to legislate. The old Supreme Court, on which had been conferred the right to issue the prerogative

writ of *Habeas Corpus* under the common Law, was the predecessor of the High Court and the High Court inherited those powers when the Supreme Court was abolished. But this common law right was made a statutory one, by the provisions of the Criminal Procedure Code and the power of the High Court to issue the writ in a manner other than what is specified in section 491 was taken away (the Criminal Procedure Code of 1872 and 1875). *The District Magistrate, Trivandrum* v. *Mammen Mappillai*[1] overruled two earlier decisions in *Kochunni Elaya Nair*, In re[2] and *Govinda Nair*, In re[3] which held that the High Court had powers, apart from the provisions of the Criminal Procedure Code. This decision of the High Court was confirmed by the Judicial Committee in *Matthen* v. *District Magistrate, Trivandrum*[4]. Under these circumstances the Counsel appearing for the petitioners had, perforce to admit that they could not invoke any power other than what is contained in section 491, Criminal Procedure Code. The result is, that the power to issue the writ comes within the meaning of the terms "jurisdiction and power of the High Court" in entry No. 2 in the Provincial List and it was within the competence of the Governor to promulgate the Ordinance taking away such a power.

It is next contended that the right to issue the writ is contained in entry No. 2 of the Concurrent List, namely Criminal Procedure Code including all the matters included in the Criminal Procedure Code. I am prepared to accept the contention to this extent, that the two entries namely entry No. 2 is in the Concurrent List and No. 2 in the Provincial List overlap each other to some extent and section 491 may also come within the expression

"including all matters included in the Code of Criminal Procedure";

but does such overlapping take away the right of the Provincial Legislature to deal with the subject-matter under consideration? In *Stewart* v. *Brojendra Kishore*[5] a Bench of the Calcutta High Court had to deal with entry No. 4 in the Concurrent List and No. 2 in the Provincial List; and the learned Judges have observed that merely because the Civil Procedure Code contains certain provisions relating to the jurisdiction and powers of Courts, it does not follow that Civil Procedure in the Concurrent Legislative List includes everything relating to the jurisdiction and powers of Courts. So to hold would be completely to wipe out the second entry in the Provincial Legislative List. It is true, that where a subject-matter might fall either in the Concurrent Legislative List or in the Provincial Legislative List, section 100 makes the former the dominant list; but this principle cannot apply where the result would be to rob the provincial entry of all its content. The learned Judges further observe following a decision in *Marriage Legislation in Canada*, In re[6] that 'Civil Procedure' in the Concurrent Legislative List must be held to exclude matters relating to the jurisdiction and powers of Courts since special provision is made for these matters elsewhere in the list. The provisions in the Civil Procedure Code whether they are civil procedure in the limited sense or not are of course specifically included in the 4th entry in the Concurrent Legislative List. The same remarks, in my opinion, apply with equal, if not greater force, to entry number 2 in the Concurrent List as well as in the Provincial List respectively. Now applying that decision to the facts of the present cases, I would hold that Criminal Procedure in the Concurrent List must be held to exclude matters relating to jurisdiction and powers of all Courts including the High Court since special provision for that, is made in the Provincial Legislative List. The word 'including' in entry No. 2 was the subject of some comment and Mr. Mani invited our attention to a decision of the Privy Council in *Rajah Bejoy Singh* v. *Surendra Narayanan Singh*[7]

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1. (1939) 2 M.L.J. 135 : I.L.R. 1939 Mad. 708.
2. (1921) 41 M.L.J. 441 : I.L.R. 45 Mad. 14.
3. (1922) 43 M.L.J. 396 : I.L.R. 45 Mad. 922 (F.B.).
4. (1939) 2 M.L.J. 406 : L.R. 66 I.A. 222 : I.L.R. 1939 Mad. 744 (P.C.).
5. A.I.R. 1939 Cal. 628 at 634.
6. (1912) A.C. 880.
7. (1928) 55 M.L.J. 456 at 462 : L.R. 55 I.A. 320 : I.L.R. 56 Cal. 1 (P.C.).

to the effect, that the expression "including all interests therein" does not increase the corpus of the subject of the lease in that particular case. It is unnecessary to consider the real import of that expression since I am of opinion that entry No. 2 in the Provincial List covers the present case.

Relying upon section 223 of the Constitution Act which re-affirms and upholds the existing powers, jurisdiction, etc., of the High Court on the establishment of the Dominion as exactly what they were, before that period, it is urged that as clause 44 of the Letters Patent of the High Court declares that the provisions of the Letters Patent are only subject to the Legislative Powers of the Governor-General,—the equivalent of which is, at present, the Dominion Legislature,—the Provincial Legislature or the Governor has no power to promulgate the Ordinance with the inclusion of section 16-A thereby interfering with clause 44 of the Letters Patent. The short answer to this is that clause 44 itself makes the Letters Patent subject to the Legislative powers of the Governor-General and since such legislative powers relating to the jurisdiction and powers of Courts as the Governor-General had, became transferred to either the Provincial Legislature or the Dominion Legislature by virtue of the Constitution Act the objection can have no validity. In *Hirji Laxmidas* v. *Francis Fernandez*[1], Stone, C.J., and Kania, J., had to consider a similar question and the conclusion arrived at therein was that by the joint effect of section 293 of the Constitution Act, and sections 2 and 7 of Government of India (Adaptation of Indian Laws) Order, 1937, reference to the Governor-General in clause 44 of the Letters Patent refers to all other competent authorities including the Provincial Legislature. The clauses of the Letters Patent can therefore be altered by the Provincial Legislature. It follows therefore that section 293 of the Constitution Act was wide enough to cover Letters Patent as a Law and the proper authority to legislate is the Provincial Legislature. *Ex concesso* if the issuing of a writ of *Habeas Corpus* is included in either Clause 2 of List No. 2 or in clause 2 of List No. 3 it cannot be said that clause 44 is a bar to the promulgation of the Ordinance.

Before leaving this topic it is necessary to advert to another really desperate argument advanced on behalf of the petitioners, and that is, that in the alternative the power to issue directions in the nature of a writ of *Habeas Corpus* is a matter not enumerated in any of the lists in the 7th schedule to the Constitution Act, but is a residuary power and therefore according to section 104 of the Act such residual powers of Legislation are vested in the Governor-General who may empower either the Dominion Legislature or the Provincial Legislature to enact a law with respect to it. As admittedly there has been no such empowering of either Legislatures so far as the issuing of the writ is concerned, according to the petitioners, the Ordinance to that extent is void. This argument cannot be accepted because, in my opinion, this matter is governed either by entry No. 2 in List No. 2 or entry No. 2 in List No. 3. Moreover as observed by the Federal Court in *Manikka Sundar Bhattar* v. *R. S. Naidu*[2], where there is a choice between two possible constructions of an entry or entries, one of which will result in legislative power being conferred by some entry or entries in the list and the other finding of no existing powers,—but if legislation is required, that recourse must be had to section 104,—then, that construction which would include the subject in an entry or entries should be preferred. This is an additional reason for holding that the subject-matter of section 16-A is included in Lists 2 and 3.

The next line of attack is that even if the Ordinance is *intra vires* so far as section 16-A is concerned, the petitioners object to its application to the various cases under consideration. Out of the applications now before us, 17 applications were filed after the 25th May, 1948, but the rest of them were pending in this Court on the date of the promulgation of the Ordinance. The learned Advocate-General does not dispute the fact that the petitioners, in all the cases, were arrested under Act I of 1947 and detained in custody before the promulgation of the Ordinance. The

1. A.I.R. 1945 Bom. 352 : 8 F.L.J. 119. 2. (1946) 2 M.L.J. 17 : 9 F.L.J, 57 (F.B.).

question therefore arises as to the applicability of the Ordinance and its provisions to the cases already pending in this Court and to those filed subsequent to 25th May, 1948, by persons who have been arrested and detained prior to the coming into force of the Ordinance. It is not seriously disputed that section 16-A relates to a matter of substantive right and not one of procedure. In *Vasudeva Samiar*, In re[1], a Full Bench of this Court following *Colonial Sugar Refining Co.* v. *Irving*[2] decided that the amendment of clause 15 of the Letters Patent by which the right to prefer a Letters Patent appeal was restricted to cases where the Judge who heard it has granted a certificate permitting the filing of such Letters Patent appeal, was held to be not retrospective in order to affect appeals in suits which had been filed before the amendment. The institution of a suit carries with it the implication that all appeals then in force are preserved to it through the rest of its career unless the Legislature has either abolished the Court to which an appeal then lay or has expressly or by necessary intendment given the Act a retrospective effect. If the right to file an appeal cannot be impliedly taken away by construing the law as having a retrospective effect, *a fortiori* it follows that that right to get one's illegal detention set aside cannot also be taken away. To this aspect of the case the contention on behalf of the Crown is that that section 16-A expressly applies to all pending cases or at least by necessary intendment applies to such cases. The learned Advocate-General points out that the words :

"Shall apply to any person detained or deemed to have been detained under section 2 of this Act."

make it clear that all persons whose liberty has been curtailed by applying the provisions of section 2 of the Act or who are deemed to have been detained under the provisions of section 19 of Madras Act I of 1947 are affected by section 16-A. I am unable to read section 16-A as expressly giving it a retrospective operation. The Ordinance making authority could have used appropriate words if the intention was to make the section retrospective. We are familiar with legislative enactments where suitable and proper words had been explicitly and clearly used in order to bring out the intention to make the statute retrospective in operation. In the absence of any such words I am not prepared to agree with the learned Advocate-General that the words "detained or deemed to have been detained" should be understood as denoting a clear retrospective operation to the statute.

Then, the question is whether by necessary intendment it was given a retrospective operation. Neither the preamble to the Ordinance nor any other provision gives any direct indication about the intention to make it retrospective. The learned Advocate-General relied upon some cases, which according to him showed that such a piece of legislation should be deemed to have retrospective effect. In *Basanta Chandra Ghose* v. *King-Emperor*[3], there is a passage in the judgment of the learned Chief Justice to the effect that the analogy of civil proceedings in which the rights of parties have ordinarily to be ascertained as from the date of the institution of the proceedings cannot be invoked in matters of detention. If at any time before the Court directs release of a detenu on the ground that he is wrongfully detained a valid order directing his detention is produced, the Court cannot order his release merely on the ground that at some prior stage there was no valid cause for his detention. The question is not whether the later order validates the earlier detention, but whether on the face of the later valid order the Court can direct the release of the detenu. It cannot be said that these observations can be directly applied to the present petitions, because the Court has not yet considered whether the applicants were validly detained or not. It is not as if the original detention under the Public Safety Act having been found illegal, a validating Act is passed justifying such detention and making it legal. In *Shibnath* v. *Porter*[4], Mitter, J., considered the effect of an Ordinance as affecting pending proceedings. Though the learned Judge held in that case that the illegal detention was later on validated

1. (1928) 56 M.L.J. 369 : I.L.R. 52 Mad. 361 (F.B.).
2. (1905) A.C. 369.
3. (1945) 1 M.L.J. 365 : 8 F.L.J. 40.
4. A.I.R. 1943 Cal. 377 at 390 and 391.

by the Ordinance, his general observations can be read only as laying down that unless there is an express provision, retrospective operation cannot be given to an Ordinance like the one he was considering. He also expressed the opinion that where the statute gives its provisions retrospective operation in express terms it would be a matter for consideration how far the retrospective operation extended and whether pending actions were intended to be affected by it and therefore the question finally resolves itself into a matter of construction, though express words are not essential. I do not see how this decision helps the contention of the learned Advocate-General. The other decisions relied on by him, *viz.*, *Mukherjee* v. *Mussammat Ram Ratan Kuer*[1] and *The United Provinces* v. *Mst. Atiqua Begum*[2] do not carry this contention any further. In the former case their Lordships found that section 26 (N) of the Bihar Tenancy Act was retrospective because the words used were sufficiently plain. In the latter case the Federal Court had to consider the " requirements of Remission Acts of 1938 (United Provinces) " and Sulaiman, J., in discussing the retrospective nature of that piece of legislation observed that when a statute deprives a person of his right to sue or affects the power and jurisdiction of a Court in enforcing the law as it stands, its retrospective character must be clearly established. Ambiguities in it should not be removed by Courts nor gaps filled up in order to widen its applicability. It is a well-established principle that such a statute must be construed strictly and not given a liberal interpretation. As I construe the section, I am clear that there is no intention, even implicit, as can be gathered from the objects and from an overall examination of the whole Ordinance to make section 16-A retrospective, much less is there any express provision to that effect. These applications that were pending on the 25th May, 1948, should be decided in accordance with Act I of 1947, as it stood before its amendment by the Ordinance. It is pertinent to refer in this connection to *Lauri* v. *Renaud*[3] where Lindley, L.J., observed :

> " It is a fundamental rule of English Law that no statute shall be construed so as to have retrospective operation, unless its language is such as plainly to require such a construction ; and the same rule involves another and a subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective effect than its language renders necessary."

(See also Craies' Statute Law, 4th Edition, pp. 329 and 330). Similar observations are found in Maxwell's Interpretation of Statutes (8th Edition, page 199). Quoting from *Warne* v. *Beresford*[4] the learned author observes :

> " Where for instance the defendant pleaded to an action for a small sum that the jurisdiction of the Court had been taken away by the Court of Requests Act and that Act was repealed after the filing but before the trial, it was held that the plaintiff was entitled to judgment."

(See also Halsbury, Vol. 31, Hailsham's edition, pages 515-517).

With regard to the 17 petitions filed subsequently, the petitioners contend that section 16-A cannot take away their right to invoke the powers of this Court to issue a writ of *Habeas Corpus*, if their detention is found to be illegal or improper. The question as to what the powers of this Court are in the absence of section 16-A and with it in the statute will be considered later. The only point now to be decided is whether section 16-A debars the petitioners from filing the applications after the 25th May, 1948, and the Court from hearing them. The petitioners put forward the plea that though their applications reached the High Court only after the 25th May, 1948, they had been despatched from their places of detention by the respective petitioners some days before the promulgation of the Ordinance and that the delay caused in transit or occasioned by the action of the executive authorities should not prejudice them. There is no allegation that their applications were fraudulently or wantonly withheld until the Ordinance was passed. Though it was very feebly suggested that the executive authorities withheld the transmission of these applications to the Advocates till the Ordinance was promulgated, no attempt whatever has been made to substantiate such a suggestion. I am definitely

1. (1936) I.L.R. 15 Pat. 268.
2. (1941) 1 M.L.J. (Supp.) 65 : 1940 F.C.R. 110 at 182 : 3 F.L.J. (F.C.) 97.
3. (1892) 3 Ch. 402 at 421.
4. 6 L.J. Ex. 192.

of opinion that in the absence of any tangible material, it is not open to this Court to entertain or accept a suggestion of the kind. Even if it be so, I fail to see what this Court can do in a matter like this.

The petitioners in these 17 applications further contend that there is a right vested in them under section 491 of the Criminal Procedure Code to invoke the jurisdiction of this Court, the moment they were illegally detained under the Madras Public Safety Act and therefore if section 16-A of the Ordinance cannot be construed as having a retrospective operation, that vested right which inhered in them prior to its promulgation should not be prejudiced or taken away, by the application of section 16-A. The arguments proceeded on the basis that recourse to section 491 and the application to invoke the same are rights vested in the petitioners from the moment of their detention. I am prepared to accept that it is a right which a person possesses to see that he is not wrongfully confined. It is one of the essential elements in the liberty of a human being, but to say that it becomes vested the moment he is illegally detained is to my mind overstating the principle and going too far. In order that a right might become vested, there must be an antecedent act or omission with an intention to avail of or take advantage of the privilege ; otherwise, as is well known the right is only contingent. A mere right to take advantage of a certain privilege cannot be styled as a vested right. In *Abbott* v. *Minister for Lands*[1], the Privy Council in dealing with the Crown Alienations Act, 1861, of New South Wales in Australia has laid down that the mere right existing at the date of a repealing Statute to take advantage of the provisions of the Statute repealed is not a right accrued. To my mind in the case of the petitioners in 17 cases they did not have any *right accrued in their favour* by their mere detention. The above decision has been followed in *Hamilton Gell* v. *White*[2], where Atkin, L.J., was of opinion that abstract rights conferred by a repealed Statute cannot be considered as specific *rights accrued* in favour of an individual. In this connection it is also useful to refer to the observations of Sulaiman, J., in *United Provinces* v. *Mst. Atiqua Begum*[3], where a number of cases of the English Courts were considered and discussed. As against the above line of authority, Mr. K. Krishnamurthi, appearing for the petitioners in one of these petitions relies upon the observations of the Court of Appeal in *Hough* v. *Windus*[4]. In that case what happened was that before the enactment of section 146 of the Bankruptcy Act of 1883 and in accordance with the law as it stood, a sheriff had entered into possession and seized the goods of the defendant under a writ of *elegit* at the suit of the plaintiff, a judgment-creditor of the defendant ; but no delivery of the goods had been made to the plaintiff at the time the Bankruptcy Act became law. It was held by the Court of Appeal that the Bankruptcy Act of 1883 had not deprived the plaintiff of his right to the delivery of such goods, even though the writ of *eligit* had ceased to exist as a result of the Act. On the analogy of the principle stated here, learned counsel wants the Court to say that the right which the petitioner had, to apply for a writ of *Habeas Corpus* before the promulgation of the Ordinance cannot be taken away by section 16-A. I am unable to apply the analogy to this case for unlike the case in the Court of Appeal there was no action taken by the petitioners in the 17 petitions here. *Hough* v. *Windus*[4] would certainly be an authority in favour of the contention that section 16-A cannot be applied retrospectively in order to take away the right of the petitioners in applications pending at the time of the promulgation. Mr. B. V. Subramaniam on the other hand wants to evolve a theory by the acceptance of a converse proposition of law as is seen from the two cases cited by him, *viz.*, Weir's (Criminal Procedure and Rulings) 791 and *Chockalingam*, In re[5]. In the former case this Court decided that an offence committed under an enactment since repealed when that enactment was in force may be tried under the repealed enactment. This principle is embodied in section 6, clauses (*c*) and (*e*) of the General Clauses Act (Act X of 1897) as well as in section 8, clauses (*d*),

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1. (1895) A.C. 425.
2. (1922) 2 K.B. 422 at page 431.
3. (1941) 1 M.L.J. Supp. 65 : 1940 F.C.R. 110 : 3 F.L.J. (F.C.) 97.
4. (1884) 12 Q.B.D. 224.
5. (1945) 2 M.L.J. 295.

(*e*) and (*f*) of the Madras General Clauses Act (Act I of 1867). The decision of Kuppuswami Aiyar, J., in *Chockalingam*, In re[1] applied these provisions of law to the Newspaper Control Order, 1942, though the General Clauses Acts as such do not apply to such orders. I am unable to accede to the contention that the principles deducible from these decisions can be successfully applied here. A recent decision of the House of Lords in *Wicks* v. *Director of Public Prosecution*[2], affirms the principle that the repeal of a Statute will not prevent the initiation and trial after its repeal of a prosecution regarding an offence committed when the law was in force. This, again, is a converse case.

Certain observations of Wallis, C.J., in *Raja of Pithapur* v. *Venkatasubba Rao*[3] were also relied upon. The learned Chief Justice and Kumaraswami Sastri, J., agreed with Sadasiva Aiyar, J., who had followed an earlier decision in *Ramakrishna Chetty* v. *Subbaraya Aiyar*[4], laying down that where an Act contains provisions for the limitation of suits which take away a vested right of suit without providing for any equivalent remedy, then, according to the approved rule of construction the provisions must be construed to have been enacted subject to the implied exception that they were not to extend to such vested rights to sue which were to continue subject to the rules of limitation in force at the passing of the Act. These decisions proceed upon the rule of law that where there is a vested right of suit it cannot be impliedly taken away by an enactment. Such abolition of a right of suit must be in express terms or by necessary intendment. It seems to me that the principles of law discussed in these cases as well, cannot be applied to the present petitions. The whole question is whether the petitioners have a vested right to avail themselves of section 491, even if they do not move their little finger or take any steps in that direction. Certain observations in the judgment of Fazl Ali, J., in *Banwari Gope* v. *King-Emperor*[5] tend to show that in the case of criminal proceedings instituted against a person, he is deemed to have a right of appeal vested in him in accordance with the law existing on the date when the criminal proceedings were instituted. By implication it can be inferred from this decision, that in order that a right might be vested in an individual there must be some overt action taken by him or some proceeding instituted against him. As the learned Judge observes, as soon as a Magistrate takes cognizance of an offence there is a criminal case against the accused person and at that point of time he acquires such a right of appeal or revision as the case may be as the law confers upon him. The right of appeal being a right incidental to and continuing from an accusation alleged against a person is not exactly the same as the right to apply for a writ of *Habeas Corpus* for any illegal detention. Probably a person arrested and detained under the Public Safety Act (Act I of 1947) may have a right vested in him from the moment of his arrest to have recourse to the provisions of Madras Act I of 1947, regarding the service of the reasons for the detention on him, and the right to have his case sent before the Advisory Board constituted by the Act. In one sense, these advantages may be said to be rights vested in him. But I find it impossible to hold that a person detained under the Public Safety Act has got a vested right of applying for a writ of *Habeas Corpus* under section 491 by mere inaction. Such being the case, section 16-A must be held to be applicable to the cases filed after the 25th of May, 1948.

The most important question discussed at length during the hearing of these applications has now to be considered. In so far as the petitions pending in the Court at the time of the promulgation of the Ordinance are concerned, what exactly are the powers of interference by this Court? According to section 491 (1) (*b*), if a person is illegally or improperly detained in public or private custody within the appellate criminal jurisdiction of the High Court, the High Court can order that he be set at liberty. Section 491 (1) (*a*) gives the power to the High Court to direct that a person within the limits of such appellate jurisdiction

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1. (1945) 2 M.L.J. 295.
2. (1947) A.C. 362.
3. (1915) 29 M.L.J. 1 : I.L.R. 39 Mad. 645.
4. (1912) 24 M.L.J. 54 : I.L.R. 38 Mad. 101.
5. (1943) I.L.R. 22 Pat. 175.

be brought up before the Court to be dealt with according to law. Section 16 (*i*) of Madras Act I of 1947 enacts that no order made in exercise of any power conferred by or under this Act or deemed to have been made under this Act by virtue of section 19, shall be called in question in any such Court. Sub-section (2) deals with the discharging of proceedings calling in question the validity of an order made under section 2 of the Madras Maintenance of Public Order Ordinance and sub-section (3) says that where any order as is referred to in sub-section (1) purported to have been made and signed by an authority in the exercise of any power conferred by or under this Act, the Court shall presume that such order was so made by such authority. There has been a large body of case law in the Indian High Courts as well as in the Federal Court on a similar and analogous subject, *viz.*, the provisions of the Defence of India Act and the rules thereunder. Most of those decisions refer to the well-known decisions of the House of Lords in *Liversidge* v. *Sir John Anderson*[1] and *Greene* v. *Secretary of State for Home Affairs*[2]. In the earlier of them, the House of Lords had to consider whether the applicant who was detained by the Home Secretary under Regulation 18-B of the Defence (General) Regulations of 1939 was entitled to get the particulars of the reasons of his detention from the Home Secretary and in the second case, it was an application for a writ of *Habeas Corpus* by a person detained under the same Regulation. The House of Lords by a majority held in the first case, (Lord Atkin dissenting) that the Court cannot compel the Secretary of State to give particulars of grounds on which he had reason to believe the detenu to be a person of hostile associations or that by reason of such hostile associations it was necessary to exercise control over the detenu. The production by the Secretary of State of an order of detention made by him and *ex facie* regular and duly authenticated constitutes a defence to such an action unless the plaintiff discharges the burden of establishing that the order is invalid. In *Greene's case*[2] the majority of the Learned Law Lords held that the production of the Home Secretary's order, the authenticity and good faith of which were not impugned constituted a complete answer to an application by the detenu for a writ of *Habeas Corpus.* I do not think it necessary to discuss at any length the principles of law and the precepts of the Constitution considered at great length by the Law Lords because the matter has been so exhaustively and thoroughly considered in all the various aspects that could be ever imagined, if I may say so, in the speeches of the Noble Lords. A very clear and succinct summary of the principles in those cases has been pithily given in *R.* v. *Home Secretary Budd*(Ex parte)[3]. The legal position is, that the Court has now power to inquire into the grounds for the Home Secretary having reasonable cause to believe or having been satisfied within the meaning of the Regulation and that the only matters upon which the Courts have power to inquire are—(1) the good faith of the Home Secretary, (2) the authenticity of the order and (3) its application to the persons detained. I may straightaway say, for reasons which are being given hereafter, that applying these principles to the present petitions, I am of opinion that if the Provincial Government is, *bona fide*, satisfied with respect to any person that he is acting or about to act in a manner prejudicial to the public safety or the maintenance of public order, then, it is not open to the Court to inquire into the sufficiency or validity of the reasons which made the Provincial Government to pass such an order.

Rule 26 of the Defence of India Rules is very similar in wording to the present section 2 of Madras Act I of 1947 and there is similarity in many respects between the above two provisions and rule 18-B of the Defence (General) Regulations of 1939. They are in many respects in *pari materia,* though not *ad idem.* One can safely assume that Regulation 18-B is the parent of similar provisions of law, either enacted or promulgated in India. Now, the words used in Regulation 18-B are " Has reasonable cause to believe " and those in section 2 of Madras Act I of 1947 are " If satisfied that . . . . ." These two expressions denote the same state of mind and are not intended to express anything different from each other and

1. (1942) A.C. 206.
2. (1942) A.C. 284.
3. (1942) III L.J. (K.B.) 475.

such being the case the decisions on the interpretation of rule 18-B of Defence (General) Regulations as well as on rule 26 of the Defence of India Rules are very helpful in deciding this question. There is the further circumstance that section 16 (1) of Madras Act I of 1947 is worded practically in the same terms as section 16 (1) of the Defence of India Act with a very minor addition, *viz.*, " deemed to have made . . . ." The construction of section 16 (1) of the Defence of India Act and rule 26 of the Defence of India Rules came up for decision finally before the Privy Council in *Emperor* v. *Sibnath Banerji*[1] and the Judicial Committee has laid down what the powers and functions of the High Court are when approached by a person detained under rule 26 of the Defence of India Rules. Briefly stated, the principles of law enunciated are that it cannot be said that in view of section 16 (1) of the Defence of India Act and section 59 (2) of the Government of India Act, 1935, that the High Court has no jurisdiction to investigate the validity of orders of detention made under rule 26 of the Defence of India Rules. Sub-section (1) of section 16 assumes that an order is made in exercise of the power given under rule 26. It clearly leaves it open to challenge such an order on the ground that it was not made in conformity with the power conferred. It is therefore quite open to the High Court to investigate and find out whether or not the order was made in conformity with and in exercise of the power conferred. The burden of establishing by admissible evidence *prima facie*, the inaccuracy of the recitals in the order of detention lies heavily on the person who challenges it ; but if a Court is satisfied that the order was not made in conformity with or in exercise of the powers, it can certainly enforce the provisions of section 491, Criminal Procedure Code. As their Lordships of the Judicial Committee over-ruled in some respects the decision of the majority of the Federal Court and the Calcutta High Court, it is unnecessary to refer to those decisions at this stage.

There is an earlier case decided by the Federal Court reported in *Basanta Chandra Ghose* v. *King-Emperor*[2], which dealt with " the Restriction and Detention Ordinance III of 1944 " (sections 6 and 10) promulgated by the Governor-General of India. That Ordinance contained, in addition to a provision similar to section 16 of Madras Act I of 1947 and section 16 (1) of the Defence of India Act, a further clause stating that no Court shall have power to make any order under section 491, Criminal Procedure Code, in respect of any order made under or having effect under that Ordinance or in respect of any person the subject-matter of such an order (*vide* clause 10 (1) of the Ordinance). This latter portion resembles very much section 16-A of the present impugned Ordinance and therefore the construction of section 10 (1) of Ordinance III of 1944 by the Federal Court will be of immense assistance in deciding what exactly are the powers which this Court possesses when section 16-A of the Ordinance is found *intra vires*. The principles of law that emerge from this decision are (1) that it is open to the detenu to show that the order of detention was not in effect made by the authority empowered to make it, or (2) that it was a fraudulent exercise of the power by the authority, or (3) that the detenu was not the person intended to be affected or lastly (4) that the authority which made the order did not act in good faith. In other words the order must be in proper exercise of the powers conferred by the Statute and not in a colourable exercise, nor should the order be the result of bad faith on the part of the authority. It should also not be an abuse of the powers conferred under the Act or for the purpose of effecting a fraud on the Act. Consistently with these principles, good faith on the part of the order-making authority is presumed until the contrary is proved and a mere challenge by the detenu is not sufficient to shift the onus on the authority. In my judgment the above principles are well established from the decisions cited, and they are fully applicable to Madras Act I of 1947 and Ordinance II of 1948. Moreover in *Basanta Chandra Ghose* v. *King-Emperor*[2], the Federal Court also considered the effect of section 10 (1) of Ordinance III of 1944 which corresponded to section 16-A of the present Ordinance. Spens, C.J.,

1. (1945) 2 M.L.J. 325 : 8 F.L.J. 222 (P.C.).
2. (1944) 6 F.C.R. 295.

in delivering the judgment has emphasised the aspect that section 10 (1) of Ordinance III of 1944 did not protect a document which was not really an order under rule 26, that clause (1) of section 10 had not introduced any new principle of immunity, that except for reference to section 491, Criminal Procedure Code, clauses 1 and 3 of section 10 merely re-enact clauses (1) and (2) of section 16 of the Defence of India Act, and that such re-enactment was necessitated because all future orders of detention should be made under the Ordinance and could not therefore attract the benefit of section 16 of the Defence of India Act. It is also further observed that no curtailment of the powers of the Court to investigate and interfere with the orders of detention has been imposed by the taking away of the powers of the High Court under section 491. The Court is still at liberty, even after insertion of section 10 (1) in the Ordinance to investigate whether an order purporting to have been made under rule 26 of the Defence of India Rules and deemed to be made under the Ordinance . . . . . was in fact validly made in exactly the same way as immediately before the promulgation of the Ordinance. Such being the case, it cannot be said that by a similar insertion of section 16-A in the Madras Ordinance II of 1948, there has been any curtailment of the limited powers which this Court already had when section 16 (1) of Madras Act I of 1947 was on the statute book. To my mind, this section 16-A seems to be surplusage and it does not in any way reduce or minimise the powers of this Court, nor does it add to the qualified immunity which the authority making an order of detention already had. Even without the insertion of section 16-A the powers of this Court, as I have already discussed, were restricted to finding out whether the order of detention was made by an authority empowered to make it in conformity with the Statute or whether it was a fraudulent exercise of the power or whether the order itself was authentic or whether it applies to the person concerned and the good faith of the authority in making the order is presumed. The Court can also investigate whether there was any colourable exercise of power or whether it was made in bad faith or in abuse of the powers conferred under the Act, but with the addition of section 16-A of the Ordinance the above limited powers are not in any manner reduced. But it is not open to the Court to find out whether the grounds on which Provincial Government is satisfied are sufficient. Different standards of satisfaction are likely to exist in the case of different individuals even if the society were ideal. In the society as it is constituted today, we cannot expect the same standard in every individual, so that if the executive authority states *bona fide* that it is satisfied, this Court cannot say that it is not a proper or valid satisfaction. It is interesting to note that under the Defence Regulations in England, there was no provision either like section 16 of the Defence of India Act or like section 16 or 16-A of the Madras Act and Ordinance. Even then, the House of Lords held that it was not open to the Court to go behind the satisfaction of the Home Secretary.

In my opinion, these are principles deducible from a discussion of cases of the highest authority so far as this Court is concerned. These principles ought to be applied in considering questions of detention here. But it was suggested that another decision to which the attention of the Court was invited, reported in *Ex-Rana Birpal Singh of Bhajji State* v. *The King-Emperor*[1], strikes a somewhat different note. On a careful reading of that decision and the comparison of it with the earlier cases of the Federal Court and the Privy Council, I do not feel that anything different has been laid down. The argument of the counsel before the Federal Court was that Regulation III of 1818, the detention under which was specifically excluded from the operation of section 491 by sub-clause (3) of that section, did not apply to the petitioner in that case, who was said to be the ruling Prince of Bhajji State. It was therefore urged that the detention of a ruling prince under that Regulation was absolutely outside its purview, was a negation of it and not the exercise of the power. The question that was considered was whether the person detained was a ruling Prince or not, and on that basis, the question came within one of the three principles

1. (1946) 1 M.L.J. 322 : I.L.R. 1946 Lah. 96 : 9 F.L.J. 1 (F.C.).

laid down by the Privy Council and the House of Lords, *viz.*, the applicability of the regulation to the person concerned. The good faith of the authority making the order and the authenticity of it were not questioned and therefore the Federal Court did not have to consider those aspects. Having carefully read that decision of the Federal Court, I feel that the following passage in the judgment should be read only as an answer to the question argued, *viz.*, the applicability to the person concerned :

> " It is however clear in our judgment that once the Court is satisfied that a person is being detained under Regulation III, there is no jurisdiction under section 491 which a Court can exercise in the matter."

I do not interpret this decision as in any way proceeding in any divergent direction from the line of decisions in England and in this country on the subject referred to by the learned Chief Justice in *Basanta Chandra Ghose* v. *The King-Emperor*[1]. In view of the above discussion in which I have considered the authorities which are binding upon us, it is unnecessary to discuss the observations of the various other High Courts to which our attention was drawn, *viz.*, *Prabhakar* v. *Crown*[2], *Emperor* v. *Harish Chundra*[3] and *Manubhai Bhikabhai* v. *The Crown*[4], in all of which similar conclusion to the one arrived at above has been reached.

K.S. *Ordered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

V. Damodara Menon and others .. *Petitioners**

v.

P. Chathu Achan .. *Respondent.*

Madras Marumakkathayam Act (XXII of 1933 as amended by Act XXXII of 1947), section 4—One of the parties to marriage not alive on date when Act came into force—Children of union if legitimate for purposes of succession.

Under the Marumakkathayam Law before it was altered by the statute the children of Marumakkathayam marrige were not treated as legitimate. To remedy this Madras Act XXII of 1933 was passed. Under section 4 of that Act the union between the parents governed by the Marumakkathayam Law was legalised subject to the conditions laid down in that section. One of the requisites under that section was that the union should have been openly solemnised in accordance with the customary ceremonies if any, prevailing in the community to which the parties belong or either of them belongs before the date on which the Act came into force and was subsisting on such date. In *Janaki Amma* v. *Raman Nayar*, (1946) 2 M.L.J. 135 : I.L.R. 1947 Mad. 318, it was held that if on the date when the Act came into force one of the parties to the union was dead, there being no subsisting marriage on that date the marriage could not be legalised and therefore the children of the union were to be treated as illegitimate for purposes of succession. As a result of agitation against the position by the public, Madras Act XXXII of 1947 was passed and *inter alia* the expression " and is subsisting on such date" occurring in section 4, sub-section (1), clause (*b*) (*i*) and (*b*) (*iii*) were omitted, and the provisions of the Amending Act were expressly made retrospective. Accordingly, the decision in *Janaki Amma* v. *Raman Nayar*, (1946) 2 M.L.J. 135 : I.L.R. 1947 Mad. 318 is no longer good law and notwithstanding the fact that their mother died before 1932 when the Marumakkathayam Act came into force and there was no subsisting marriage between the parents on that date the children of such union are legitimate and on the death of their father are entitled to be brought on record as his legal representatives.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsiff, Alatur, dated 22nd July, 1947, in I.A. No. 1080 of 1947 in O.S. No. 402 of 1938.

N. Gopala Menon for Petitioners.

Respondent not represented.

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1. (1944) 2 M.L.J. 167 : 1944 F.L.J. 203 : 6 F.C.R. 295 (F.C.).
2. I.L.R. (1943) Nag. 154.
3. I.L.R. (1943) All. 773.
4. I.L.R. (1943) Bom. 433.

* C. R. P. No. 1727 of 1947. 6th October, 1948.

The Court delivered the following

JUDGMENT.—The 18th defendant in the suit, O.S. No. 402 of 1938 on the file of the District Munsiff's Court, Alatur, who is the father of the petitioners in this civil revision petition died and these petitioners applied in the lower Court to get themselves impleaded as the legal representatives of the deceased 18th defendant. Their mother also died sometime before 1932. The exact date of her death is not known. The petition was rejected on the ground that as there was no valid marriage between the mother and the father of the petitioners they were not entitled to come on record as the legal representatives of the deceased 18th defendant. This order was passed by the learned District Munsiff on 22nd July, 1947. Under the Marumakatayam law before it was altered by the statute the children of a Marumakatayam marriage were not treated as legitimate. To remedy this defect the Legislature intervened and finally the Madras Marumakatayam Act XXII of 1933 was passed. Under section 4 of that Act the union between the parents governed by the Marumakatayam law was legalized subject to the conditions laid down in that section. One of the requisites under that section is that the union should have been openly solemnized in accordance with the customary ceremonies if any, prevailing in the community to which the parties belong or either of them belongs before the date on which the Act came into force and was subsisting on such date. Under this limitation if on the date when the Act came into force one of the parties to the marriage died there being no subsisting marriage on the date when the Act came into force the children of the union were treated as illegitimate for purposes of succession. This was the interpretation placed upon the section by Horwill, J., in *Janaki Amma* v. *Raman Nayar*[1], which was affirmed on Letters Patent Appeal by a Bench in *Janaki Amma* v. *Raman Nayar*[2].

This decision naturally created surprise among the people governed by that law and there was agitation by the public with the result, the Government came forward with the amending Act called " the Madras Act No. XXXII of 1947." By section 2 of the Amending Act the expression "and is subsisting on such date" occurring in section 4, sub-section (1), clauses (*b*) (*i*) and (*b*) (*iii*) were omitted. There were also other amendments introduced in the Act which are not material for the purpose of this discussion. Section 6 of the Amending Act expressly made the provisions of the Amending Act retrospective. It was expressly enacted that,

"The amendments made by this Act shall be deemed to have been made in the said Act immediately before the passing thereof: Provided that nothing contained in this Act shall affect—(*a*) any decree or order of a competent Court which became final before the commencement of this Act, or (*b*) any sale which was held in execution of a decree or an order of a competent Court and which became final before the commencement of this Act, or (*c*) any transfer or partition of property effected before the commencement of this Act."

In view of the clear language of section 6 of the Amending Act it must now be held that the marriage between the petitioners' father and mother was valid notwithstanding the fact that their mother died before 1932 when the Madras Marumakatayam Act came into force and there was no subsisting marriage on that date. The decision, therefore, in *Janaki Amma* v. *Raman Nayar*[2] is no longer good law. The petitioners, therefore, are the legitimate children of the deceased 18th defendant in the suit and they are the persons entitled to come on record as the legal representatives of the deceased 18th defendant.

The civil revision petition is, therefore, allowed, the order of the learned District Munsiff is set aside and the lower Court is directed to add the petitioners 1 to 4 herein as the legal representatives of the 18th defendant in suit O.S. No. 402 of 1938 on the file of the District Munsiff's Court, Alatur. The respondents, unfortunately, have not appeared in this Court and therefore no costs are allowed in this revision petition.

K.S. *Petition allowed.*

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1. (1945) 2 M.L.J. 15.
2. (1946) 2 M.L.J. 135: I.L.R. 1947 Mad. 318.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE GOVINDA MENON.

Papanasam Chettiar and another .. *Appellants**

v.

Muthayya Chettiar (dead) and others .. *Respondents.*

Hindu Law—Joint family—Debts—Suit against manager though not described as such and impleading of adult coparceners also as defendants—Decree—If binds joint family—Minor coparceners not impleaded eo nomine—If bound by decree and sale in execution thereof.

That a family is bound by a decree properly passed against the manager either in respect of family property or for a debt contracted by the manager is well settled and where the suit relates to a joint family property or a debt payable by the joint family and the person sued is the manager, he need not be described as such in the plaint though it may be advisable to do so. If it appears that in fact he was the manager and the suit relates to joint family property or joint family liability, it must be presumed that he was suing or being sued in his representative capacity and does not prevent the decree from being against the entire family.

Mayne's Hindu Law, 10th edition, pages 386 and 387 and *Venkatanarayana* v. *Somaraju*, (1937) 2 M.L.J. 251 : I.L.R. 1937 Mad. 880 (F.B.), relied on.

Rangaswami Goundan v. *Kandaswami Goundan*, (1942) 2 M.L.J. 361, considered.

Vasudevan v. *Sankaran*, (1897) 7 M.L.J. 102 : I.L.R. 20 Mad. 129 (F.B.) and *Rayarappan Nambiar* v. *Kotayan Chalile Veetil Kamaran*, (1918) 35 M.L.J. 51, applied.

Somappa v. *Nagi Reddi*, (1941) 2 M.L.J. 1050, referred to.

Where a suit is brought against the manager and the adult members are also joined as party defendants, the minor members of the joint family must be taken to have been duly represented in the suit.

Tulshi v. *Bishnath Rai*, A.I.R. 1923 All. 284; *Vesu* v. *Kannamma*, (1926) 51 M.L.J. 282 ; *Adinarayana* v. *Venkatasubbayya*, (1937) 2 M.L.J. 653 ; and *Garibulla* v. *Khalak Singh*, (1903) I.L.R. 25 All. 407, relied on.

In any event where the father of minor coparceners is made a defendant and a decree passed against him for payment of the decree amount out of the joint family properties, the minor coparceners though not *eo nomine* parties to the suit will be bound by the decree and the sale in execution of that decree.

Linganagowda v. *Basangowda*, (1927) 52 M.L.J. 472 : I.L.R. 51 Bom. 450 at 453 (P.C.), applied.

Appeal against the decree of the District Court, Tinnevelly, dated 13th October, 1944, in A.S. No. 53 of 1944 preferred against the decree of the Court of the Subordinate Judge, Tinnevelly, in O.S. No. 31 of 1942.

Ch. Raghava Rao and *K. Venkateswaran* for Appellants.

T. L. Venkatarama Aiyar and *C. Krishnamachari* for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiffs in a partition suit whose claim to a major portion of the properties that belonged to the joint family was rejected by the trial Court and which was affirmed in appeal by the learned District Judge of Tinnevelly, are the appellants in this second appeal. There were four brothers Sankaralingam, Muthiah, Subbiah and Kandasami who constituted a joint family of which Sankaralingam was the managing member. Subbiah had died some years ago leaving behind a son Isakimuthu. For the purpose of this second appeal, the existence of Isakimuthu is not of special concern. The managing member had subscribed to a chit fund of which one Ramachandra Iyer, father of the third respondent and brother of the second respondent, was the stake-holder. The manager had executed a receipt in favour of the stake-holder on 30th June, 1919, in acknowledgment of the receipt of the prize amount and agreeing to pay future subscriptions properly. Since he committed default, the stake-holder filed O.S. No. 103 of 1928 on the file of the Sub-Court, Tinnevelly, in which the manager, the executant of the receipt was the first defendant and the two brothers Muthiah and Kandasami were defendants 2 and 3. The claim was that a decree should be passed against the

* S. A. No. 544 of 1945. 9th December, 1947.

family properties of the defendants and against the first defendant as the executant of the receipt. The decree in the suit, Ex. P 3 (*d*), was in the following terms :

" This Court doth order and decree that the first defendant personally and the defendants 2 and 3 out of their family properties do pay to the plaintiff, Rs. 5,440, etc."

In execution of that decree properties belonging to the joint family were attached and sold and purchased by the decree-holder himself.

The present suit out of which the second appeal arises was for partition of all the joint family properties including those sold in execution of the decree in O.S. No. 103 of 1928. The plaintiffs are the two sons of the second defendant Muthiah. Their main allegation is that the decree in O.S. No. 103 of 1928 was not binding on them as they were not *eo nomine* parties to the suit and that neither the first defendant, the manager of the family, nor the other two defendants represented the plaintiffs' interests and therefore the auction sale and the purchase by Ramachandra Iyer were not binding on themselves or their shares in the family properties. There were various other allegations contained in the plaint with which we are not concerned at this stage. Both the lower Courts on a construction of the decree have held that as the plaintiffs are bound by the decree, the execution sale and the purchase by Ramachandra Iyer are binding on them and dismissed the suit so far as those properties are concerned ; and the question that has been raised in this second appeal is as to the binding nature of the decree on the plaintiffs.

Unfortunately, neither the plaint in O.S. No. 103 of 1928 nor the judgment therein is available but the certified copy of the decree, Ex. P 3 (*d*), as well as the extract from the suit register, Ex. P 3, have been filed. We have also the written statement of the first defendant Sankaralingam, Ex. P 3 (*a*) and that of the second defendant Muthiah, Ex. P 3 (*b*), exhibited. A copy of the issues framed is marked as Ex. P 3 (*c*). It is seen from paragraph 5 of Ex. P 3 that in the body of the plaint the claim was against the first defendant Sankaralingam as the managing member of the joint family consisting of himself and his brothers, defendants 2 and 3, Muthiah and Kandaswami, and as it can be presumed that the suit register extract contains a correct summary of the allegations in the plaint, it can be taken as proved that the claim was against the joint family as such. Both the first defendant Sankaralingam and the second defendant Muthiah disputed the joint family liability, Sankaralingam pleading that as the other two defendants have not jointly put their signature in the receipt, it is not valid and binding on the joint family. Muthiah's defence was that the chit was being subscribed not for the benefit of the joint family but for Sankaralingam's personal advantage. Issue No. 8 as seen from Ex. P 3 (*c*) raised the question as to whether defendants 2 and 3 were liable for the claim or any portion thereof. From what has been said above it is clear that the suit was laid against the joint family represented by its managing member and in addition the plaintiff, *ex abundanti cautela*, made the two other senior members parties to the suit in order to make assurance doubly sure that the joint family was properly represented. The defendants raised the question of the liability of the joint family and contested the suit and, as already stated, the decree was that the first defendant, the executant of the receipt, personally and defendants 2 and 3 out of their family properties should pay the plaintiff a sum of money, etc., etc. This being so, ordinarily there should be no doubt that the family properties can be validly attached and sold in execution of such a decree.

But the appellants' contention is that the first defendant was divested of his representative capacity because firstly he is not described as a family manager in the cause title to the plaint or in the decree and therefore he was not sued *qua* family manager. Secondly the joinder of defendants 2 and 3 would have been unnecessary if the first defendant was impleaded as joint family manager and since defendants 2 and 3 were on the record, it should be inferred that the first defendant did not represent the interests of the other members of the family but did defend the suit only in his individual capacity ; so is the case of the other two defendants. On this reasoning, according to the appellants, the joint family not being party to the suit and the present plaintiffs, admittedly members of the joint family, not

being impleaded *eo nomine*, the decree does not bind the joint family and the attachment and sale in execution did not pass the share of the appellants.

As I have already indicated, according to the proper construction of the decree, the joint family as an entity was the party to the suit. It was represented by the managing member, the first defendant. The other two defendants, the seniormost male members, were also impleaded lest they should later on question the joint family liability. In these circumstances, it is impossible to hold that the decree is not against the joint family. Mr. Raghava Rao contends that the decree should be interpreted as laying down that the first defendant's liability was personal only and that the second part of the sentence directs that defendants 2 and 3 should pay out of their family properties. There was no family consisting of defendants 2 and 3 alone. They were members of a joint family and such being the case, the decree against a non-existent joint family of defendants 2 and 3 alone, cannot bind the joint family properties of the members. In my event, the utmost that could be said was that the share of defendants 2 and 3 in the joint family alone can be made liable for the decree amount. It seems to me that this reasoning is erroneous and the contention cannot be accepted. The word "their" refers to all the defendants and not defendants 2 and 3 alone. The payment, according to the decree, should be out of the joint family properties belonging to all the defendants and since the first defendant represented the other members of the family as well, the decree directed that the amount decreed has to be paid from the properties belonging to the entire joint Hindu family.

That a family is bound by a decree properly passed against the manager either in respect of family property or for a debt contracted by the manager is well settled and where the suit relates to a joint family property or a debt payable by the joint family and the person sued is the manager, he need not be described as such in the plaint though it may be advisable to do so. If it appears that in fact he was the manager and the suit related to joint family liability, it must be presumed that he was suing or being sued in his representative capacity and even the omission to state in the decree that it was passed against him in such capacity does not prevent the decree from being against the entire family—*vide* pages 386 and 387 of Mayne's Hindu Law, 10th edition. In this connection it is useful to refer to a Full Bench decision of this Court in *Venkatanarayana* v. *Somaraju*[1]. At page 903 of the report Venkataramana Rao, J., observes as follows :

"Therefore, where a father or other manager is sued as a representative of the family the other members of the family must be held to be substantially parties to the suit through such manager. The fact that they are not parties *eo nomine* will not render them any the less parties to the suit. It was on this principle held that, where a manager dies during the pendency of the suit or after decree, the person who succeeds him as manager can be brought on the record and the other members of the family need not be made parties. A judgment against a person sued in a representative character is a judgment against every individual member covered by the representation and therefore the bar of *res judicata* is held to apply to a member of a family not a party *eo nomine* to the litigation represented by its manager."

Mr. Ch. Raghava Rao contends that the proposition above stated has been to some extent departed from in later decisions of this Court, more particularly in *Rangaswami Goundan* v. *Kandaswami Goundan*[2], in which King, J., observes that *Venkatanarayana* v. *Somaraju*[1], cannot be read,

"as establishing the universal proposition that whenever the manager of a joint Hindu family is sued the members of the family must be deemed to be represented by him. Whether they are or not so represented is a question of fact depending upon many things, the nature of the claim, the language of the plaint, the subject-matter of the suit, and the issues which require decision before a decree can be given."

I do not think that the statement of the law as enunciated by Venkataramana Rao, J., runs counter to the principle enunciated by King, J. On a close reading of the decision in *Venkatanarayana* v. *Somaraju*[1], it does not appear that it was intended

1. (1937) 2 M.L.J. 251 : I.L.R. 1937 Mad. 880 (F.B.).
2. (1942) 2 M.L.J. 361.

to lay down that in every case where a person who happens to be the manager of a joint family is sued, he must for all purposes represent every other member of the family. Cases can be conceived where the manager's interests are adverse to those of the family or where he has been in active collusion with the plaintiff in the suit. It may also be that in order to escape personal liability he abstains from putting forward the necessary defences to the suit. He may, even be grossly negligent in the conduct of the suit. In such cases it cannot be said that the manager represented the joint family. In my opinion, the proper way of looking at the question is, as stated by a Full Bench of our High Court in *Vasudevan* v. *Sankaran*[1], relating to a family of Nambudiris who are generally governed by the principles of Hindu law except in so far as such principles are modified by customary usage having the force of law. Where a manager in such a family is joined as a defendant as representing the family and which he honestly defends, the decree is binding on the other members of the family not actually made parties to the suit. This principle has been further elaborated in *Rayarappan Nambiar* v. *Kotayan Chalile Veetil Kamaran*[2], where Ayling and Seshagiri Iyer, JJ., held that :

"It is not the form of the suit that is essential ; but the question in each case will be whether in substance the person suing or sued conducted the litigation for his own benefit or as representing the family of which he was the head."

The learned Judges relied on *Subbanna Bhatta* v. *Subbanna*[3], *Baldeo* v. *Mobarak Ali Khan*[4] and *Sheo Shankar Ram* v. *Jaddo Kunwar*[5], for the above statement of the law. *Somappa* v. *Nagi Reddi*[6], is also instructive with respect to this question. Viewing the question in this light we have to see whether the conduct of the suit by Sankaralingam and Muthiah was for their own benefit or for that of the entire family and I have no reason to doubt that they defended the suit on behalf of the family.

The next contention of Mr. Raghava Rao is that since Muthiah and Kandaswami were made parties to O.S. No. 103 of 1928, Sankaralingam the manager ceased to have any representative capacity and that he should be deemed to be defending the suit in his own individual right. The answer to this argument is found in a decision of the Allahabad High Court by Mears, C.J. and Bannerjee, J., in *Tulshi* v. *Bishnath Rai*[7], where it was laid down that where a suit was brought against the manager and the adult members were also joined as party defendants the minor members of the joint family must be taken to have been duly represented. The learned Judges observed :

"It was not necessary that he should have been described as a manager or that in the plaint it should have been stated specifically that the defendants to the suit represented not only themselves but also the minor members. It was sufficient if in reality the whole of the family was represented by the persons who were named as defendants to the suit . . . . It is true that it was unnecessary to make every adult member a defendant if they were represented by the managing member but if for the sake of precaution the adult members were made parties to the suit that did not affect the real nature of the suit."

Reference may also be made to a decision of Wallace, J., in *Vesu* v. *Kannamma*[8], where a similar principle is laid down as regards a Marumakatayam tarwad also. The same principle is seen enunciated in *Adinarayana* v. *Venkatasubbayya*[9] and *Garibullah* v. *Khalak Singh*[10].

Even if Sankaralingam the first defendant in O.S. No. 103 of 1928 did not represent the interest of the present plaintiffs who were minors then, I am of opinion that Muthiah, the father of the present plaintiffs, as the second defendant in O.S. No. 103 of 1928 did sufficiently represent the interests of his sons. When he put forward the plea that the joint family was not liable for the debt he must be presumed to have been acting not only on his own behalf but on behalf of his sons as well.

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1. (1897) 7 M.L.J. 102 : I.L.R. 20 Mad. 129 (F.B.).
2. (1918) 35 M.L.J. 51.
3. (1907) 17 M.L.J. 180 : I.L.R. 30 Mad. 324 at 326.
4. (1902) I.L.R. 29 Cal. 583 at 586.
5. (1914) L.R. 41 I.A. 216 : I.L.R. 36 All. 383 (P.C.).
6. (1941) 2 M.L.J. 1050.
7. A.I.R. 1923 All. 284.
8. (1926) 51 M.L.J. 282.
9. (1937) 2 M.L.J. 653.
10. (1903) I.L.R. 25 All. 407.

Mr. T. L. Venkatarama Aiyar for the contesting respondents contends that the written statement, Ex. P. 3 (*b*) sufficiently indicates that Muthiah represented his sub-branch of the family. It is possible to construe the written statement in that way. In *Linganagowda* v. *Basangowda*[1], their Lordships of the Judicial Committee in discussing a question of the representation of certain minors by their father state as follows :

> "It seems clear that the plaintiff in the previous suit was acting on behalf of himself and his minor children to try to exclude a collateral branch from a share of the family property. If he had succeeded, the judgment would have inured for the benefit of the children, and as he has failed, they must take the consequences."

Applying that principle here, if Muthiah had succeeded in O.S. No. 103 of 1928, the present plaintiffs would have had the benefit of it. But since he has failed the present plaintiffs must be bound by that decree.

The lower appellate Court has held that a previous suit, O.S. No. 50 of 1932, in which Isakimuthu, son of Subbiah successfully contended that the Court sale in a suit by another creditor did not affect his share and succeeded in establishing his contentions, operated as *res judicata* so far as the present suit is concerned. Mr. T. L. Venkatarama Aiyar appearing for the respondents rightly submitted that he could not justify the conclusion of the learned Judge on any legal principle. I entirely agree with him. But as I have already held that the joint family *as such* was party to the suit O.S. No. 103 of 1928, the decree passed therein was binding on all the members thereof; the sale in execution of that decree bound the shares of all the members including the minors and therefore the present plaintiffs' share in the properties sold in execution of that decree also passed to the purchaser. The decision of the lower Courts on this point is correct.

No other questions have been argued in this second appeal which is accordingly dismissed with costs. No leave.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

Kodavalur Subbamma .. *Appellant**

v.

Lota Narayanamurthi and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 91 and Order 1, rule 8—Obstruction to village pathway—If public nuisance—Suit in representative capacity for removal of obstruction—Proof of special damage—If essential—Village pathway—Representative suit—Maintainability.

It is open to an individual member of the public to maintain a suit for removal of obstruction to a public highway which constitutes a nuisance without the sanction of the Advocate-General under section 91, Civil Procedure Code and even without proof of special damage.

Very often Courts have to deal with the infringement of the rights of the residents of a village or a section of a community in pathways, wells and banks of rivers and so on. Infringement of such rights cannot be deemed to constitute a public nuisance within the meaning of section 91, Civil Procedure Code or section 268, Indian Penal Code. A member of such class can file a representative suit under Order 1, rule 8, Civil Procedure Code, for relief in respect of infringement of such rights.

Case-law discussed.

Appeal against the decree of the Court of the Subordinate Judge, Nellore, dated 9th August, 1946, in A.S. No. 277 of 1946 preferred against the decree of the Court of the District Munsiff of Nellore, dated 5th November, 1945, in O.S. No. 795 of 1944.

Ch. Raghava Rao for Appellant.

B. Srinivasamurthi for Respondents.

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1. (1927) 52 M.L.J. 472 : I.L.R. 51 Bom. 450 at 453 (P.C.).

* S. A. No. 2078 of 1946. 18th August, 1948.

The Court delivered the following

JUDGMENT.—The first defendant is the appellant in this second appeal. The suit was for a declaration that the portion marked KLMN in the plaint plan is a public pathway and for possession of a portion out of the same after ejecting the first defendant and for a mandatory injunction directing the first defendant to remove a wall which was constructed on the pathway and for other reliefs. The plaintiffs five in number, instituted the suit not only in their individual capacity but also on behalf of the other residents of the village of Kota in their representative capacity and obtained leave of the Court under Order 1, rule 8 of the Civil Procedure Code to institute the suit in that form.

The main contesting defendant in this suit was the first defendant. The second defendant remained *ex parte*. The first defendant contended that the pathway was not a "public" pathway, that there was no encroachment and that the suit was not maintainable without the sanction of the Advocate-General under section 91 of the Civil Procedure Code or at any rate without proof of special damage. The learned District Munsiff who tried the suit found that the pathway was set apart by two adjacent owners but that it was not a public pathway, that it was intended to enable the people of the village to reach the well *W* in the plaint plan for getting fresh water. His view was that notwithstanding the right possessed by the residents of the village the property continued to be the property of the original owners and that therefore the plaintiffs had no right of action. He, however, found that there was an encroachment. Following the decision of this Court in *Munisami* v. *Kuppuswami*[1], the learned District Munsiff held that it was unnecessary for the plaintiffs to prove any special damage in order to maintain the suit as after the decision of the Privy Council in *Manzur Hasan* v. *Mohamed Zaman*[2], the rule of English common law that one member of the public cannot maintain an action for removal of obstruction of a highway without proof of special damage over and above the damage suffered by others did not apply to India. In the result the suit was dismissed on the ground that the right of action to remove the wall and the encroachment vested in the original owner and that the plaintiffs had no *locus standi* to institute the suit.

Against this decision the plaintiffs preferred an appeal to the Subordinate Judge of Nellore who reversed the decree of the learned District Munsiff and decreed the suit. He found agreeing with the District Munsiff that there was an encroachment on the pathway. He differed from the District Munsiff in his view that the pathway was not a public pathway. According to the learned Subordinate Judge the plaintiffs were entitled to sue because they also sustained special damage along with the other residents of the village.

Against this decision the first defendant preferred this second appeal. It was contended on behalf of the appellant that the finding of the learned Subordinate Judge that there was an encroachment was not correct; that on the finding of the learned Subordinate Judge that the pathway was a public pathway the suit was not maintainable without the sanction of the Advocate-General under section 91 of the Civil Procedure Code or in any event without proof of special damage by the plaintiffs. According to the appellant the finding of the learned Subordinate Judge on the question of special damage amounted to no more than that the plaintiff also suffered damage along with others and not a damage suffered by the plaintiffs over and above the damage suffered by others.

The finding of the Court below regarding encroachment by first defendant in my opinion is correct and is supported by the oral and documentary evidence on record. The recital in Ex. D 3 under which the first defendant acquired title refers to the pathway which was left for the benefit of the public for fetching water from the well. On the evidence the pathway was clearly intended for the benefit

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1. (1939) 1 M.L.J. 392 : I.L.R. 1939 Mad. 870.

2. (1924) 48 M.L.J. 23 : L.R. 52 I.A. 61 : I.L.R. 47 All. 151 (P.C.).

of the residents of the village for fetching water from the well and there was an encroachment. The finding of the learned Subordinate Judge that it was a public pathway amounts to saying that it was a pathway set apart for the benefit of the residents of the village of Kota and not for the benefit of the general public. This is made clear by the statement in paragraph 12 of the plaint that the plaintiffs were instituting the suit not only for their benefit but also for the benefit and on behalf of the other residents of the village of Kota in a representative capacity under Order 1, rule 8 of the Civil Procedure Code. The case therefore has to be considered on the footing that there was a pathway set apart by the owners of the adjacent plots for the benefit of the residents of the village of Kota to enable them to reach the fresh water well *W* in the plaint plan and to take water from it. I agree with the contention of the learned advocate for the appellant that the finding of the learned Subordinate Judge on the question of special damage is not a finding that the plaintiffs had suffered any damage over and above the common inconvenience caused to all the neighbours by reason of the construction and encroachment by the first defendant.

This leads me to the consideration of the question whether the suit at the instance of the plaintiffs which is a representative action under Order 1, rule 8, Civil Procedure Code, is maintainable without proof of any special damage. Section 91 of the Civil Procedure Code does not help the plaintiffs as they did not obtain the sanction of the Advocate-General in which case alone a suit without proof of special damage would be maintainable in respect of a public nuisance assuming that what is complained of in this suit amounts to a public nuisance. The plaintiffs raised the contention in the Courts below that they were entitled to maintain the action without proving special damage even if their complaint amounts to a public nuisance. This was the view taken by Wadsworth, J., in *Muthuswami* v. *Kuppuswami*[1]. According to that decision after the decision of the Privy Council in *Manzur Hasan* v. *Mohamed Zaman*[2], it is open to an individual member of the public to maintain a suit for removal of obstruction to a public highway which constitutes a nuisance without the sanction of the Advocate-General under section 91 of the Civil Procedure Code and even without proof of special damage. On behalf of the appellant it was strenuously contended that this decision was wrong and that the Calcutta and the Patna High Courts have interpreted the Privy Council decision in a different manner. Unfortunately in this case the respondents were *ex parte* but Mr. Raghava Rao the learned advocate for the plaintiff has very fairly placed before me the authorities for and against bearing upon the case.

Under the law obtaining in England as stated in 24 Halsbury, page 82, paragraph 144 (second edition),

> " A private individual may bring an action in his own name in respect of a public nuisance when, and only when, he can show that he has suffered some particular, direct and substantial damage over and above that sustained by the public at large, or when the interference with the public right involves a violation of some private right of his own, or when a statute has given him a special protection or benefit which is being invaded."

This position of the law was accepted and applied in India till the decision of the Privy Council in *Manzur Hasan* v. *Mohamed Zaman*[2]—see *Hussain Sahib* v. *Narasimhappa*[3] and *Kandasami Koundan* v. *Karuppan Koundan*[4]. In one class of cases however there was difference of opinion between the Bombay and the Madras High Courts. That was where a community or a section of a community or a particular body of persons claimed a right to carry a procession along a public highway and there was obstruction of that right by others. The Bombay view was that even in such class of cases it was incumbent upon the plaintiffs to allege and prove special damage. *Satku valad Kadir Sausare* v. *Ibrahim Aga valad Mirza Aga*[5], was a case on that point though in a later decision in *Baslingappa Parappa* v.

1. (1939) 1 M.L.J. 392 : I.L.R. 1939 Mad. 870.
2. (1924) 48 M.L.J. 23 : L.R. 52 I.A. 61 : I.L.R. 47 All. 151 (P.C.).
3. (1912) 23 M.L.J. 539.
4. (1913) M.W.N. 1001.
5. (1877) I.L.R. 2 Bom. 457.

Dharmappa Basappa[1], a different view was expressed. This Court in *Velan Pakkiri Taragan* v. *Subbayan Samban*[2], decided that a suit would be maintainable in such a case without allegation and proof of special damage. Such class of cases were treated by this Court as not being cases of public nuisance at all but cases of trespass or threatened trespass to the plaintiffs and an action of trespass was maintainable even without proof of special damage. Finally this conflict was resolved by the Privy Council in *Manzur Hasan* v. *Mahammad Zaman*[3], already referred to. The Judicial Committee accepted the view of this Court as being right and held that the Bombay view was wrong. Lord Dunedin referred to the decision of the Bombay High Court in *Satku Valad Kadir Sausare* v. *Ibrahim Aga Valad Mirza Aga*[4], and after setting out the headnote in that judgment pointed out that the Bombay decision " proceeded entirely on English authorities, which lay down the difference between proceedings by indictment and by civil action."

> " In their Lordships' opinion such a way of deciding the case was inadmissible. The distinction between indictment and action in regard to what is done on a highway is a distinction peculiar to English law and ought not to be applied to India."

The decision in *Satku Valad Kadir Sausare* v. *Ibrahim Aga Valad Mirza Aga*[4], proceeded upon an exhaustive examination of the authorities on which the rule of English common law was founded and the learned Judges applied that rule to the case before them which related to a right to take a procession along a highway without obstruction. It is the correctness of the application of the English common law rule that came up for consideration before the Judicial Committee. The Judicial Committee did not rest their decision on the ground that the special rule as to damage did not apply to the class of cases before them but that the rule itself had no application to India and that the distinction was peculiar to the English law and that it should not be extended to India. In view of this clear pronouncement it is difficult to confine the decision of the Privy Council to what may be called the procession cases as did the learned Judges of the Calcutta and the Patna High Courts. I respectfully agree with Wadsworth, J., in his interpretation of the Privy Council decision,

> " that it deals generally with the whole class of cases governing the rights of the public to use the public way."

This was also the interpretation placed by two earlier decisions one in *Mandakinee Debee* v. *Basantakumaree Debee*[5], by Jack, J., and the other in *Municipal Committee, Delhi* v. *Mohammad Ibrahim*[6]. The Calcutta High Court in *Surendra Kumar Basu* v. *District Board of Nadia*[7], and the Patna High Court in *Chowdry Bibuti Narayan Singh* v. *Maharaja Sir Guru Mahadev Asram Prasad Sahi Bahadur*[8], interpreted the decision of the Privy Council in a different manner and confined its operation to procession cases.

Their Lordships of the Calcutta High Court were of the opinion that the statement of the law in *Baslingappa Parappa* v. *Dharmappa Basappa*[1], was expressly approved by the Privy Council. Except quoting the headnote of that decision nowhere was it stated in the judgment that that statement of law was approved. There is no indication in the judgment of their Lordships that they were accepting the distinction drawn in *Baslingappa* v. *Dharmappa Basappa*[1], as the basis of the decision. The decision of the Privy Council is founded on the larger principle that in an action by a private individual for relief in respect of a public nuisance it was not necessary under Indian law to establish special damage. The passage already quoted makes no exception of any sort and is general in its scope. I am unable to accept the view taken by the Calcutta and the Patna High Courts and in my opinion the decision of Wadsworth, J., is right.

I think the suit is maintainable also on another ground. Even if proof of special damage is necessary in cases where a representative action was instituted

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1. (1910) I.L.R. 34 Bom. 571.
2. (1918) 36 M.L.J. 79 : I.L.R. 42 Mad. 271 (F.B.).
3. (1924) 48 M.L.J. 23 : L.R. 52 I.A. 61 : I.L.R. 47 All. 151 (P.C.).
4. (1877) I.L.R. 2 Bom. 457.
5. (1923) I.L.R. 60 Cal. 1003.
6. (1934) I.L.R. 16 Lah. 517.
7. (1942) I.L.R. 1 Cal. 533.
8. (1939) I.L.R. 19 Pat. 208.

after obtaining leave under Order I, rule 8 of the Civil Procedure Code as laid down in *Adamson* v. *Arumugam*[1], and the interpretation placed by Wadsworth, J., on *Manzar Hasan* v. *Mohammed Zaman*[2], is not correct, in my view, the wrong complained of in the present case does not constitute a public nuisance. A village path of the kind in suit cannot be treated and raised to the dignity of a public highway. The word "public" used by the plaintiffs in the plaint and by the learned Subordinate Judge in his judgment is to be understood as being limited only to a section of the public namely the residents of the village of Kota. The right of way was claimed only by this definite section of the public and not for the benefit of and on behalf of the public in general. Very often Courts have to deal with the infringement of the rights of the residents of a village or of a section of a community in pathways, wells and banks of rivers and so on. Infringements of such rights cannot be deemed to constitute public nuisance within the meaning of section 91, Civil Procedure Code or within the meaning of section 268 of the Indian Penal Code. As pointed out by Wilson, J., in *Chunilal* v. *Ramakishen Sahu*[3], there are three distinct classes of rights of way and other similar rights :

"First, there are private rights in the strict sense of the term vested in particular individuals or the owners of particular tenements, and such rights commonly have their origin in grant or prescription. Secondly, there are rights belonging to certain classes of persons, certain portions of the public, such as the freemen of a city, the tenants of a manor, or the inhabitants of a parish or village. Such rights commonly have their origin in custom. Thirdly, there are public rights in the full sense of the term which exist for the benefit of all the Queen's subjects ; and the source of these is ordinarily dedication."

In respect of these rights of way the learned Judge observed at page 465,

"I think there is reason to suspect that, in some cases, ways and other claims of a like nature have been treated as public rights, when perhaps they might have been both more correctly and more conveniently regarded as village ways and village rights : more correctly, because I think there is reason to suppose that such village roads as distinguished from public roads are of very common occurrence ; more conveniently, because, as I shall show later, there may be more easy civil remedies for treating questions of village roads than questions relating to public roads."

In respect of such village roads the learned Judge points out that it would be open to a member of the class by taking appropriate steps under section 30 of the old Civil Procedure Code now corresponding to Order I, rule 8 and to institute a representative suit for relief. The present case is an instance in point and illustrates how inappropriate it is to treat as a public right what was merely a village path and call an obstruction to it a public nuisance and apply the disabilities relating to the remedies in respect of public rights to such cases. In such a case it is perfectly open to some of the residents of the village to institute a suit both for themselves and also on behalf of the other residents of the village taking advantage of the machinery provided by the Code under Order I, rule 8, to bring a representative action. In such pathways the public in general are not interested and no question of any public nuisance or of proving special damage arises. Wort, J., of the Patna High Court sitting as a single Judge had to deal with questions relating to village pathways in more than one case. Though the decisions of the learned Judge are not altogether uniform the general principle deducible from his decision is that in respect of village pathways, rasthas, cart-tracks or other rights it is open to a member of a class to bring a representative action under Order I, rule 8 of the Civil Procedure Code and obtain relief without proving special damage. The learned Judge rests his decisions on *Harrop* v. *Hirst*[4]. The decisions of the learned Judge are to be found in *Mohamed Din* v. *Mst. Atrajo Koer*[5], *Bisser Pathak* v. *Harbans*[6], *Ramaghulam Khatik* v. *Ram Khalawan Ram*[7], and *Ramdahin Pande* v. *Parameshwar Singh*[8]. The decision of a Bench in *Chowdri Bibhuti Narayan Singh* v. *Maharajah Sir Guru Mahadev Asram Prasad Sahi Bahadur*[9], also take the same view. There is

1. (1886) I.L.R. 9 Mad. 463.
2. (1924) 48 M.L.J. 52 : L.R. 52 I.A. 61 : I.L.R. 47 All. 151 (P.C.).
3. (1888) I.L.R. 15 Cal. 460.
4. (1868) L.R. 4 Ex. 43.
5. (1931) I.L.R. 10 Pat. 568.
6. A.I.R. 1937 Pat. 54.
7. (1936) I.L.R. 16 Pat. 190.
8. A.I.R. 1940 Pat. 160.
9. (1939) I.L.R. 19 Pat. 208.

the latest decision of the Patna High Court in *Dalgobinda Mahath* v. *Khatu Mahatha*[1], by Sinha and Mukerjee, JJ., which also relates to a pathway or cart-track in which the residents of more than one village were interested. It was there held that such a pathway is not a public pathway and the disability contained in section 91 of the Civil Procedure Code did not apply to a suit relating to it. The learned Judges held that it was unnecessary to prove special damage in a case where an immediate community or section of the public was deprived of the amenity provided for that particular section as the presumption was that they suffered loss. I think it was unnecessary for the learned Judges to have rested their decision on presumed loss when they definitely found that the cart-track was not a public highway. If it was not a public highway the obstruction to it does not constitute public nuisance and even if the law were that special damage had to be proved for removal of obstruction to a highway in a suit by one member of the public, the rule would not apply to such a case. My conclusion therefore is that in the present case the pathway in respect of which the plaintiffs claim relief in this suit was not a public highway and that it was unnecessary for them to establish special damage. The action therefore was properly laid after obtaining permission under Order 1, rule 8 of the Civil Procedure Code on behalf of the residents of the village and therefore it is maintainable.

In the result the second appeals fails and is dismissed. After I posted the case for judgment the respondents 1 to 5 entered appearance through their advocate Mr. Umamaheswaram. As the appeal is dismissed it is unnecessary to consider whether the appeal should be reheard. They are, however, not entitled to any costs in this as they appeared only at a very late stage.

No leave.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

Ponnusami Goundan and others .. *Petitioners**

v.

Alamelammal and others .. *Respondents.*

Civil Procedure Code (V of 1908), *Order* 33, *rules* 5 *and* 6 *(as amended in Madras)—Application for leave to sue* in forma pauperis*—Right of respondent to show suit was barred by limitation by adducing evidence—Shutting out of such evidence—Irregularity.*

When an application for leave to sue *in forma pauperis* is made and the respondent pleads that the suit is barred by limitation, under Order 33, rules 5 and 6 of the Civil Procedure Code as amended in Madras, the Court would not be justified in shutting out the evidence which the respondent wishes to adduce to substantiate his plea.

Mythili Ammal v. *Mahadeva Iyer*, (1948) 1 M.L.J. 400.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Subordinate Judge of Salem, dated 1st April, 1947.

K.V. Ramachandra Aiyar for Petitioners.

N. R. Raghavachari for Respondents.

The Court delivered the following

JUDGMENT.—The order of the learned Subordinate Judge is unsustainable in view of the decision of this Court reported in *Mythili Ammal and another* v. *R. Mahadeva Ayyar and others*[2], and the decisions referred to therein. Under Order XXX, rules 5 and 6 of the Code of Civil Procedure as amended by this Court,

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1. A.I.R. 1948 Pat. 183.
2. (1948) 1 M.L.J. 400.

* C. R. P. No. 980 of 1947. 6th October, 1948.

the Court is not justified in shutting out evidence which the petitioners in this Court wanted to adduce in the lower Court. They wanted to show that the suit which was sought to be instituted and for which leave to sue *in forma pauperis* was applied for was barred by limitation as more than twelve years had elapsed from the date of the alienations which were impugned in the suit by proving that these alienations really were in discharge of earlier mortgages. The learned Subordinate Judge thought that the enquiry contemplated in Order XX, rule 6, perhaps meaning Order XXXIII, rule 6 of the Code of Civil Procedure does not permit such an enquiry. In the light of the decisions referred to, I have no hesitation in holding that the view of the learned Subordinate Judge is wrong and his order therefore is set aside and the petition which is now pending before him will be heard and disposed of in the light of this judgment. The petitioner is entitled to his costs in this civil revision petition.

V.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Choyi .. *Petitioner**

v.

Kaitha Parambath Ayissabi .. *Respondent.*

Madras Tenants and Ryots Protection Act (XVII of 1946), *section* 4—*Person holding land under a* karaima *chit who has built a house-*cum*-shop in it—If a tenant entitled to benefit of section* 4.

A person holding a land under a *karaima* chit who has built a house-*cum*-shop in it cannot on that ground be denied the relief of stay under the Madras Tenants and Ryots Protection Act, because he would still be a " tenant " under section 3 (*v*) of the Malabar Tenancy Act.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Muniff, Calicut, in I.A. No. 2710 of 1947 in O.S. No. 422 of 1947, dated 14th July, 1947.

D. A. Krishna Variar for Petitioner.

K. P. Raman Menon for Respondent.

The Court delivered the following

JUDGMENT.—The point for determination in this case is very simple. The suit property consisted of two items, one covered by a *karaima* chit, on which the petitioner had constructed a shop (as allowed by that chit itself) and was also living in the upstairs thereof. The other plot consisted of land on which he is alleged to have trespassed, and regarding which he is not setting up any tenancy of any kind. He applied for stay of the suit brought against him by the landlord regarding both these items. The lower Court held that the plot trespassed upon was clearly not covered by any tenancy under the Malabar Tenancy Act, and that even the other plot, covered by the *karaima* chit, could not be considered to be a case of *tenancy, as a shop* had been built on the land covered by it, and not a farm house, much less crops raised.

The learned counsel for the petitioner confined his arguments before me to the case of the land covered by the *karaima* chit and frankly conceded that the land alleged to have been trespassed upon, and in any event not covered by any tenancy, would not be protected by the Act, and that the suit might go on regarding that land, even by splitting the suit into two parts. Regarding the land covered by the *karaima* chit, his case is that the land would come under the definition of ' tenancy " and " tenant " under section 3 (*v*) of the Malabar Tenancy Act, and that the lower Court was bound to grant the stay regarding that land under Act XVII of 1946. I agree. Section 3 (*v*) clearly says that any person who has paid or has agreed to pay rent, or

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* C. R. P. No. 1273 of 1947. 13th September, 1948.

other consideration, for his being allowed by another, to enjoy the land of the latter, is a " tenant." It does not say that the enjoyment should be by cultivation on farm house alone. Section 11, clauses (1), (2) and (3) exclude certain lands from the scope of the Malabar Tenancy Act, but a land on which a petty shop is built is not exempted under any of those sub-sections.

Besides, the petitioner claims to live in the upstairs of this very shop. So it is a house-*cum*-shop, a natural thing in a poverty-stricken country. I do not see how the petitioner can be denied the relief under the Malabar Tenancy Act simply because he chose to construct a shop on the plot and to live in it himself. A house in which an agriculturist lives and stocks his implements will not be excluded from the scope of the Act. In modern times, trade and industry are as important as agriculture, the primitive occupation of India's peasants. So, with the progress of the times, a person, whose contract of tenancy allows it, must be allowed to construct a *shop* on lands on which he could freely construct dwelling houses, manure dumps, stables, for cattle, etc. Indeed, he may even construct a tennis court, for recreation, if the contract allows it, without forfeiting his right to the tenancy, or losing his right to a " stay " of the suit.

In that view, I modify the order of the lower Court, and direct it to stay the suit so far as the land covered by the *karaima* chit is concerned, leaving it free to proceed with the suit regarding the alleged trespassed land, splitting it up, if necessary, from the other matter. In the peculiar circumstances, and as there appears to have been no ruling of the High Court so far regardng lands covered by *karaima* chits, I direct all the parties to bear their own costs.

V.S. — *Order modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN.

Thathi Reddi and others .. *Petitioners**

Madras Gaming Act (III of 1930), sections 6, 8 and 9—Scope of the presumption under section 6—Conviction under sections 8 and 9—Proof of gaming in a common gaming house—Necessity.

The presumption permitted by section 6 of the Madras Gaming Act can be drawn only to establish that the house in question was a common gaming house. It cannot be extended further to establish without further evidence that a specified person was the owner or keeper of the common gaming house. In the absence of any evidence that a person was the owner of the house in question or even that he was keeping or using such a house for gaming or that he was deriving any profits from the gaming, he cannot be convicted under section 8 of the Act.

Before any conviction could be ordered under either section 8 or section 9 of the Act, it must be proved that the premises in which the accused were found gaming was a common gaming house.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Additional First Class Magistrate, Madanapalle, dated 6th December, 1947, in C.A. No. 164 of 1947, preferred against the order of the Stationary Sub-Magistrate, Piler, in C.C. No. 762 of 1947.

A. Bhujanga Rao for the Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court delivered the following

JUDGMENT.—All the petitioners were convicted under section 9 of the Madras Gaming Act, 1930. A-4 was in addition convicted under section 8 of that Act. Before any conviction could be ordered under either of these two sections it must certainly be proved that the premises in which these persons were found gaming was a common gaming house within the meaning of section 3 of the Act. The learned Magistrate relied to a considerable extent on the presumption prescribed by section 6 of the Act,

* Crl. R.C. No. 109 of 1948. 17th November, 1948.
(Crl. R. P. No. 104 of 1948).

"Any cards, dice, etc., found in the place . . . . . shall be evidence that such a place is used as a common gaming house and that the persons found therein were there present for the purpose of gaming, although no play was actually seen by the police officer or any of his assistants."

There could be certainly no denying the fact that cards and money were found with the petitioners and obviously they were playing a game of cards for stakes. There was gaming but the question is, was it gaming in a common gaming house? Were that the only piece of evidence that cards and money were found with the petitioners, section 6 would justify the application of the presumption that the petitioners were gaming in a common gaming house. That was the scope of the decision in *Alagappa Chettiar* v. *Emperor*[1]. Walsh, J., observed :

"At the best the omission of these words can only mean that in spite of there being no evidence to the contrary the Court need not accept them as conclusive evidence but it cannot mean that the prosecution cannot succeed without calling other evidence."

The learned advocate for the petitioners referred to *Kasa Satyanarayana*, In re,[2]. But there was a specific finding by the learned Magistrate on the entire evidence on record that the accused were not deriving any profits by running the gaming house. I am unable to see anything in that decision to conflict with the principles laid down in *Alagappa Chettiar* v. *Emperor*[1].

In this case apart from the fact that cards and money were found with the petitioners when the police raided the premises there was the fact that the house was one occupied by Kanakaratnamma. The petitioners including A-4 admitted that they were not the residents of that house. Their explanation for their presence there failed to find acceptance at the hands of the Courts below. From this fact, in addition to the fact that they were found gaming, the learned Magistrate rightly held that the evidence on record simply proved the case for the prosecution, that these petitioners were gaming in a common gaming house. The conviction of the petitioners under section 9 is confirmed. The sentences are not heavy.

The conviction of A-4 under section 8 however, stands on an entirely different footing. The presumption permitted by section 6 can be drawn only to establish that the house in question was a common gaming house. It cannot be extended further to establish without further evidence that a specified person was the owner or keeper of that common gaming house. There was really no acceptable evidence that A-4 was the owner of the house in question or even that he was keeping or using such a house for gaming. To reiterate, the case for the prosecution itself was that one Kanakaratnamma occupied that house. Even if A-4 was her lover that does not necessarily establish that he occupied that house along with Kanakaratnamma. In the absence of evidence to prove that A-4 did derive any profit from the gaming he cannot be convicted under section 8. The reasoning of the learned Magistrate, that as A-4 had only a small amount of money with him when the Police raided the house, that sum of money must represent the profits A-4 derived from the gaming, fails to commend itself to me. The conviction of A-4 under section 8 is set aside and is directed to be acquitted of that charge. The fine imposed under that section, if collected shall be refunded to A-4.

V.S. *Conviction of one accused under S. 8 set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

M.K. Krishna Rao .. *Petitioner**

v.

Sri Gangadareswarar Temple and other connected temples by trustees .. *Respondent.*

Written statement—Amendment—Discussion and finding against the allegations in the amendment sought before it is allowed—Refusal on the basis of such finding—Propriety.

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1. 1932 M.W.N. Crl. 120.
2. (1945) 2 M.L.J. 521.

* C. R. P. No. 909 of 1948. 16th November, 1948.

An intended amendment of a written statement should not be discussed and found against even before it is allowed to be incorporated, and issues framed thereon and evidence and arguments adduced on it. A refusal to allow an amendment straightaway on a finding against the allegations in the amendment sought for on merits is not proper. If there are laches on the part of the defendant, it is a case for allowing amendment on terms, for costs are the supreme panacea for all procedural ills.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Additional City Civil Judge, Madras, dated 22nd April, 1948, in I.A. No. 515 of 1948 in O.S. No. 517 of 1946.

N. C. Vijiaraghavachari and *N. C. Srinivasan* for Petitioner.

M. Chelva Aiyangar for Respondent.

The Court delivered the following

JUDGMENT.—The point for determination in this petition is whether the lower Court in law in refusing to allow the amendment sought for by the first defendant in his statement even on terms and in straightaway finding against the allegations in the amendment sought for on merits though the amendment had not been allowed, an issue framed, and the parties had not let in the requisite oral and documentary evidence and adduced arguments thereon.

I am of opinion that, in the circumstances of this case, the lower Court ought to have allowed the amendment *on terms*, and ought not to have given its findings on the contention in the amendment without first allowing the amendment and framing an issue thereon and allowing both sides to adduce the relevant oral and documentary evidence and the arguments they desired. The suit had begun to be heard though there was, undoubtedly, some laches on the part of the first defendant who had allowed the present trustees to be brought on record without objecting then, perhaps because he had not fully looked into the rulings on the subject and made himself acquainted with all the relevant facts. But, all that would be only a matter of costs. Costs are, certainly the supreme panacea for all procedural ills. I do not see any possible damage to the other side if suitable costs, which I fix at Rs. 60, are given to them as a condition precedent to the amendment and these costs are made not costs in any suit or proceedings but declared to be merely a solatium. It is desirable that the proper procedure should be followed in all proceedings in public interests and that an intended amendment should not be discussed and found against even before it is allowed to be incorporated, and issues framed thereon, and evidence and arguments adduced on it.

I, therefore, set aside the lower Court's order dismissing the petition for amendment, and allow the amendment on condition of the petitioner's paying the respondents, or depositing in the lower Court, for payment to the respondents, a consolidated sum of Rs. 60, which will not be costs in the suit or any other proceedings whatever, to compensate them for the waste of time, money and energy caused by his laches, within a month from today, failing which payment or deposit this petition will stand dismissed with costs.

In case the payment is made, the petition will be allowed without costs, and the lower Court will proceed to frame the issues on the point involved in the amendment, allow the parties to adduce the relevant oral and documentary evidence, and dispose of the suit in the usual course.

V.S. *Petition allowed on terms.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

Kamalammal .. *Petitioner**

v.

Rajarathna Naicker .. *Respondent.*

Limitation Act (IX of 1908), *Article* 182 (5)—" *In accordance with law* "—*Application for transmission of decree without filing certified copy of decree as required by rule* 142 *of the Civil Rules of Practice—Not one in accordance with law—Dismissal of such application as not pressed—Though a* " *final order* " *cannot save limitation. Civil Procedure Code* (*V of* 1908), *section* 39 *and Order* 21, *rules* 5 *and* 6.

The combined effect of sections 121, 122 and 127 of the Civil Procedure Code (V of 1908) is to make rule 142 of the Civil Rules of Practice part of the Code. The provision in rule 142 of the Civil Rules of Practice that the judgment-creditor shall together with the first petition for transmission of the decree file a certified copy of the decree sought to be executed is mandatory and a petition which does not comply with that proviso is not one " in accordance with law " and an order dismissing such petition as not pressed though a " final order " will not save limitation for a fresh execution petition.

Pachaiappa Achari v. *Poojari Seenan,* (1905) 28 Mad. 557 and *Venkatarama Sastri* v. *Venkatanarasimham,* (1937) 2 M.L.J. 881, distinguished and not followed. *Prasad* v. *Pawn Kunwar,* I.L.R. 1943 Nag. 669 and *Satyanarayana* v. *Kaji Reddi,* (1945) 2 M.L.J. 427 : I.L.R. 1946 Mad. 452, relied on.

Kesavaloo v. *Official Receiver, West Tanjore,* (1936) 71 M.L.J. 336 : I.L.R. 1937 Mad. 112 ; *Chidambaram Nadar* v. *Ramanadar,* (1937) 1 M.L.J. 453 : I.L.R. 1937 Mad. 616 ; *Syed Ghulam Khader Sahib* v. *Viswanatha Iyer,* (1942) 2 M.L.J. 768 : I.L.R. 1943 Mad. 357 and *Muthuvenkatasubba Reddiar* v. *Thangavel Chettiar,* (1948) 1 M.L.J. 327, followed.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the District Court, North Arcot, dated 18th March, 1946, in A.S. No. 359 of 1945 (E.P. No. 369 of 1944, District Munsiff Court of Vellore, in S.C.S. No. 397 of 1932, District Munsiff Court, Ranipet).

B.V. Viswanatha Aiyar for Petitioner.

M. Natesan for Respondent.

The Court delivered the following

JUDGMENT.—This is a civil revision petition against the order of the District Judge of Vellore confirming the order of the District Munsiff of Vellore. This arises out of execution proceedings and the question for determination is whether the application made for execution is barred by limitation. The material facts are these. A decree was passed on 21st July, 1932, by the Court of the District Munsiff of Ranipet. In February, 1935, the village to which the parties belong was transferred from the jurisdiction of the Ranipet Court to that of Vellore Court. On 21st July, 1935, the last day of limitation, an execution petition for transmission of the decree was filed in the Court of the District Munsiff of Ranipet. The petition was returned with an order of Court on 25th July, 1935, that the decree-holder should produce a copy of the decree and seven days' time was granted for the same. The petition was re-presented on 31st July, 1935, wih an endorsement " not pressed." The petition, when it was re-presented, was not accompanied by a copy of the decree. On 1st August, 1935, the petition was dismissed as " not pressed." A similar application was filed on 21st July, 1938, and it was also similarly dismissed on the 5th August, 1938. Another application for transmission to Vellore Court was filed on 23rd June, 1941, and an order of transmission was passed on 26th June, 1941. The decree was received in Vellore Court on 2nd July, 1941 and it was returned on 6th January, 1942, as no steps were taken. The application out of which this revision arises, E.A. No. 64 of 1944, was filed in the Court of the Ranipet District Munsiff on 10th June, 1944, and transmission was ordered on 13th June, 1944, and the present execution petition was filed on 1st July, 1944. This petition is resisted on the ground that it is barred by limitation.

* C. R. P. No. 1250 of 1946. 26th October, 1948.

The grounds of objection are (1) the petition presented on 21st July, 1935, to the District Munsiff's Court, Ranipet, is not " in accordance with law " within the meaning of that expression in Article 182 (5) of the Limitation Act, (2) the order passed on 1st August, 1935, dismissing the petition as " not pressed " is not a final order within the meaning of these words in Article 182 (5).

I will deal with the second ground first, *viz.*, whether the order dismissing the petition as " not pressed " is a final order. It is now well-settled that the words " final order " imply that the proceeding has terminated so far as the Court passing it is concerned. Vide *R.T. Kesavaloo* v. *Official Receiver, West Tanjore*[1], and *Chidambara Nadar* v. *Ramanadar*[2]. The true test as laid down in *Syed Gulam Khader Sahib* v. *Viswanatha Aiyar*[3], is whether the order puts an end to the application in respect of which it is made so far as the Court passing it is concerned. Applying the above test, I should say that the orders of the Court of the Ranipet District Munsiff passed on 1st August, 1935, and 5th August, 1938, are final orders. The fact that the petition is dismissed as not pressed does not make any difference. Vide *Muthu-Venkatasubba Reddiar* v. *Thangavel Chetti*[4].

Now this final order must be on an application made in accordance with law. The question now is whether the application made on 21st July, 1935, (which was re-presented on 31st July, 1935) is an application made in accordance with law. The application was made to the Court of the District Munsiff at Ranipet for transmission of the decree to the Court of the District Munsiff, Vellore, The provisions of the Code of Civil Procedure applicable to such applications are sections 39 and Order XXI, rules 5 and 6, Civil Procedure Code and rule 142 of the Civil Rules of Practice. These applications are not required to be in any particular form as required in the case of applications for execution under Order XXI, rule 11. But under rule 142, Civil Rules of Practice, the judgment-creditor shall together with the first petition for execution or transmission of the decree, file in Court a certified copy of the decree sought to be executed. In this case copy of the decree was neither filed in Court together with the application on 21st July, 1935, nor was it produced on 31st July, 1935, when the petition was re-presented although there was an order of Court dated 25th July, 1935, directing the petitioner to produce a copy of the decree. In rule 142, the word used is " shall " which shows that the provision is mandatory. The question is whether the violation of such a mandatory provision makes the application one not in accordance with law.

The learned counsel for the petitioner contends that it is not necessary to file a copy of the decree and the application does not cease to be one made in accordance with law. He relies on *Pachiappa Achari* v. *Poojali Seenan*[5], and *Venkatarama Sastri* v. *Venkatanarasimham*[6], in support of his contention. These two decisions relate to applications for execution apparently to Courts which themselves passed the decree. In *Mathuranath Ray Chowduri* v. *Janakinath Ray Chaudhuri*[7], it was held that

> " an order to file a copy of the decree is needless because the Court in which this application was made was the Court which made the decree and if any reference to the decree was needed, the original could easily have been examined."

In *Pachiappa Achari* v. *Poojali Seenan*[5], the application for execution of the decree was not accompanied by a copy of the decree as required by Rule 164 of the Civil Rules of Practice then in force, but it complied with the terms of section 235 (corresponding to present Order XXI, rule 11 (2). It was held that there was no omission or error in the contents of the application itself which consequently was perfectly in accordance with law. In short the decision is to the effect that if the provisions of Order XXI, rule 11, Civil Procedure Code are complied with, it does not matter even if the order of the Court in any other particular is not complied with. This decision was given on 10th August, 1905, and the

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1. (1936) 71 M.L.J. 336: I.L.R. 1937 Mad. 112.
2. (1937) 1 M.L.J. 453 : I.L.R. 1937 Mad. 616 (F.B.).
3. (1942) 2 M.L.J. 768 : I.L.R. 1943 Mad. 357.
4. (1948) 1 M.L.J. 327.
5. (1905) I.L.R. 28 Mad. 557.
6. (1937) 2 M.L.J. 881.
7. (1929) I.L.R. 57 Cal. 996.

Procedure Code was amended in 1908. The amendment introduced several new sections and we are concerned only with three of them for the purpose of this case. They are sections 121, 122 and 127. The combined effect of these sections is that the rules contained in the Civil Rules of Practice must therefore be read along with section 39 and Order XXI, rules 5 and 6 for the purposes of transmission of the decree and with order XXI, rule 11 for the purpose of application for execution. If this is so, then under rule 142, Civil Rules of Practice the decree-holder shall together with the first petition for execution or transmission of the decree sought to be executed file in the Court a copy of the decree sought to be executed. *Pachiappa Achari* v. *Poojali Seenan*[1], may be good law at the time it was decided, as rule 164 of the Civil Rules of Practice, as it then stood, did not have the force and effect as if enacted in the Code. The amendment of the Code in 1908 has altered the legal effect of these rules. But *Venkatarama Sastri* v. *Venkatanarasimham*[2], which is also to the same effect as *Pachiappa Achari* v. *Poojali Seenan*[1], is decided under the present Code. There is no reference to rule 142 of the Civil Rules of Practice and therefore there is no discussion as to the effect of it in view of the new sections 121, 122 and 127 of the Code. But this decision relates to an application for execution and not for transmission of decree. Apart from this in *Govind Prasad* v. *Pawankumar*[3], their Lordships of the Judicial Committee have made a distinction between a rule which is permissive and a rule which is mandatory. Following this decision and applying the distinction aforesaid, a Division Bench of our High Court in *Satyanarayana* v. *Kaji Reddi*[4], has held

"that an execution application which does not state correctly the number of the suit relating to the decree sought to be executed is not a petition in accordance with law."

Now if as stated already, the combined effect of sections 121, 122 and 127 is to make the rule 142 part of the Code, then the provision in rule 142 that the judgment-creditor shall together with the first petition for transmission of the decree file the certified copy of the decree sought to be executed is mandatory and failure to comply with such a mandatory provision makes the petition one "not in accordance with law."

The petition filed on 21st July, 1935 (and re-presented on 31st July, 1935) was unaccompanied by a copy of the decree) is not in accordance with law and the order passed thereon will not enure to the benefit of the petitioner herein. The objection that the present petition is time-barred prevails and the civil revision petition is dismissed with costs.

K.S. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Sanivarapu Venkata Reddi and others .. *Petitioners**

v.

Nimmakayala alias Nagella Lakshmi Reddi .. *Respondent.*

Civil Procedure Code (V of 1908), Order 23, rules 1 and 2—Leave to withdraw suit with liberty to file fresh suit after arguments in appeal—No satisfactory reasons given—Legality.

Any Court allowing a party to withdraw a suit with liberty to file a fresh suit at such a late stage as after the closing of the arguments in appeal, is bound under Order 23, rule 1, Civil Procedure Code, to give reasons for its being satisfied that the suit must fail by reason of some formal defect or that there were other sufficient grounds for allowing the withdrawal and it would be acting without jurisdiction and with material irregularity in allowing the withdrawal at that stage if sufficient reasons falling within Order 23, rules 1 and 2 (*a*) or (*b*) Civil Procedure Code are not given.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Kurnool, dated 4th December, 1946, in M.P. No. 360 of 1946 in A.S. No. 118 of 1946 etc.

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1. (1905) I.L.R. 28 Mad. 557.
2. (1937) 2 M.L.J. 881.
3. (1943) 2 M.L.J. 121 : I.L.R. 1943 Nag. 669 (P.C.).
4. (1945) 2 M.L.J. 427 : I.L.R. 1946 Mad. 542.

* C. R. P. No. 800 of 1947 and S.A.No. 933 of 1947. 27th October, 1948.

A. C. Sampath Ayyangar for Petitioner.

C.A. Vaidilingam, *T.Venkatadri* and *K. Ramachandra Rao* for Respondent.

The Court delivered the following

JUDGMENT.—The facts, are briefly these : The respondent in this petition filed O.S. No. 122 of 1944 on the file of the District Munsiff's Court, Nandyal, praying for a declaration that the *rastha* marked XY in the plaint plan was a public *rastha* and for an injunction restraining the petitioners, the defendants in the suit, from obstructing him and his men in going through the public *rastha* to the fields, Survey Nos. 194, 195 and 192/3, and taking manure carts through the public *rastha* to the said fields, and, in the alternative, for establishment of his right of easement of necessity to go through the *rastha* to the abovesaid fields through the *rastha* and for an injunction against the defendants. He filed a plan with the plaint. The defendants too filed a plan, Ex. D. 1. The District Munsiff, Nandyal, by his judgment dated 22nd November, 1944, dismissed the suit with costs. The plaintiff seems to have applied for a local inspection and the learned District Munsiff seems to have refused it, probably because, as he suggested, the place was in an interior village some 20 miles from the Court-house, and as a local inspection was not considered to be essential even otherwise.

The plaintiff took the matter in appeal to the Subordinate Judge, Kurnool. When the appeal was pending, and after arguments had been addressed on both sides, the plaintiff-appellant applied to the learned Subordinate Judge, on 4th December, 1946, by M.P. No. 360 of 1946, for permission to withdraw from the suit with liberty to file a fresh suit on the same cause of action on such terms as the Court deemed fit. The reason given by him was that the suit was defective, as there was no correct plan showing the various plots essential to be considered in deciding the suit, and as his petition for local inspection, after the evidence had been closed, in the trial Court, had been dismissed, and he could not also take out a commission, and as a correct plan was essential for a proper appreciation of the evidence in the case. The counsel for the present petitioners endorsed on that petition " Received notice. I oppose the application." But when the petition itself came up for hearing before the learned Subordinate Judge, he does not seem to have addressed any arguments opposing it. The learned Subordinate Judge perhaps, thought that *both sides had put in the petition for withdrawal*, as the decree in A.S. No. 118 of 1946 has a clause " Both the parties file M.P. No. 340 of 1946 praying for permission to withdraw the suit." Probably he saw the signature of the counsel for the defendants in that M.P., without seeing the endorsement, " I oppose the applications." That alone can explain why he passed such a summary and cryptical order; according permission to withdraw the suit. That order is quoted below :

> " The plaintiff's suit is defective for want of proper sketch showing the disputed *rastha* and the situation of the various lands which appear in the evidence. The sketch filed by the defendants also contains no letters demarcating the several items mentioned therein. Under such circumstances, I grant leave to the plaintiff-appellant to withdraw the suit with liberty to file a fresh suit on the same cause of action. But he should give a sum of Rs. 100 to the defendants-respondents towards their costs of the suit and of this appeal within one month from this date as a condition precedent for filing a fresh suit."

The learned Subordinate Judge thereafter dismissed the appeal, and granted permission to the plaintiff to file a fresh suit on condition of his paying Rs. 100 costs within a month. Hence this revision petition by the defendants.

The learned Counsel for the petitioners urged that the learned Subordinate Judge went wrong in law in allowing the plaintiff to withdraw the suit with liberty to file a fresh suit on condition of paying Rs. 100 within a month without being satisfied, and without giving reasons for his being satisfied, that the suit must fail by reason of some formal defect or that there were other sufficient grounds for allowing the plaintiff to institute a fresh suit, as he was bound to do under Order XXIII,

rule I of the Civil Procedure Code, and the rulings in *Jogamma* v. *Bhanumurthi*[1], and *Abdul Sobhan* v. *Samasuddin Ahmed*[2]. There is considerable force in this contention. Any Court allowing a party to withdraw from a suit with liberty to file a fresh suit at such a late stage as this, after arguments also have been addressed in appeal, is bound to give satisfactory reasons falling within Order XXIII, rule I, Civil Procedure Code. The lower appellate Court has undoubtedly failed to do so. It is not clear what it meant by saying that the suit was defective for want of a proper sketch showing the disputed *rastha* and the situation of the various lands which appeared in the evidence. There were two sketches before it, namely the plan filed by the plaintiff along with his plaint and the plan filed by the defendants, Ex. D. 1. If it wanted a more detailed and accurate sketch than either of these it was within its powers to direct the parties to get a commissioner appointed to draw a correct sketch with full details, or to suggest a local inspection by itself to clear up all the doubts it had. It did not even say whether it was allowing the withdrawal because the want of a correct sketch amounted to a *formal defect* in its opinion, or only amounted to *a sufficient ground* under Order XXIII, rules 1 and (2) (*b*).

I am convinced that it did not give its detailed reasons because it was perhaps under the wrong impression that both sides had put in a petition for withdrawal and did not, therefore, go into the matter deeply or give sufficient reasons for its order. It is clear now, and is not disputed by the other side, that the defendants had not joined in the petition for withdrawal, and had, as a matter of fact, expressed that very day their determination to oppose that application. The endorsement on the petition will show at least their initial intention to oppose and there is no proof that they withdrew from that intention later in the day. The learned counsel for the petitioners has assured me that it is not the insufficiency of the solatium (he says that at least Rs. 250 must have been spent by his clients) that has made the defendants file this petition but the fact that the withdrawal had been allowed for insufficient reasons, and that no sufficient reasons existed for allowing the withdrawal at that stage.

It seems to me that the lower Court acted without jurisdiction, and with material irregularity, in allowing the withdrawal of the suit at that stage without giving sufficient reasons falling within Order XXIII, rules 1 and 2 (*a*) or (*b*) of the Civil Procedure Code. The only course, therefore, to follow in this case, consonant with justice, equity and good conscience, will be to set aside the order of the lower Court granting permission to the plaintiff to withdraw from the suit with liberty to file a fresh suit, and in consequence the decree in the appeal, and to direct the lower Court to restore the petition and the appeal to their original numbers and to proceed to dispose of the application for withdrawal afresh, after hearing both sides and giving sufficient reasons for the order either way in the restored M.P. No. 360 of 1946, and thereafter to proceed to dispose of the appeal afresh, and I direct accordingly. In the circumstances, I direct that the costs in the Civil revision petition and the second appeal (No. 933 of 1947), to abide and be provided for by the lower Court, when disposing of the application for withdrawal of the appeal afresh. Rs. 100 paid by the plaintiff to the defendants under the order of the lower Court in the withdrawal application now set aside, will be refunded to the plaintiff on a proper application to the lower Court.

S.A. No. 933 *of* 1947. No separate order is necessary in view of the orders in C.R.P. No. 800 of 1947 which covers this matter also and has directed the fresh hearing of A.S. No. 118 of 1946. Court-fee paid on the memo of second appeal will be refunded.

Leave refused.

V.S. ——— *Petition allowed.*

1. 1927 M.W.N. 851.

2. A.I.R. 1931 Cal. 336.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Vembu Ammal .. *Petitioner**

v.

Esakkia Pillai .. *Respondent.*

Provincial Small Cause Courts Act (*IX of* 1887), *section* 17 (1)—*Review petition—Deposit of decree amount or security—Necessity.*

The proviso to section 17 (1) of the Provincial Small Cause Courts Act is mandatory and not merely recommendatory.

Assan Mohammad Sahib v. *Rahim Sahib*,(1920) 38 M.L.J. 539: I.L.R. 43 Mad. 579 (F.B.) relied on.

Where a Court admits and proceeds with a petition for review without the necessary deposit or security, even after the mandatory need for the security is brought to its notice, it errs in law.

Petition under section 25 of Act IX of 1887 praying that the High Court will be pleased to revise the order of the Court of the District Munsiff, Tirunelveli, dated 27th September, 1946, in I.A. No. 143 of 1946 in S.C.S. No. 99 of 1946 and the decree in S.C.S. No. 99 of 1946.

V. Meenakshisundaram for Petitioner.

Respondent not represented.

The Court delivered the following

JUDGMENT.—This is a petition for revising and setting aside the order of the District Munsiff of Tinnevelly dated 27th September, 1946, in I.A. No. 143 of 1946, a review petition, in S.C.S. No. 99 of 1946. The facts are briefly as follows :

S.C.S. No. 99 of 1946 was a suit filed by the petitioner Vembu Ammal, against the respondent, Esakkia Pillai, for recovering the amount due on a promissory note, Ex. P. 1, dated 17th Feburary, 1945, for Rs. 190 with subsequent interest and costs. Vembu Ammal had alleged that Esakkia Pillai had written the whole promissory note, Ex. P. 1, himself, and had signed in it, and that the amount was due. She had examined three witnesses, P.Ws. 2 to 4, who swore that Esakkia Pillai had written the promissory note himself and signed in it. Esakkia Pillai had denied that he had written the suit promissory note or signed in it.

Mr. B.R. Charkrawarthi, the District Munsiff, who tried the suit first gave a decree to the petitioner for the suit amount and costs, on 11th June, 1946. The respondent put in I.A. No. 143 of 1946 for reviewing the judgment delivered on 11th June, 1946, by comparing his signature in a registered sale deed of November, 1945, with the signature in Ex. P. 1. He had not deposited the decree amount or got any order of the District Munlff regarding security. The petitioner raised her objection regarding this (under the proviso to section 17 (1) of the Provincial Small Cause Courts Act) when the review petition came on for hearing before the subsequent District Munsiff, Mr. Balasubramanian Chettiar. The learned District Munsiff, who heard the review petition, remarked that there was little doubt, that, for the purpose of reviewing the judgment, security must have been furnished by Esakkia Pillai and accepted within thirty days from the date of the decree, evidently relying on the Full Bench decision of this Court in *Assan Mohammed Sahib* v. *Rahim Sahib*[1], holding the provisions of section 17 (1) of the Provincial Small Cause Courts Act to be mandatory and not merely recommendatory. But he went on to say that his predecessor must have admitted the review petition without security probably under the mistake that no security was necessary for reviewing the judgment, and that, as the petition had been admittted and the order of admission had not been got quashed, he must proceed with it. He then went on to discuss the merits of the case. He held that the signature in Ex. P. 1 was not the signature of the respondent as it differed from the signature of the respondent in the registered sale deed of November, 1945. He also stated that the plaintiff (petitioner) had not let in any evidence regarding the consideration. In the end, he reviewed and set aside the judgment of his predecessor and dismissed the suit with costs. Hence this petition. The respondent has remained absent in this Court though properly served.

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* C. R. P. No. 1379 of 1946. 7th October, 1948.

1. (1920) 38 M.L.J. 539 : I.L.R. 43 Mad. 579 (F.B.).

The learned counsel for the petitioner urged that the lower court's order in the review petition was passed without jurisdiction and was patently wrong in law and also perverse in fact, and ought to be set aside, and that the original decree in the petitioner's favour, passed on 11th June, 1946, must be restored with costs throughout. I agree. The proviso to section 17 (1) of the Provincial Small Cause Courts Act clearly says that an applicant for a review of judgment shall, at the time of presenting his application, either deposit in the Court the amount due from him under the decree or in pursuance of the judgment, or give such security for the performance of the decree, or compliance with the judgment, as the Court may, on a previous application, made by him in this behalf, have directed. The provisions are *mandatory*, and not merely recommendatory, and the Full Bench ruling in *Assan Mohammed Sahib* v. *Rahim Sahib*[1], is conclusive on the point. The respondent did not make a previous application, as required by the proviso, or deposit the amount due from him under the decree or obtain an order of Court regarding the security to be furnished by him. Probably, as the learned District Munsiff who reviewed the judgment remarked, the District Munsiff who admitted the review petition without security was not aware of the proviso to section 17 (1) of the Provincial Small Cause Courts Act and, perhaps, the copy of the Provincial Small Cause Courts Act before him was an old one and did not contain this proviso, and he was misled into thinking that no security was required. Whatever it be, the lower Court erred in law in admitting and proceeding with a petition for review without necessary deposit or security, even after the mandatory need for security was brought to its notice. Even its finding on fact, namely that the signature in Ex. P. 1 was not the respondent's, was patently wrong. P.Ws. 1 to 4 had sworn that the respondent had himself written the suit promissory note in their presence. Their evidence on this point was not shaken. The learned District Munsiff was not justified, as a layman, in comparing the signature in Ex. P. 1 with the signature in an unexhibited sale deed of November, 1945, not even filed by the respondent in the trial Court, and in coming to the conclusion that the two signatures were radically different and that the signature in Ex. P. 1 must, therefore, be a forgery. Even a handwriting expert's opinion will not be conclusive on the point. Here, the learned District Munsiff was not a handwriting expert; nor was the sale deed containing the signature which he used for comparing with the signature in Ex. P. 1 exhibited; nor was the signature in the sale deed admitted by this petitioner to be the signature of the respondent. Any comparison of a *disputed* signature will be only useful when it is done with an *admitted* signature; otherwise, it will be a case of blind leading the blind. There was no need also for the petitioner to prove consideration when the respondent had not denied the receipt of consideration and raised an issue regarding it.

In these circumstances, the judgment of the learned District Munsif in review is set aside, and the original judgment and decree of the District Munsif dated 11th June 1946 restored with costs throughout.

K.C. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL, AND MR. JUSTICE GOVINDA MENON.

Balammal .. *Appellant**

v.

The Official Assignee of Madras .. *Respondent.*

Limitation Act (IX of 1908), Article 48—Official assignee taking possession of moveable property as belonging to insolvent—No step taken by alleged true owner to establish claim for 3 years—Claim barred by limitation.

Where a person claiming to be the true owner of certain moveable property, which was taken possession of by the Official Assignee on the ground that it belonged to an insolvent, does not take steps to establish the claim for 3 years from the date of knowledge of the possession by the Official Assignee, his claim to the property is, even if true, barred by limitation. It is the duty of the Official Assignee

1. (1920) 38 M.L.J. 539 : I.L.R. 43 Mad. 579 (F.B).

* O. S. A. No. 2 of 1948. 29th September, 1948.

to administer the estate of the insolvent for the benefit of the creditors and not to hold, any property that he takes into his posesssion as the property of the insolvent, on behalf of any person who might subsequently establish a claim to the property. On the contrary, he holds the property adversely to the true owner if the true owner is not the insolvent.

Appeal against the judgment of Clark, J., dated 25th August, 1947, in Application No. 367 of 1947 in petition No. 46 of 1942 on the file of the High Court in the exercise of the Insolvency jurisdiction.

M. A. Narasayya for Appellant.

C.R. Rajagopalachariar for Respondent.

The Judgment of the Court was delivered by

Horwill, J.—In July, 1942, the husband of the appellant was adjudged an insolvent; and before the end of the year the Official Assignee took possession of some timber on the ground that it belonged to the insolvent. In 1942 or earlier, the appellant claimed that the timber was hers; but on the 22nd February, 1943, despite her objections, the property was sold. Chandrasekhara Aiyar, J., before whom the matter came for confirmation of the sale, ordered that the sale proceeds should be held by the Official Assignee pending further orders. On the 26th March, 1943, some moveables were sold, which realised a sum of Rs. 225. On the 30th August, 1944, the Official Assignee applied for directions to distribute certain assets in his hands as belonging to the insolvent. On the 11th December, 1944, Clark, J., passed an order on these applications, He said that with regard to the houses sold it was the interest of the insolvent that had passed to the vendees, and so it was unnecessary for him to consider whether or not the houses belonged to the insolvent. With regard to the Rs. 2225 which were the proceeds of the timber and moveable property which is the subject of this appeal, the learned Judge was informed that the property had been sold absolutely and that the question as to the title to the property had still therefore to be determined. Clark, J., therefore directed by the order of that date that the Official Assignee should for the present retain in his hands that sum; and he added at the end of his order:

"This will give an opportunity to the first respondent to take appropriate action to establish her right to the properties now represented by those sums."

The first respondent, who is the appellant here, took no action at all. The Official Assignee therefore filed a subsequent application on the 30th July, 1947, for permission to distribute this Rs. 2225; and the leared Judge in the order now appealed against directed the Official Assignee to distribute that money, as the claim of the appellant, even if true, was barred by time.

The learned advocate for the appellant argues that the learned Judge was wrong in holding that the claim was barred by limitation, as the proper Article of the Limitation Act to apply was not Article 48, as the learned Judge thought, but the residuary Article 120. For the purpose of this argument Mr. Narasayya Chowdhury relies principally on *Gurudas Pyne* v. *Ram Narain Sahu*[1]. In that case, a suit was filed by the owners of certain logs of timber against one Modhoosoodhun, who had misappropriated them, and another for conversion of the timber, and a decree was passed. The matter was taken in appeal to the High Court and subsequently to the Privy Council, and during the pendency of these proceedings the judgment-debtor died and the brother of the judgment-debtor thereupon sold the logs of timber which, of course, he held for the benefit of his brother's heir, the widow of the deceased judgment-debtor. In the course of execution, certain difficulties arose, and the decree-holder was unable to proceed against all the properties of the judgment-debtor. So a fresh suit had to be filed. Their Lordships had to consider whether a suit lay for the proceeds of the sale, and they held that it did; but that as it was a suit for the sale proceeds, Article 48 did not apply. They held that the brother had not converted the logs, but had sold them on behalf of the deceased judgment debtor for the benefit of the widow, and that since there had been no

1. (1884) L.R. 11 I.A. 59: I.L.R. 10 Cal. 860 (P.C.).

2. (1946) 1 M.L.J. 140: I.L.R. 1946 Mad. 306.

conversion by the brother, the suit against the brother and the widow was not a suit to which Article 48 would apply.

The learned advocate further argued that the Official Assignee is in the position of a receiver and that he holds the property and the sale proceeds of the property for the benefit of the true owner. The duty of the Official Assignee is to administer the estate of the inslovent for the benefit of the creditors. He certainly does not hold any property that he takes into his possession as the property of the insolvent on behalf of any person who might subsequently establish a claim to the property. On the contrary, he holds the property adversely to the true owner if the true owner is not the insolvent. In support of his argument on this point, Mr. Narasayya Chowdhury has quoted *Karana Murthi* v. *Ramanatha*[1], which in our opinion has no application whatsover. That was a case in which the real owner sued a benamidar for sums received by him; and the learned Judges held that the benamidar was in the position of a trustee and that the appropriate article was Article 120 and not Article 62.

The appeal is dismissed with costs.

V.P.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

K. Krishna Nair .. *Petitioner**

v.

Valliammal .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XV of 1946)—Residential purpose—Test—Rule making the Court of Small Causes the authority to hear appeals—Validity—Competency of revision to High Court against orders of a Judge of the Court of Small Causes.

In determining whether a premises is residential or non-residential the main or primary purpose for which it is let out or taken or used must be considered. Hence a premises must be deemed to be taken and used for 'residential purpose' though a portion of the premises may be used for making appalams when people are not sleeping there and used for sleeping purposes when appalams are not made there.

The rule making the Small Cause Court itself the 'authority' to hear appeals against the orders of the House Rent Controller, instead of the Chief Judge of the Small Causes Court, as formerly is not *ultra vires*, since a Court can certainly be an 'authority' though every 'authority' need not be a Court.

If a statute or rule names a 'Court' as an 'authority' the usual appeals and revisions lying to the High Court from that Court will lie.

As a Judge of the Small Cause Court does not act as *persona designata* but as a Judge of the Small Cause Court and as part of the Small Cause Court a revision will lie against orders passed by him.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Small Cause Court, Madras, dated 24th April, 1948, in H.R.A. No. 892 of 1947 (R.C.L. Dis. No. 1215 of 1947 House Rent Controller, Madras).

N. Gopala Menon for Petitioner.

V. Srinivasan and *T. R. Ramachandran* for Respondent.

The Court delivered the following

JUDGMENT.—The facts of this case are briefly these: The petitioner is living in a house in Madras City formerly owned by one Baggiammal, wife of one Babu Mudaliar, from whom the respondent has subsequently bought it for residential purposes. The respondent got an order from the Additional Rent Controller,

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1. (1946) 1 M.L.J. 140 : I.L.R. (1946) Mad. 306 (F.B.).

* C. R. P. No. 974 of 1948. 26th October, 1948.

Madras, on 6th September, 1947, directing the petitioner to vacate and hand over possession of the premises to her on or before 31st October, 1947. Before the Additional Rent Controller the petitioner had contended that a portion of the house was used by him for non-residential purposes, *viz.*, for making *appalams*, or *pappadams*, and that, therefore, the Additional Rent Controller could not order eviction under the Act since the respondent wanted the house only for residential purposes. The Additional Rent Controller has remarked as follows in the course of his order :

> "Further, a premises is residential or not residential according to the main purpose for which it was taken. It is not the respondent's case that he took the premises or portion of it for making *appalams*. Respondent admits that even the portion of the house used for making *appalams* is used as sleeping apartments during the night. A portion of a lawyer's or doctor's residential house used for professional work cannot be treated separately as non-residential premises. For the above reasons, I am unable to accept the respondent's contention that a portion of the house is non-residential and confine this application to the remaining portion."

The petitioner took the matter in appeal to the Small Causes Court, Madras. The Second Judge of the Small Causes Court, who heard the appeal, disbelieved the petitioner's contention that a portion of the house was used for non-residential purposes, and dismissed the appeal. Hence this petition.

At the outset, the learned Counsel for the respondent urged that a revision petition would not lie to this Court since the "authority" which heard the appeal, *viz.*, the Small Causes Court, is not a "Court" subordinate to this Court when deciding appeals against orders of the House Rent Controller. The learned Counsel for the petitioner relied on the rulings in *National Telephone Co., Ltd.* v. *Postmaster General*[1], the *Municipal Corporation of Rangoon* v. *N.A. Shakur*[2], and *Kiron Chandra* v. *Kalidas Chatterjee*[3], for the proposition that if a statute or rule names a "Court" as an "authority" the usual appeals and revisions lying to the High Court from that Court will lie. I agree, as in this case, the second Judge of the Small Causes Court did not act as a *persona designata* but as a Judge of the Small Causes Court, and as a part of the Small Causes Court. So, this petition will lie. The learned Counsel for the petitioner raised three main contentions. The first was that the rule making the Small Causes Court itself the "authority" to hear appeals against the orders of the House Rent Controller, instead of the Chief Judge of the Small Causes Court, as formerly was *ultra vires*, since a Court can never be an "authority." I cannot agree. A Court can certainly be an "authority" though every "authority" need not be a Court. It is commonly stated that the High Court is the highest authority in the Province in Judicial matters. There is no inherent absurdity or incorrectness about this expression. I have not been referred to any rulings by the learned Counsel for the petitioner in support of this startling proposition. Indeed, the very rulings relied on by him for showing that a revision petition would lie to this Court are to cases where a Court is named as the "authority."

The next contention was that both the Courts erred in ordering eviction, since the premises were used by the petitioner for non-residential purposes, and were required by the respondent for residential purposes, and that the lower appellate Court erred in not referring to the affidavit filed by the former owner's husband stating that the premises were taken by the petitioner on rent only for non-residential purposes, and for making *appalams* and not for residential purposes at all. I cannot agree. The observations in the order of the trial Court already quoted, show that it was not the petitioner's case that he had taken the premises for non-residential purposes. The petitioner himself had only contended that he was using a portion of the premises for making *appalams* and not the entire premises. He had admitted that he and the members of his family were living in that house and sleeping even in the rooms where the *appalams* were made when they were not actually being made. So, the affidavit, filed in the lower appellate Court by the former owner's husband, who had absolutely nothing to lose by filing such an affidavit, was in flat contradiction to the petitioner's own contentions in his written statement and befre the trial Court and deserves no credence. I am therefore of

1. 1913 H.L. 545.
2. (1925) I.L.R. 3 Rang. 560 at 576 (F.B.).
3. A.I.R. 1943 Cal. 247.

opinion that the premises were only taken and used for "residential purposes" though a portion of the premises was undoubtedly used for making *appalams* when people were not sleeping there, and were used for sleeping purposes when *appalams* were not made. I consider that, in such cases, the primary purpose for which the building is let our or used should be the determining factor. A lawyer may use a room of his house for giving legal advice to his clients ; an astrologer may use a room of his house for giving predictions ; a barber may use a room of his house for shaving his clients ; but such use of a room will never make a house itself one used for "non-residential purposes." In this case, the difficulty has become greater because the rooms used for the making *appalams* were also used for sleeping by the members of the family all of whom were not proved to be engaged in the *appalam* industry. So, the analogy of a doctor and nurses sleeping in a clinic, cited by the learned Counsel for the petitioner, will not apply. The last contention was that the petitioner had not been served with a proper notice to quit, and, so should not be evicted till he is served with a proper notice and given sufficient time to quit, especially as he and his family will suffer hardship if turned out at once. I do not find this objection in the revision petition ; nor can I go into it here. The respondent however agrees to give a month's time from to-day to the petitioner to peacefully vacate the house.

All the contentions of the petitioner have failed. This petition deserves to be and is hereby dismissed, but without costs, as it seems to have been filed because the lower appellate Court did not refer at all to the affidavit filed by the previous owner's husband and give its finding regarding its value or otherwise, and the petitioner considered that affidavit to be clinching.

The petitioner must vacate the premises within a month from to-day, which time is given as a special act of grace with the consent of the respondent.

V.P.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Ramineedi Ramachandra Rao, minor by mother and guardian Tayaramma .. *Appellant**

v.

Sri Rajah Inuganti Rajagopala Venkata Narasimhanarayanam-garu and others .. *Respondents.*

Madras Estates Land Act (I of 1908), *section* 192 (5)—*Non-payment of admitted amount—Trial Court not passing order—Order by appellate Court regarding admitted rent—When can be passed—Other pleas of tenant whether can be agitated.*

Where the trial Court did not exercise its powers under section 192 (5) of the Madras Estates Land Act and the appellate Court dismissed the defendant tenant's appeal on the ground that the "admitted amount" was not paid by them, but it was not clear what exactly was the amount admittedly payable,

Held, that the appellate Court could exercise the powers under section 192 (5) only after going through the procedure prescribed by that section, namely after stating what the amount payable was and after giving an opportunity to the party to pay the same.

Held further, that section 192 (5) only takes away the right of the tenant to plead that the rent claimed was excessive and that the party was entitled to urge all other pleas open to him.

Appeal against the decree of the District Court, West Godavari at Eluru in A.S. No. 449 of 1944 preferred against the decree of the Court of the Revenue Divisional Officer, Kovur, in S.S. No. 60 of 1942.

M. S. Ramachandra Rao for Appellant.

C. A. Vaidialingam and *T. Venkatadri* for Respondents.

The Court delivered the following

JUDGMENT.—The main point urged before me by the learned Counsel for the appellant in this second appeal, the third defendant in the suit, was that the lower appellate Court was not entitled in law to dismiss the appeal with costs on the ground that he had not deposited "the admitted amount" in the trial Court.

* S. A. No. 295 of 1946. 3rd November, 1948.

He urged that the *trial Court* had not exercised its powers under section 192 (5) of the Madras Estates Land Act and refused to take cognizance of the appellant's plea that the rent claimed was in excess of the amount due, and that, therefore, the lower appellate Court had no power to exercise that power, and dismiss the appeal, without at least passing an order directing the appellant to pay into Court the amount so admitted to be due, or such reasonable portion of the amount which the Court might direct, as the section itself requires. I agree. Neither side is able to tell me now what was the rent admitted as due by this appellant, except that he admitted it to be Rs. 600 per year ; but, as he has claimed that the plaintiff was the "landholder" only for every alternative year, the defendants being landlords in the intervening years, and as he has also contended that some of the instalments of rent claimed in this suit have become barred by limitation, it is not clear what exactly was the amount of rent admitted by him to be due to the plaintiff landholder. It had to be worked out. The trial Court and the lower appellate Court did not mention the amount due, and did not work it out. Hence the inability of the Counsel on both sides to tell me at once what the admitted amount is.

It is also clear that, once the *trial Court* tries the suit on merits, taking also this plea of excess rent into consideration and discussion, and does not take the powers conferred on it by section 192 (5) for refusing to take cognizance of the plea regarding the excess rent, due to failure to deposit the admitted rent, *the appellate Court* can exercise that power only after going through the procedure prescribed by section 192 (5) of the Madras Estates Land Act. There is nothing unreasonable in this. It is only like giving reasons every time a judgment-debtor is ordered to be arrested and sent to a Civil jail, whether by the trial Court or by the appellate Court. It is not even enough if reasons are given once. They must at least be referred to again in unmistakable terms, and accepted once more, when ordering the arrest again. The lower appellate Court did not at all advert to this, and pass an order directing the appellant to deposit the admitted amount, naming it specifically, or such reasonable portion of it, as it may direct, within the time to be named by it. When a Court has got powers under the statute to reduce the amount to be deposited and may order the whole amount or a part of it to be deposited, it is obvious that it must pass an order stating the amount required to be deposited before enforcing the prescribed penalty.

Besides as pointed out by the learned Counsel for the appellant section 192 (5) only takes away the right of the appellant to raise *the plea that the rent claimed is excessive*, if he fails to deposit the amount directed to be deposited under section 192 (5) of the Estates Land Act. *All other pleas raised by him will be open to him*, and must be discussed, and findings given, before the suit or appeal can be dismissed. Such pleas, to name a few, are that he is not a tenant, that the amount due from him is barred by limitation, that he has paid all amounts due from him, that a statute has wiped out the whole or a portion of the amount due by him, etc.

In the end, therefore, I set aside the lower appellate Court's order of dismissal of the appeal, and remand the appeal to the lower appellate Court for fresh disposal in the light of the above observations, and after passing an order under section 192 (5) if it deems fit, naming the amount required to be deposited, and giving the appellant three months' time from the date of its order for such deposit. When disposing of the appeal, it will, of course, consider also the other pleas of the appellant and the alleged error in the trial Court's decree in giving a decree only in the name of the plaintiff and not in he name of defendants 1 and 2 also. In the circumstances, the costs of this second appeal will abide and be provided for by the lower appellate Court, when disposing of the appeal afresh.

Court-fee paid on the memorandum of this second appeal will be refunded.

B.V.V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO AND MR. JUSTICE MACK.

A.K. Gopalan .. *Petitioner**

v.

The District Magistrate, Malabar and another .. *Respondents.*

Criminal Procedure Code (V of 1898), *section* 491—*Nature of proceedings under—Difference of opinion among judges hearing application—Duty to formulate the point on which they differed in the reference to a third Judge—Letters Patent Clause* 36 *and not Criminal Procedure Code (V of* 1898), *section* 429, *applicable.*

The Judges who differ in their opinion in regard to an application under Section 491, Cr. P. C., should state in the reference to a third Judge the point upon which they differ as the proceedings under that section are governed when there is such a difference of opinion, by clause 36 of the Letters Patent and not by section 429, Criminal Procedure Code.

Madras Maintenance of Public Order Act (I of 1947), *section* 2 (1)—*Order of detention under—Jurisdiction to make—Foundation for—Ground on which detention will be proper under the Act—" Forthwith " in section* 2 (2) *—Meaning.*

Satyanarayana Rao, J., on difference of opinion between *Subba Rao, J.*, and *Mack, J.*

The very foundation of the exercise of jurisdiction under section 2 (1) (*a*) of the Madras Maintenance of Public Order Act is the " satisfaction " of the detaining authority that the person concerned is acting or is about to act in a manner prejudicial to public safety or the maintenance of public order and if there is such satisfaction, the authority concerned with the object of preventing the person from so acting could direct his detention. Where an order of a District Magistrate merely states that he was satisfied that a person's "detention was necessary for the maintenance of law and order and public safety " that is not the question on which according to the section he should be satisfied. A man's detention may be necessary for various reasons either because of his past conduct or because he is a man of bad character, but the Act does not justify the detention of the person and deprivation of his liberty under such circumstances. The only ground on which a detention can be justified under section 2 of the Act is that the detaining authority is satisfied that the person *is acting* or *is about to act* in a manner prejudicial to public safety, etc. This narrows down the scope of the material which can properly be considered as justifying an order under the section. It is not a mere technicality as *Mack, J.*, thought but it is an essential requirement of the section. Where the order of detention does not on the face of it disclose that the detaining authority had addressed himself to the only question to which he should have confined his attention, the order is illegal. All the past activities of the person should not be taken into consideration. The detaining authority is not entitled to go beyond the proximate past, as the reason for the order of detention is that the present activities of the person are such as to endanger public safety and should be immediately prevented.

The fact of detention along with the grounds for it should be communicated to the Government *forthwith*. The word " forthwith " means " immediately" and " without delay" and not " as soon as possible " as held by *Mack, J.*

If a person was in jail for a long time (as an under trial prisoner) and thus prevented from indulging in activities of any kind, it may be a matter for consideration whether there could be any material to justify an action under section 2 (1) of the Act. The fact that a man who is already in jail is about to be released may not by itself be a proper ground for making the order of detention, as it would savour of lack of *bona fides* on the part of the authority concerned.

Per *Subba Rao, J.*—The order communicated after 16 days cannot be said to have been communicated " forthwith " as required by section 2 (2) of Act 1 of 1947. It is not open to the officer concerned to say that he could not comply with the provision because of administrative convenience. The non-compliance with the mandatory provision of section 2 (2) must be deemed to have caused prejudice to the detenu.

Per *Mack, J.*—The word " forthwith " can reasonably mean nothing more than " as soon as possible " taking administrative exigencies into consideration.

Petitions under section 491, Criminal Procedure Code praying that in the circumstances stated in the affidavits filed therewith, the High Court will be pleased to issue directions in the nature of a *Habeas Corpus* for production before the High Court, Madras, the person of A.K. Gopalan, a detenu in the Central Jail at Coimbatore to be dealt with according to law and to direct that he be set at liberty.

The Court made the following order:—

Subba Rao, J.: Cr. M. P. No. 1309 of 1948.—This is an application under section 491, Criminal Procedure Code. The petitioner is A.K. Gopalan. He was the President of the Kerala Provincial Congress Committee in the year, 1935. Later on he became a Communist and took a prominent part in the Communist Organisatin. On the 17th December, 1947, he was arrested by the Tanaraseri Police and was charged under

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* Crl. M. P. Nos. 1309 and 1911 of 1948. 18th November, 1948.

section 117, Indian Penal Code, by the Stationary Sub-Magistrate, Cannanore, in P. R. C. No. 10 of 1947. It also appears that there were two other prosecutions pending against him in the Court of the Sub-Divisional Magistrate, Tellicherry, under section 506, Indian Penal Code. On 11th February, 1948, he was released on bail by the High Court subject to certain conditions. On 18th March, 1948, the conditions not having been complied with, the application for bail was dismissed. On 23rd April, 1948, he was detained by an order of the District Magistrate, Malabar, purporting to be under section 2 (1) (*a*) of the Madras Maintenance of Public Order Act, 1947 (Madras Act I of 1947) in the Vellore Central Jail. That order was dated 22nd April, 1948. On 11th May, 1948, on an application by the petitioner, the High Court enlarged him on bail. Though the Public Prosecutor appeared, it was not brought to the notice of the Court that the petitioner was detained under Madras Act I of 1947. Presumably, for the same reason the Crown might not have taken interest in opposing that application and did not even communicate that fact to the Public Prosecutor. Though the order of detention was passed on 22nd April, 1948, the District Magistrate of Malabar intimated to the Government the said fact only on 9th May, 1948, and the Government despatched the grounds for detention for service on the petitioner on 27th May, 1948, which was received on the next day, 28th May, 1948. Meanwhile, the petitioner, on 14th May, 1948, itself, sent an application under section 491, Criminal Procedure Code, to his Advocates for presenting the same in Court. That petition was received by the Government and was sent down to the Advocates after 25th May, 1948. The Ordinance to amend the Madras Act I of 1947, was issued on 25th May, 1948, whereunder the power of the High Court under section 491, Criminal Procedure Code, in regard to detenus under section 2 of Madras Act I of 1947 has been curtailed. The Government have not yet passed the final order under section 3, sub-section (5) of the Act. The petitioner filed the application under section 491, Criminal Procedure Code, for releasing him from the Vellore Central Jail and setting him at liberty on the ground that the order under which he was detained is illegal.

The law on the subject is very well settled; but in view of the general importance of the right which the section is intended to protect, it is as well that I state it briefly. *Habeas Corpus* is a high prerogative right and it is a great constitutional remedy for all manner of illegal confinement. In England, it has been described as the Magna Carta of British liberty. The liberty of the subject has always been considered a question of gravest importance in England and no person can be kept in illegal custody for a single minute. In India, especially after the attainment of independence, one cannot overstate its importance. Now, that we have attained freedom, it is the sacred duty of this Court to see that no citizen of this Province, whether he is rich or poor, whether he belongs to this or that political persuasion, is illegally detained for one minute. Of course, this is subject to the restrictions imposed on the personal liberty of the subject by the Legislature in its supreme wisdom having regard to emergent situations. But the Executive should not be allowed to overstep the boundaries fixed by the Legislature and must prove that the action is strictly within the spirit, and the letter of the law. No provision of the statute restricting the liberty of the citizen can be overlooked and no breach of any provision thereof can be condoned on the ground of administrative convenience or pressure of work. Madras Act I of 1947 is one of such Acts which admittedly restricts the individual liberty of the citizen in the interests of public welfare. The relevant sections of the Act read as follows :

"2 (1) The Provincial Government, if satisfied with respect to any particular person that he is acting or about to act in any manner prejudicial to the public safety or the maintenance of public order and with a view to preventing him, it is necessary so to do, may make an order :—

(*a*) directing that he be detained . . . . . .

(2) When any order is made under sub-section (1) by an officer or authority empowered under section 15, that officer or authority shall forthwith report the fact to the Provincial Government together with the grounds on which the order has been made and such other particulars as, in the opinion of such officer or authority, have a bearing on the necessity for or expediency of the order . . .

3 (1) Where an order in respect of any person is made by the Provincial Government under sub-section (1) of section 2 or where any such order is made by any officer or authority subordinate

to them, after receipt of the report specified in sub-section (2) of that section, the Provincial Government shall communicate to the person affected by the order, so far as such communication can be made without disclosing the facts which they consider it would be against the public interest to disclose, the grounds on which the order has been made against him and such other particulars as are in their opinion sufficient to enable him to make, if he wishes, a representation against the order; and such person may, within such time as may be specified by the Provincial Government, make a representation in writing to them against the order and it shall be the duty of the Provincial Government to inform such person of his right of making such representation and to afford him opportunity of doing so."

The other sub-sections to section 3 empower the constitution of Advisory Councils for scrutinising and reporting on the propriety of the detention in individual cases. It will therefore be seen that the Act itself provides safeguards against abuse of such unlimited power and also gives an opportunity to the detenu to make adequate and proper representations in time to prevent grave and unintended injustice to a particular individual.

In this case the order under section 2 (1) (*a*) of Madras Act I of 1947 was passed by Sri N. S. Arunachalam, District Magistrate, Malabar. The order is in the following terms:

"Whereas, I, N.S. Arunachalam, Esq., O.B.E., I.C.S., am satisfied that the detention of A. K. Gopalan is necessary for the maintenance of law and order and public safety.

I direct his detention under section 2 (1) (*a*) of the Madras Maintenance of Public Order Act, 1947, in the Vellore Central Jail.

Given under my hand and seal dated 22nd April, 1948.

(*Sd.*) N. S. ARUNACHALAM,
District Magistrate."

It is incumbent upon the District Magistrate to satisfy himself that the person to be detained is acting or is about to act in any manner prejudicial to public safety or the maintenance of public order. The order *ex facie* does not show that the District Magistrate satisfied himself that the petitioner was acting or was about to act in a manner prejudicial to public safety. Obviously, he could not satisfy himself on that ground as the petitioner was in custody at the time the order was passed. As aforesaid, he was an under-trial prisoner and his bail application was dismissed on 18th March, 1948. It is impossible for the District Magistrate to predicate at that point of time whether the petitioner would be released on bail or would be kept in remand till the criminal cases pending against him were disposed of. It was also not possible for the District Magistrate at that stage to anticipate the result of the criminal proceedings against the petitioner. It might be that the prisoner might be acquitted or it might be that he would be convicted in which case he would continue to be in jail till the expiry of the period for which he would be sentenced. Presumably, for the said reasons, the District Magistrate was not in a position to satisfy himself within the meaning of the section that the petitioner was acting or was about to act in any manner prejudicial to public safety and therefore, as stated in his order vaguely, that the order of detention was necessary for the maintenance of law and order and public safety. This order is not in strict compliance with the provisions of section 2 and therefore it cannot be deemed to be an order passed under that section.

The District Magistrate made another glaring mistake. Under sub-section (2) of section 2, the Magistrate shall forthwith report that fact to the Provincial Government together with the grounds on which the order has been made. It is admitted that it was only on 9th May, 1948, that the District Magistrate, Malabar, intimated to the Government the fact of the issue of the said order of detention. The delay is of sixteen days. The word 'forthwith' is clear and unambiguous and however it is interpreted, it would be doing violence to the language to hold that the order communicated after sixteen days could be said to have been communicated forthwith. The learned Public Prosecutor stated that the delay was due to pressure of work and was not intentional. When the statute with a purpose contains a mandatory provision directing an officer that he shall forthwith report the fact to the Government, it is not open to the officer concerned to say that he could not comply with the provisions because of administrative convenience. Such arguments, if

accepted, would be a great infringement on the liberty of a citizen and would be leaving him at the mercy of an officer who may communicate the order at his own leisure. The Government received the order on 9th May, 1948, and communicated the grounds for detention on the 27th May, 1948, *i.e.*, the petitioner was detained in prison for a period of five weeks without being informed why he was detained. The non-compliance of the provisions of sub-section 2 also must be deemed to have caused prejudice to the petitioner.

The learned Public Prosecutor relied on a decision of the Federal Court in *Basanta Chandra Ghose* v. *Emperor*[1]. The detenu in that case was arrested on 27th March, 1942, under an order dated 19th March, 1942, purporting to be made by the Governor of Bihar in exercise of the powers conferred by rule 26 of the Defence of India Rules. Though the application was filed on 28th April, 1943, it was not disposed of till February, 1944, and meanwhile Ordinance III of 1944 was promulgated on 15th January, 1944. On 3rd July, 1944, the Governor of Bihar passed two orders one cancelling the order of detention of 19th March, 1942, and the second directing the detention of the appellant on the ground that it was necessary so to do " with a view to preventing him from acting in a manner prejudicial to the maintenance of public order and efficient prosecution of the war." The learned Chief Justice held that when the earlier order of detention was held defective merely on formal grounds, there was nothing to preclude a proper order of detention being based on the pre-existing grounds themselves and that there was no force also in the contention that no order of detention could be passed against a person who was already under detention. The only point that was raised and decided in that case was that the detention though illegal under the previous order, was legal under the subsequent order passed by the Government and the fact that the order was passed when the petitioner was under detention pursuant to an illegal order did not preclude the Government from passing a legal order detaining the petitioner. This judgment is of no help in deciding the present case as the provisions which were under consideration in that decision are in no way analogous to the provisions of section 2 which I have got to construe in this case. Another decision relied on by the respondent is that of *Wanchoo, J.*, in *Mool Chand* v. *Rex*[2]. That case arose under U. P. Maintenance of Public Order (Temporary) Act IV of 1947. The provisions of that order are not *pari passu* with the provisions of Madras Act I of 1947. The only question raised and decided in that case was whether the action was *mala fide*. It was argued in that case that the executive authorities acted *mala fide* in detaining the petitioners under that Act when they found that there was no case against them under certain specific provisions of the penal law. The learned Judge after considering the various circumstances, negatived the contention that there was any *mala fides* on the part of the Government. That case also has no bearing on the question to be decided in this case. *Hirji Shivram Vyas* v. *Commissioner of Police*[3] has been cited before me. That case arose under Bombay Public Security Measures Act. The only question decided in that case was whether the Government acted *mala fide* in detaining the petitioner. On a consideration of the various circumstances, the learned Judge came to the conclusion that the Government's order was bad for want of *bona fides*. The observations of the Chief Justice in regard to the construction of the words ' is acting ' do not in any way support the respondent's contention.

The learned Counsel for the petitioner raised two more contentions (1) that the Government in this particular case acted *mala fide* and (2) that the order of the Government communicating the reasons under section 3 (1) of the Act, was not issued by or under the name of His Excellency the Governor. It is unnecessary to give any final decision on these two points as I have held that the order in question did not comply with the requirements of section 2 (1) which was the necessary foundation for its validity.

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1. (1945) 1 M.L.J. 365 : 1945 F.L.J. 40: 1945 F.C.R. 81.
2. 1948 A.L.J. 81.
3. (1948) 50 Bom.L.R. 210.

In the result and for the reasons stated above, I hold that the order of detention was bad and therefore I direct that the detenu A. K. Gopalan be set at liberty forthwith.

Crl. M. P. No. 1911 of 1948.—For the reasons mentioned in my judgment in Crl. M. P. No. 1309 of 1948, I allow this application.

Mack, J. : *Crl. M. P. No.* 1309 and 1911 of 1948.—I have had the advantage of perusing my learned brother's judgment, with which I am, with great regret, constrained to disagree, as the question involved is the liberty of a subject. The petitioner, A. K. Gopalan, in the applications under section 491, Criminal Procedure Code, was arrested under the ordinary law on 17th December, 1947, in connection with a public speech he made at Calicut on 5th December, 1947, containing, it is alleged, incitement to murder. He was charged under section 302, Indian Penal Code, read with section 117, Indian Penal Code, and is under trial for these serious offences. He was directed to be released on bail by the High Court in Crl. M. P. No. 193 of 1948 on 11th February, 1948, on substantial security on conditions that except on the days when he was being actually tried he should not be in Malabar District, and that if on other days he was found within this District he would forthwith be arrested. He was duly released but was re-arrested on the 6th March, for alleged breach of this condition. He then filed Crl. M. P. No. 460 of 1948 in the High Court again asking for bail. It was dismissed by the same learned Judge who dealt with the first bail application on representation by the Public Prosecutor that the petitioner came to Calicut in breach of his bond, was found giving instructions to his confederates when he was arrested and that he escaped from custody and had to be again arrested at the railway station. It was while he was on remand in the Cannanore Sub-Jail that the District Magistrate, Sri N. S. Arunachalam, on 22nd April, 1948, issued an order for his detention under section 2 (1) of the Madras Maintenance of Public Order Act basing it on the ground that he was "satisfied that the detention of A. K. Gopalan, is necessary for the maintenance of law and order and public safety." In pursuance of this order the petitioner was removed to the Central Jail, Vellore, as detenu No. 803. Unfortunately the District Magistrate did not despatch a copy of his detention order to the Government till the 9th May, though section 2 (2) requires him to do so 'forthwith.' On 31st May, 1948, Crl. M. P. No. 1309 was filed in this Court under section 491, Criminal Procedure Code, for his release supported by an affidavit from the petitioner in which he alleged that he handed over to the Superintendent of the Vellore Jail an affidavit on the 1st May, 1948, and a letter containing instructions to file a petition in the High Court for his release, but that the Jail Superintendent sent his letter to the Government of Madras. However this may be, an application for bail, Crl. M. P. No. 1014 of 1948, was filed in the High Court on 6th May, 1948, during the vacation, and his release on bail was directed on 11th May, 1948, with a slight relaxation of the conditions imposed originally that he should not be in Malabar District except in connection with his trial and on the day prior to it and subsequent to it only, *i.e.*, for an aggregate period of three days in all, and that he would be liable to be remanded if he contravened this direction on any occasion. There is nothing on record to show in Crl. M. P. No. 1014 of 1948, which we have called for and perused along with the bail applications presented to this Court that the learned Judge was aware that a detention order had been passed by the District Magistrate against the petitioner under section 2 (1) on 22nd April, 1948. Such an order can of course be legitimately passed on material available to the Provincial Government or the District Magistrate outside the narrow scope of the information or material laid before a criminal Court relevant only to a specific offence alleged to have been committed on which it can within the exercise of a rather limited discretion direct the release of an accused person on bail. There is nothing therefore inconsistent or in conflict between the bail order of the High Court directing the release of the petitioner on bail, and the order of detention issued by the District Magistrate which however so long as it is in force renders the bail order inoperative.

The petitioner has filed a second petition Crl. M. P. No. 1911 of 1948, from the Coimbatore Jail to which he has since been removed, accompanied by another affidavit asking for his release. I have considered both his affidavits in arriving to my decision. In his second affidavit he complains, *inter alia*, that as far as letters, interviews, and legal facilities are concerned, they are more limited than that of an ordinary prisoner, and that a detenu is not allowed to correspond with his friends.

Mr. Pillai has sought to bring the case of the petitioner within categories 3 and 4 of the Full Bench decision (since reported in (1949) 1 M.L.J. 1). It will be remembered that the Madras Maintenance of Public Order Act, 1947, was held by the Full Bench of our Court to be *intra vires* despite section 16 which laid down that:

"No order made in exercise of any power conferred by or under this Act . . . . shall be called in question in any Court."

Section 16-A, a subsequent amendment, which sought to oust even the powers of this Court altogether under *Habeas Corpus* applications under section 491, Criminal Procedure Code was held to be superfluous and has, subsequent to the Full Bench decision, been repealed. The Full Bench has held following the most recent English case law on the interpretation of a similar Public Safety and Order Act that the High Court has a residuum of power and jurisdiction to interfere and set at liberty a person detained under section 2, if his case can be brought within one of four categories only:

"(1) when the order is not duly authenticated, as for example, when it is passed by an officer or authority not empowered under section 15 of the Act;

(2) when the person detained in pursuance of the order is not the person intended to be detained, that is to say, when there is a mistake of identity;

(3) when there is a lack of *bona fides*; and

(4) when it is established that the essential requirement of section 2, namely, the satisfaction of the Provincial Government or an officer or other authority empowered under section 15 with respect to the particular person that he is acting or about to act in any manner prejudicial to the public safety or the maintenance of public order and with a view to preventing him it is necessary to direct him to be detained or otherwise dealt with under section 2 (1) of the Act, is not present. If it is established that neither the Provincial Government nor the officer or other authority empowered under section 15 has exercised its or his mind on the material placed before it or him, than an order of detention, though purporting to be passed under section 2 (2) must be deemed to be not an order under section 2."

It appears to be clear to me that, on the basis of this decision by which I am bound, a mere breach of a directive provision, even a mandatory provision, will not *per se* be a valid ground for setting aside a detention order, though such a breach, if proved, will of course be perfectly relevant as helping to show that the order of detention lacked *bona fides* under the third category.

The most important contention of Mr. Pillai, which my learned brother has allowed, is that the District Magistrate's order of detention is not in strict compliance with section 2 (1) that it cannot be deemed to be an order passed under that section and presumably that the petitioner's case will therefore fall under the fourth category. Under section 2 (1) the Provincial Government or the District Magistrate on whom the powers of detention have been conferred under section 15 has to be satisfied that the person in question 'is acting or about to act in a manner prejudicial to the public safety or the maintenance of public order' and 'with a view to preventing him may order his detention.' The contention is that as the petitioner was in custody in a jail on the date of the detention order, 22nd April, 1948, and had been there for some weeks, the District Magistrate could not have been in a position to satisfy himself that he was acting or about to act in a prejudicial manner. The argument boils down to this that under section 2 a detention order cannot legally be issued against a person if he is already in jail, whether on remand on a specific offence with which he is charged or while remanded to custody under section 151, Criminal Procedure Code. In Crl. M. Ps. Nos. 1090 and 1091 of 1948, a Bench consisting of Govinda Menon, J., and myself dismissed two similar petitions by two persons, Somasekharachari and K. Poornachandra Rao, against whom detention orders were passed *after* their arrest under the ordinary law. In their cases charge sheets were laid under section 110 (*e*) and (*f*), and the Sub-

Divisional Magistrate had no option but to direct their release on bail if sureties were forthcoming. Those cases were sought to be brought by the learned advocate only under the third category on the ground that the detention orders were vitiated by a lack of *bona fides*. The position that the orders were not in compliance with section 2 (1) and therefore fell into the fourth category was not pressed and argued before that Bench. It would however follow that if I accept the present contention and agree with my learned brother, then those detentions which we held to be legal would also fall into the fourth category.

The important portion of the fourth category in the Full Bench decision is as it appears to me its amplification in the second part, *viz.* :

"If it is established that neither the Provincial Government nor the officer or other authority empowered under section 15 has exercised its or his mind on the material placed before it or him."

I do not think a technical violation of section 2 (1) in not reproducing its exact words in the detention order will by itself bring this case into this exceptional category. The substance not the form of section 2 (1) has, I think, to be shown to be violated. It is quite clear in my opinion that the mind of the District Magistrate primarily responsible for law and order within his district was very greatly exercised over the activities of the petitioner and particularly at the possibility of his being released on bail, and that he issued the detention order as a precautionary measure to ensure detention which as he said in his order he considered 'necessary for the maintenance of law and order and public safety.' This is substantially tantamount to satisfaction that he will act in a manner prejudicial to the public safety if released. The wording of section 2 (1) is unhappy and in a sense difficult to apply literally to a person actually in jail at the time the order of detention is passed. But there may be cases in which although in an ordinary jail, a person may be actually acting or about to act in a manner prejudicial to public safety apprehensions of which may fully justify his removal as a detenu to another jail there to be more closely watched. Technicality may be met by technicality by an argument that even the attempt by the petitioner to obtain his release on bail, which he was of course entitled to strive for, may itself in special circumstances on information at the disposal of the detaining authority be itself regarded as an act though *per se* lawful nonetheless prejudicial to public safety, if they are satisfied that he will misuse his liberty by inciting people to acts of violence. Section 2 does not stipulate that the act prejudicial to public "safety" should itself be unlawful.

A serious obstacle to my mind to the acceptance of the contention that an order under section 2 cannot be legally issued against a person while he is actually in jail is that, if upheld, it will place a person who has given cause for his arrest by alleged acts in breach of existing ordinary law in a far more favourable position in the matter of detention orders under this Act than the person who has given no such cause for arrest, his own misdeeds as it were protecting him from a detention order under the Act. I do not think this is what the Legislature intended when it enacted section 2. I am unable to see that the issue of a detention order against a person already in jail in some other connection is *per se* illegal according to the wording of section 2 (1) as it stands.

Let me now examine the grounds on which the petitioner's detention was ordered. They are contained in a Government of Madras Public Memo, dated 25th May, 1948, signed by the Chief Secretary. According to it the petitioner became the President of the Kerala Congress Committee in 1935, resigned later and concentrated on the labour movement and began to propogate Communism in several Districts. He was bound over under section 109, Criminal Procedure Code and was in prison for 9 months. He was in 1940 sentenced to a term of imprisonment in absentia by the High Court for failure to appear in Court in connection with another criminal charge. He was arrested on 28th February, 1941, but escaped from the Vellore Central Jail on 24th September, 1941. Appearing at a public meeting in connection with a rally day of the Communist party on 11th November, 1941, he was again arrested. After his release he is said to have started a campaign of vilification of the authorities and incitation of the masses

to violence. An interim bond under section 112, Criminal Procedure Code, was taken from him when he contested an election on the Communist ticket for the Calicut General Constituency. Later he was proceeded against under sections 107, Criminal Procedure Code and 506, Indian Penal Code, though the grounds do not say whether successfully or not. He is said to have visited Ceylon and collected Rs. 8,000 for Communist Party Funds. He was arrested on 23rd January, 1947, under the Public Safety Ordinance but released on 2nd October, 1947. In his second affidavit in support of Crl. M. P. No. 1911 of 1948, which he filed from the Central Jail, Coimbatore, he complains that though the Government first mentioned his name in the list of persons to be released in the General Amnesty on Independence Day he was not released, and after some vain representations to the Government he went on hunger strike for 11 days and was then released conditionally on 1st October, 1947. The grounds then detail his activities after his release, many of which appear to be perfectly legitimate criticism of Government Policy, of high placed Ministers of the Government of India, denunciation of black-marketing and so on. But mingled with all this—and what constitutes the real gravamen of the indictment is his alleged continuous incitation of the masses to violence which led to his arrest on a charge of incitement to murder. In his affidavits in which there is in favour of the petitioner no attempt to conceal incidents in his record he says also that two further charges under section 506, Indian Penal Code are pending against him. A most serious allegation in the grounds is that the Communist Party which he leads in Malabar District is now indulging in violence and subversive activities, that most of the important members of the Party have gone underground with every prospect of the petitioner doing likewise and from there were guiding various grave crimes such as arson, looting and murder, being committed by Communists. I can only consider these serious indictments at their face value on the presumption that they are made with a sense of responsibility by those on whom there rests the heavy burden of maintaining law and order in these difficult times.

There is another important factor for which a Court has to allow under this statute held to be *intra vires*, that the Government is entitled under section 3 (1) to withhold grounds within their exclusive knowledge which they consider it would be against the public interest to disclose. Apprehensions that the petitioner was preparing to go underground and direct subversive activities on adequate grounds, apart from anything else justify a detention order under section 2, although the petitioner was in Jail when the order was passed.

In view of the petitioner's past history and his activities set out in the grounds and in his own affidavits, it is not possible for me to hold that the District Magistrate did not exercise *his mind on the material placed before him* when as a *precautionary measure he issued the detention order* on the lines he did. As I said before and for these further additional reasons I am unable to find that merely because the District Magistrate's order did not reproduce *the exact words of section 2 his detention order is liable to be set aside* as being no order at all under this section and as coming within the fourth category of the Full Bench decision.[1]

The second ground which weighed with my learned brother is the failure of the District Magistrate to send a copy of the detention order dated 22nd April, 1948, forthwith to the Government as required by section 2 (2) of the Act. He despatched the order on 9th May, 1948, after 17 days, the delay being explained by the learned Public Prosecutor as due to administrative strain consequent on Communist disturbances. The main reason for this direction to District Magistrates in the statute is that a person arrested on a detention order should be given as early an opportunity as practicable of making his representations against the order. As the petitioner was in jail throughout this period and was not arrested on the basis of the detention order the delay has not prejudiced the petitioner very much. There are several mandatory directions in the Act. A breach of any of them *per se* cannot

1. (1949) 1 M.L.J. 1 (F.B.).

come within any of the four categories and make a detention order liable to be set aside. Such breaches can however in my view be used as relevant material to establish lack of *bona fides* and bring a case under the third category. The delay may indeed reflect and be due to the great strain imposed on the Collector and his district administration and the word " forthwith " can reasonably mean nothing more than " as soon as possible " taking administrative exigencies into consideration.

As regards lack of *bona fides* alleged I am unable to find any material to show that there was any political animosity underlying the order on the part of the Government in power against a prominent member of an opposing party. There is, on the other hand cogent material and every indication that it was passed perfectly *bona fide* by the District Magistrate in discharge of his onerous responsibilities of maintaining law and order and of protecting the freedom and liberty of the inhabitants of his district which in his considered opinion had become gravely endangered by subversive activities which were taking a very violent turn. I entirely agree with my learned brother that a statute like this depriving a subject of his liberty should be strictly construed. But as I read the grounds of detention a wider liberty and a wider freedom are likely to be gravely threatened if liberty is accorded to an individual likely to abuse it by inciting people to violence by arson, loot and murder. In such a case I think there should be a more liberal construction of the statute in favour of the wider freedom likely to be imperilled, that under which we, Judges, administer justice without any interference whatsoever from executive authority, under which Mr. Pillai is entitled and enabled to argue before us for hours if not days together with leisurely and seductive ability on the liberty of the subject and under which we, Judges, are entitled to a free expression of our opinion in a case before us even in disagreement with each other, one of the great privileges of a free democracy. I am not therefore inclined in this case to *place too strict a construction in favour of the individual, when these liberties come into conflict.*

A technical point has been raised by Mr. Pillai, *viz.*, that the Government Memorandum containing the grounds of detention should have been signed by the Government and not by the Chief Secretary. Mr. Pillai raised the same point in Crl. M. P. No. 102 of 1948, before a bench consisting of Govinda Menon, J., and myself. As Mr. Pillai seeks an independent finding here, I shall merely incorporate the relevant portion of the judgment delivered by Govinda Menon, J., in that petition :

" According to section 59 (1) of the Constitution Act, all executive actions of the Government of the Province shall be expressed to be taken in the name of His Excellency the Governor and since on the face of the order of the Government it does not appear that the action was taken in the name of His Excellency the Governor, learned counsel strenuously contends that the order of detention does not conform to the Act. Even if this is a defect, we are of opinion that it is only one of form and not of substance. In *Gas Plant Manufacturing Co., Ltd.* v. *Emperor*[1], the Federal Court has decided that where instead of the words " Governor-General in Council " a particular order referred to the Central Government, the contention that the order was invalid has to be rejected. The learned Public Prosecutor also invited our attention to sub-section 2 of section 59 of the Constitution Act which states that orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in the rules to be made by the Governor and the validity of an order or instrument which is so authenticated shall not be called into question on the ground that it is not an order or instrument made or executed by the Governor. He also informs us that there are rules made under this sub-section empowering the Chief Secretary to issue the order on behalf of the Governor. We are not inclined to accept the contention of the learned counsel for the petitioner that the Government order dated 8th April, 1948, was not issued by order of His Excellency the Governor as contemplated in section 59 (1) of the Constitution Act. This contention has therefore no force."

For these reasons I find that the petitioner's case cannot be brought within either category No. 3 or category No. 4 of the Full Bench decision[2] and these petitions should be dismissed.

Subba Rao, J.—As my learned brother differed from me, this matter will be placed before the Chief Justice for orders as to posting before a third judge.

1. (1947) 2 M.L.J. 402 : 1947 F.L.J. 71 (F.C.). 2. (1949) 1 M.L.J. 1 (F.B.).

The petitions came on for hearing before Satyanarayana Rao, J.

A. K. Pillai for *Messrs. Row and Reddy* for Petitioner.

The Advocate-General (*K. Rajah Aiyar*) for the Public Prosecutor on behalf of the Crown.

The Court (*Satyanarayana Rao, J.*) expressed the following

OPINION*.—These applications have been placed before me by an order of the Chief Justice as there was a difference of opinion between Subba Rao, J. and Mack, J., when they were heard by them in the first instance. At the outset it is to be observed that the learned Judges who differed in their opinion should have stated the point upon which they differed as the proceedings under section 491, Criminal Procedure Code, are governed when there is a difference of opinion by clause 36 of the Letters Patent and not by section 429, Criminal Procedure Code. The jurisdiction exercised by the High Court under section 491, Criminal Procedure Code, is not an appellate jurisdiction and therefore section 429 of the Code does not apply. The proceedings are analogous to the proceedings under section 195 of the Code before it was amended in 1923. A Full Bench of our Court decided that the power conferred upon the High Court by section 195 (6) of the Criminal Procedure Code before the amendment in 1923 is not a part of appellate or revisional jurisdiction of this Court conferred by Chapters 31 and 32 of the Code of Criminal Procedure.

"It is a special power conferred by section 195 (6). It follows therefore that when the Judges are equally divided, the case is governed by section 36 of the Letters Patent and not by section 429 or section 439 of the Code of Criminal Procedure."

The learned Judges therefore ought to have formulated the point on which they differed. The learned counsel appearing for the petitioner and the learned Advocate-General appearing for the respondent have, however, agreed that the question dealt with in the judgment of Subba Rao, J., may be taken as the point on which the learned Judges differed. In order to obviate the necessity of a further reference back I have accepted this suggestion.

The facts of the case have been fully set out in the judgment of Subba Rao, J. It is therefore unnecessary for me to repeat the facts *in extenso* in this judgment. In both the applications, the petitioner is the same and the relief sought is also the same. The District Magistrate of Malabar passed an order, dated the 22nd April, 1948, directing the detention of the applicant under section 2 (1) (*a*) of the Madras Maintenance of Public Order Act, 1947 (Madras Act I of 1947). The order was served on the petitioner on the 23rd of April, 1948. At the time of the passing of the order, the petitioner was in jail as an under-trial prisoner. He was in jail from 17th of December, 1947, as an under-trial prisoner till now except for a break between the 11th of February, 1948 and the 6th of March, 1948, when he was released on bail. On 6th May, 1948, this Court in Crl. M. P. No. 1014 of 1948 directed the release of the petitioner on bail and when that order was passed this Court was not aware of the fact that there was a detention order already passed by the District Magistrate under the Madras Maintenance of Public Order Act, section 2 (1) (*a*).

These petitions were filed by the detenu questioning the legality of the order of the District Magistrate on various grounds. Subba Rao, J., was of the opinion that the order of detention was *ex facie* bad and that the petitioner should be released forthwith. Mack, J., was of the opinion that the petition should be dismissed as in the learned Judge's opinion the order of detention was legal.

A Full Bench of this Court[1] recently examined the provisions of the Madras Maintenance of Public Order Act and the provisions of the subsequent Ordinance II of 1948 amending the Act promulgated by the Government of Madras, and laid down the limits of the jurisdiction of this Court to interfere and set at

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* 17th November, 1948.

1. Since reported in (1949) 1 M.L.J. 1 (F.B.).

liberty under section 491 of the Criminal Procedure Code a person detained under section 2 of the Act. The residuum of power and jurisdiction of this Court to interfere is classified under four categories by the learned Chief Justice. These have been set out also in the judgment of Mack, J. The petitioner therefore must bring the order of the District Magistrate within one or more of the categories in the judgment of the Full Bench and his attempt is to bring it under categories (*c*) and (*d*).

The order of the District Magistrate, Malabar, dated 22nd April, 1948, is as follows :

"Whereas I, N. S. Arunachalam, Esq., O.B.E., I.C.S., am satisfied that the detention of A. K. Gopalan is necessary for the maintenance of the law and order and public safety.

I direct his detention under section 2 (1) (*a*) of the Madras Maintenance of Public Order Act, 1947, in the Vellore Central Jail.

Given under my hand and seal, dated 22nd April, 1948.

(*Sd.*) N. S. ARUNACHALAM, *District Magistrate.*"

In my opinion this order is bad on its face and falls within the fourth category which reads as follows :

"(*d*) when it is established that the essential requirement of section 2, namely, the satisfaction of the Provincial Government or an officer or other authority empowered under section 15 with respect to the particular person that he is acting or about to act in any manner prejudicial to the public safety or the maintenance of public order and with a view to preventing him it is necessary to direct him to be detained or otherwise dealt with under section 2 (1) of the Act, is not present. If it is established that neither the Provincial Government nor the officer or other authority empowered under section 15 has exercised its or his mind on the material placed before it or him, then an order of detention, though purporting to be passed under section 2 (2) must be deemed to be not an order under section 2."

As laid down by the Full Bench[1] it is not open to this Court to consider the reasonableness of the material on which an order of detention was made, nor canvass the grounds of the order when they are given, and see whether the grounds so given in the opinion of this Court justify the order. The very foundation of the exercise of jurisdiction under section 2 (1) (*a*) of the Act is the "satisfaction" of the detaining authority that the person concerned is acting or is about to act in a manner prejudicial to public safety or the maintenance of public order and if there is such satisfaction, the authority concerned with the object of preventing the person from so acting could direct his detention. This is treated by the Full Bench, as is clear from the passage already quoted, as an essential requirement of section 2. If this requirement is lacking, the order of detention is without jurisdiction and the detention is illegal. The order of the District Magistrate does not disclose that he had addressed himself to the only question on which he should be satisfied, because his order merely states that he was satisfied that "the detention was necessary for the maintenance of law and order and public safety." That is not the question on which according to the section he should be satisfied. A man's detention may be necessary for various reasons either because of his past conduct or because he is a man of bad character, but the Act does not justify the detention of the person and deprivation of his liberty under such circumstances. The only ground on which a detention can be justified under section 2 is that the detaining authority is satisfied that the person is acting or is about to act in a manner prejudicial to public safety, etc. This narrows down the scope of the material which can properly be considered as justifying an order under the section. It is not a mere technicality as Mack, J., has thought, but it is an essential requirement of the section. The authority according to the section and according to the interpretation placed upon it is not bound to give the reasons for his "satisfaction" in the order of detention, nor is he bound to disclose the material on which his "satisfaction" is based. The "satisfaction" is a subjective state of mind and can be known only by what is recited in the order. The essence of the matter is that by reason of the person's present activities and by reason of the threatened acts there is justification for depriving him of his liberty as the activities are such as are prejudicial to public

1. Since reported in (1949) 1 M.L.J. 1 (F.B.).

safety and the maintenance of public order and that they should be curbed and the person prevented from continuing or launching on such activities. As the order does not disclose on the face of it that the District Magistrate, the detaining authority, had addressed himself to the only question to which he should have confined his attention, the order is illegal.

Mack, J., observes in justification of the order of the District Magistrate,

> " It is quite clear, in my opinion, that the mind of the District Magistrate primarily responsible for law and order within his district was very greatly exercised over the activities of the petitioner and particularly at the possibility of his being released on bail, and that he issued the detention order as precautionary measure to ensure his detention which as he said in his order he considered ' necessary ' for the maintenance of law and order and public safety."

With respect to the learned Judge I am of opinion that these considerations are entirely foreign and should not enter into consideration when passing an order under section 2 (1) (*a*) of the Act. It is not the entire field of his activities that is open for consideration under section 2 (1). The language used is acting or about to act." To what extent it is permissible in view of this language to take into consideration the past activities of the person concerned is a question difficult to decide, but it does not arise for consideration in the present case. It would seem however that a limit should be drawn and that *all* the past activities of the person should not be taken into consideration in making the order. The detaining authority is not entitled, in my opinion, to go beyond the proximate past as the reason for the order of detention is that the present activities of the person are such as to endanger public safety and should be immediately prevented. The object of the section is prevention and not punishment. The fact that a man who is already in jail is about to be released may not by itself be a proper ground for making the order as it would savour of lack of *bona fides* on the part of the authority concerned. The complaint of the petitioner is not that the District Magistrate did not reproduce the exact words of section 2 in his order, but that the District Magistrate failed to consider the only question which is relevant for making an order of detention under the section. The section requires that the authority concerned should exercise its reasoning powers on the material placed before it in order to reach a satisfaction on the question whether the activities of the person concerned are such that his liberty should be restrained in the interests of public safety. The order under section 2 (1) should be the result of the exercise of the reasoning faculties of the authority and not merely of the mechanical reproduction of the words in the section.

Subba Rao, J., was of opinion that as the District Magistrate did not report the fact of detention to the Provincial Government together with the grounds on which the order was made till after seventeen days and not immediately as required by section 2 (2), the petitioner was also prejudiced. It may be so, but I doubt very much whether if the original order of detention is valid, the fact of detention along with the grounds was not communicated to the Provincial Government immediately would by itself make the original order of detention, illegal. It is however unnecessary for me to consider this aspect, as I am satisfied that the order of detention is on the face of it illegal. I may, however, observe that the word " forthwith " means " immediately " and " without delay " and not " as soon as possible," as Mack, J., held. The reason why the fact of detention along with the grounds should be communicated forthwith, it seems to me, is to ensure that the authority before making the order had material before him, considered the *pros and cons* of the question and made up his mind to pass an order of detention. If the reasoning should precede the order of detention there is no necessity for delaying the recording of these reasons. It is a kind of guarantee that the authority had all the material before him when passing the order and not that he made the order first and was trying to justify his order by material and reasons discovered later. It may be a question for consideration in cases where the fact of detention along with the grounds were not communicated immediately whether really the detaining authority had the material before it at the time the order was made. If a person was in jail for

a long time as in this case and thus was prevented from indulging in activities of any kind, it may be a matter for consideration whether there could be any material to justify an action under section 2 (1). Both the learned Judges have considered this question also and differed in their opinion. In the view I have taken it is not necessary for me to go into these questions in the present case.

I am satisfied that the order of detention in the present case is bad on the face of it and that as the essential requirement of section 2, namely, the satisfaction of the Magistrate that the petitioner is acting or about to act in any manner prejudicial to the public safety or the maintenance of public order is lacking in the present case, the order of detention is illegal, and I agree with Subba Rao, J., that the petitions should be allowed and that the detenu, A. K. Gopalan, should be set at liberty forthwith.

When the petitions came on for final orders under section 378 of the Code of Criminal Procedure before the Bench, the judgment of the Court was delivered by

*Subba Rao, J.**—Pursuant to the opinion expressed by Satyanarayana Rao, J., we direct that the detenu A. K. Gopalan be set at liberty forthwith.

K.S. *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO AND MR. JUSTICE MACK.

M. R. Venkataraman .. *Petitioner*†

v.

The Commissioner of Police, Madras and another .. *Respondents.*

Madras Maintenance of Public Order (Act I of 1947), sections 2 (1), (2) and 3 (1)—Scope—Order for detention valid at its inception—If becomes invalid by reason of non-compliance of authorities with requirements of section 2 (2) or 3 (1)—Grounds of detention—Antecedent conduct of detenu—If can be taken note of.

An order for detention of the petitioner was made by the Commissioner of Police who was duly authorised by the Provincial Government on 1st April, 1948. The Commissioner of Police communicated the said order to the Government under section 2 (2) of Act I of 1947 on 9th June, 1948. On the 11th September, 1948, the Government served the grounds of detention on the petitioner who was arrested on 17th August, 1948. In an application for the issue of a writ of *Habeas Corpus* it was contended *inter alia* that though the order for detention was valid when passed, it became invalid in view of the non-compliance with the provisions of sections 2 (2) and 3 (1) of Act I of 1947 and therefore the detention was illegal.

Held : (1) the order was in strict compliance with the provisions of section 2 (1) of the Act and therefore valid. (2) Assuming that in view of the enormous delay in communicating the order to the Government by the Commissioner of Police, the provisions of sections 2 (2) and 3 (1) of the Act have not been complied with, it will not have the effect of invalidating an order, that had been validly passed. Sections 2 (2) and 3 (1) were designed to provide a machinery for the person against whom the order has been passed to seek redress as early as possible. If a statutory authority did not comply with the provisions of section 2 or 3, there may be other remedies open to the aggrieved party, but the non-compliance with the provisions prescribing a procedure to get redress by the aggrieved party against whom an order has been passed under section 2 (1) cannot in law invalidate an order validly passed under section 2 (1). In any view as the order had been communicated to the Government and the grounds of detention were duly served on the petitioner the detention cannot be held to be invalid.

It cannot be said that in no circumstances the antecedent conduct of a detenu could be taken note of by the concerned authority to satisfy himself whether the person ordered to be detained is acting or is about to act in a manner prejudicial to public safety. The antecedent conduct would certainly afford data or furnish reasonable grounds in finding out the present attitude of the person concerned.

Petition under section 491, Criminal Procedure Code, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue directions in the nature of a *Habeas Corpus* that the petitioner be brought before this Hon'ble Court to be dealt with according to law and be set at liberty forthwith.

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* 18th November, 1948.

† Crl.M.P. No. 1910 of 1948. 27th October, 1948.

A. K. Pillai for *Messrs. Row and Reddi* for Petitioner.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the Crown.

The Order of the Court was pronounced by

Subba Rao, J.—This is an application under section 491, Criminal Procedure Code. The petitioner is an advocate of this Court. On the 1st April, 1948, the Commissioner of Police passed an order of detention under section 2 (1) (*a*) of the Madras Maintenance of Public Order Act (Act I of 1947). He was duly authorised by the Provincial Government to exercise its powers under section 2 (1) of the said Act. In the detention order it is stated that the petitioner is acting in a manner prejudicial to the maintenance of public order and that with a view to preventing him from so doing, it is necessary to detain him. The Commissioner of Police communicated the said order to the Government under section 2 (2) on the 9th June, 1948. On the 11th September, 1948, the Government served the grounds of detention on the petitioner. Though the order of detention was passed on 1st April, 1948, the petitioner was arrested only on 17th August, 1948, as presumably his whereabouts were not known till that date.

Mr. A. K. Pillai, learned counsel for the petitioner, raised before us the following four points: (1) that the order of the Commissioner dated 1st April, 1948, was invalid; (2) that though the order was valid when passed, it became invalid in view of the non-compliance with some of the mandatory provisions of the statute; (3) that though the detention in its origin was valid the detention of the petitioner subsequent to the contravention of the mandatory provisions of the statute was illegal; and (4) that the Government in detaining the petitioner was actuated by *mala fides*.

There is no force in the learned counsel's first argument. Section 2 (1) reads as follows:

"The Provincial Government, if satisfied with respect to any particular person that he is acting or about to act in any manner prejudicial to the public safety or the maintenance of public order and with a view to preventing him, it is necessary so to do, may make an order :—

(*a*) directing that he be detained. . . . ."

As aforesaid this power of the Government was delegated to the Commissioner under section 15 of the Act. The Commissioner states in the detention order in clear terms that the petitioner is acting in a manner prejudicial to the maintenance of public order and that with a view to preventing him from so doing it is necessary to detain him. The order is in strict compliance with the provisions of section 2 (1) and is therefore clearly valid.

There are no merits in the second point either. If the order was valid at its inception, we cannot see how it would become invalid by the subsequent non-compliance with the other provisions of the Act. The argument was that the order passed under section 2 (1) was not complete till it was communicated to the Government in strict compliance with the provisions of section 2 (2). By sub-section (2) when any order is made under sub-section (1) by an officer or authority empowered under section 15, that officer or authority shall forthwith report the fact to the Provincial Government together with the grounds on which the order has been made and such other particulars as, in the opinion of such officer or authority, have a bearing on the necessity for or expediency of the order. Though the order of detention was passed on 1st April, 1948, the Commissioner communicated the same to the Government on 9th June, 1948, *i.e.*, after ten weeks. In Crl. M. P. No. 1309 of 1948[1] we differed on the interpretation of the word 'forthwith' in the said section. Assuming that in view of this enormous delay, it must be held that the provisions of the section have not been strictly complied with, would it have the effect of invalidating an order that had been validly passed. We think not. Once an order had been

1. Since reported in (1949) 1 M.L.J. 78.

passed in strict compliance with the provisions of section 2 (1), it was validly passed. Sections 2 (2) and 3 (1) were designed to provide a machinery for the person against whom the order has been passed to seek redress as early as possible. If a statutory authority did not comply with the provisions of section 2 or section 3, there may be other remedies open to the aggrieved party. But in our view, the non-compliance with the provisions prescribing a procedure to get redress by the aggrieved party against whom an order has been passed under section 2 (1) cannot in law invalidate an order validly passed under section 2 (1). In support of his argument, Mr. Pillai cited the decisions in *Ramdhir Rai* v. *Emperor*[1] and *Abdul Jabbar* v. *Emperor*[2]. In our view those decisions have no bearing on the question to be decided in this case.

We do not also agree with the third contention of the learned counsel for the petitioner. The argument of Mr. Pillai was that assuming the order passed under section 2 (1) was valid at its inception and continued to be so, the further detention after the violation of the provisions of section 2 (2) was illegal. This argument ignores the distinction between the order of detention and the procedure prescribed for enabling the aggrieved party to seek redress. The petitioner, as we found, was legally detained under section 2 (1) of Madras Act I of 1947. Under section 4 of the Act this order of detention shall be in force for six months from the date on which it is confirmed or modified under sub-section (5) of section 3. If the authority concerned did not carry out his statutory duties, the petitioner could have taken the appropriate remedy to compel him to perform his duty. He may have other remedies if he was prejudiced by the breach of a statutory duty by the authority concerned. But in our view the non-compliance with the provisions of sub-section (2) to section 2 could not make the detention illegal. In any view as the order was communicated to the Government and the grounds for detention were duly served on the petitioner, it would be impossible to hold that the detention of the petitioner at present is invalid.

We cannot also accept the learned counsel's last argument. Paragraph 16 of the petition puts the petitioner's case briefly :

> " I submit that my detention is *mala fide* actuated by feelings of political animosity and made solely with the political intent of stifling the voice of all democratic opposition. I am kept in detention only because I fearlessly campaign for the common people. This is not liked by the vested interests and the Ministry which is theirs."

This idea is elaborated in greater detail in the other paragraphs of the petition. The learned counsel argued that we should infer *mala fides* from the long delay in communicating the order of detention to the Government. *Mala fides* is a state of mind. If a person is detained and with a view to prevent him from taking steps to get redress from the Government, if the appropriate authority intentionally delays the communication of the said order to the Government, it is possible to infer or attribute *mala fides* to the authority concerned. But in this case there is one important fact which negatives any such intention on the part of the Commissioner. The order of detention was passed on 1st April, 1948, and it was communicated on 9th June, 1948. But the petitioner was arrested on 17th August, 1948. On these facts it is impossible to attribute *mala fides* to the Commissioner as his order was communicated long before the petitioner was arrested.

It was further contended by Mr. Pillai that the grounds served upon his client could not sustain an order under section 2 (1) and therefore we must attribute *mala fides* to the Government. He argued that except the last ground all the other previous grounds related to his client's antecedents which are not permissible grounds for passing an order under section 2 (1) of the Act. The last ground according to him does not support the statement made by the Commissioner that the petitioner is acting in a manner prejudicial to the maintenance of public order. If we accept this argument we would in effect be ignoring the recent Full Bench decision[3]. The Commissioner

1. (1913) 21 I.C. 162.
2. A.I.R. 1935 Cal. 251.
3. Since reported in (1947) 1 M.L.J. 1 (F.B.).

on the material before him was satisfied that the petitioner was acting in a manner prejudicial to public safety. Under sub-section (2) to section 2 he reported to the Provincial Government the said order with the grounds on which it has been made and other particulars. Under sub-section (3) the Government communicated the grounds to the petitioner. It will be seen that under section 3, the Government is not bound to disclose to the petitioner all the material that was placed before them. It is therefore not possible for the Court to see the entire material on which the Commissioner was satisfied that the petitioner was acting in a manner prejudicial to public safety. Even the grounds communicated to the petitioner disclose material on which the Commissioner could reasonably satisfy himself that a case was made out for detention. It is not permissible for the Court to go into the correctness or otherwise of the facts or canvass the grounds for detention. The antecedent and the present activities of the petitioner were given in the grounds. They afford sufficient material for a competent authority to come to a conclusion one way or the other. Mr. Pillai argued that the last ground does not say that the petitioner is acting, but only says that the communist party is indulging in violent subversive activities and it is likely that he will also indulge in violent subversive activities. But the Commissioner certainly was entitled to infer from the said fact that the petitioner who is the present secretary of the Tamil Nad Provincial Committee of the Communist party was also acting in a manner prejudicial to public safety. But as we have already stated this is only one of the grounds. There might have been other material which was not disclosed to the petitioner.

We cannot also accept the argument of the petitioner that in no circumstances the antecedent conduct of a detenu could be taken note of by the concerned authority to satisfy himself whether he is acting or is about to act in a manner prejudicial to public safety. It is no doubt true that under section 2 (1) of the Act, the Government or the delegated authority must be satisfied that a person is acting or is about to act in a manner prejudicial to public safety. But the antecedent conduct would certainly afford data or furnish reasonable grounds in finding out the present attitude of the person concerned. Learned counsel for the petitioner relied on a decision in *Om Prakash Mehta* v. *King-Emperor*[1]. That was a decision under the Central Provinces and Berar Maintenance of Public Order Act, 1946. The operative portion of section 2 (1) of the said Act reads as follows :

> " The Provincial Government if satisfied that any person is acting in a manner prejudicial to the public safety, order or tranquillity, or is fomenting or inciting strikes with intent to cause or prolong unrest among any group or groups of employees may if it considers such order necessary make an order (*a*) directing that he be detained."

There is a material difference between the provisions of that section and section 2 (1) of Madras Act I of 1947. In the latter section the Provincial Government can detain a person not only when he is acting but also when he is about to act in a manner prejudicial to public safety. The learned Judges in construing that section held that detention could not be ordered on the basis of past actions. But they observed at page 597 as follows :

> " The bulk of the acts which are said to constitute the " acting " consist of past acts, but in each case there is included some overt act done after the 21st of November, 1946, on which date the Act came into force. The series of acts so set forth convey the sense of continuity which the Act requires and the inclusion of an overt act done after the 21st of November, 1946, imports that the said acting was continued after the datum line. These statements, combined with the reference in the order to section 2 (1). (*a*) of the Act, are sufficient to show that the ' satisfaction ' relates to a continuous course of conduct which was persisted in after the coming into force of the Act."

The grounds here also disclose that the petitioner continued to indulge in subversive activities even after the Act came into force. He is a prominent member of the Communist party. He took part in various communist activities and had even gone underground. He was detained on the previous occasions. He was charged with responsibility for many violent acts including murder, looting, arson and other grave offences which have taken place in Madura in 1947. He had

1. I.L.R. (1947) Nag. 579.

participated in secret meetings held on 6th December, 1947, and 7th January, 1948, and drew up the programme of the party. The Communist party to which he belongs, according to the last ground, is now indulging in violence and subversive activities and most of the members of the party have gone underground and from there, they are guiding various crimes such as arson, loot, murder, etc. On these facts and presumably some others which are not disclosed, the Commissioner was satisfied that the petitioner was acting in a manner prejudicial to public interests. We cannot say on the said material that no reasonable man could be satisfied that the petitioner was acting in a manner prejudicial to the maintenance of public order.

After judgment was reserved, Mr. Pillai requested us to allow him to cite some cases in support of his contention that the order passed under section 2 (1) of the Act was invalid as it was not forthwith communicated to the Government under section 2 (2). We allowed him to do so. In addition to the cases cited by him, he wanted to raise a new plea for the first time, *viz.*, that the Commissioner of Police had no authority to pass an order of detention under section 2 (1) as the order of the Provincial Government empowering him to exercise the powers under section 2 (1) had expired by the time he issued the order under the said section. This objection was not taken in the petition nor was it addressed to us before judgment was reserved. As the validity of this objection would depend upon certain facts and as it was not raised before judgment was reserved, we did not allow the advocate to raise this plea.

This application is therefore liable to be dismissed and it is accordingly dismissed.

K.S. *Application dismissed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Bombay.)

PRESENT :—LORD SIMONDS, LORD NORMAND, LORD MACDERMOTT, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

Neelangouda .. *Appellant**

v.

Ujjangouda and others .. *Respondents.*

Hindu Law—Adoption—Widow—Adoption by widow of predeceased coparcener after property had vested in mother of last surviving coparcener who had also adopted a son to her husband—Effect—Right of the subsequently adopted son to property—Right to adopt—If can be given up by widow by agreement.

Where an adoption by a widow of a predeceased coparcener takes place after the property had vested in the mother of the last surviving coparcener who had also subsequent to such vesting adopted a son to her husband, the subsequently adopted son is entitled to claim a half share from the previously adopted son.

Anant Bhikkappa v. *Shankar Ramchandra*, (1943) 2 M.L.J. 599 : L.R. 70 I.A. 232 (P.C.), followed.

A mere provision for the maintenance of the widow by the then head of the family by allotting some properties for her life will not affect her right to adopt.

Quære.—Whether it is open to a widow to give up by agreement her right to adopt.

K. B. Bengari for Appellant.

S. B. Khambatta and *H. J. Umrigar* for Respondents.

Their Lordships' Judgment was delivered by

SIR MADHAVAN NAIR.—This is an appeal by the plaintiff from a judgment and decree of the High Court of Judicature at Bombay, dated 12th November, 1942, affirming a judgment and decree of the Subordinate Judge at Dharwar dated 26th June, 1940.

The appeal arises out of a suit brought by the appellant for a declaration *inter alia* that he is the validly adopted son of one Limbangouda deceased, and has

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* P. C. A. No. 17 of 1948. 20th April, 1948.

thereby acquired the right to recover possession of one half share in the suit properties which are in the possession of defendant-respondent 1. The factum of adoption though raised in the issues was abandoned at an early stage, and does not arise for decision.

Only two questions remain for decision before the Board, these being:

(1) Has the appellant by virtue of his adoption acquired the right to recover possession of one half share in the suit properties?

(2) Had defendant-respondent 2, the adoptive mother of the appellant, lost her right to adopt to her husband in view of the maintenance deed executed in her favour by defendant-respondent 1?

Question No. 1 was answered by the learned Judges of the Courts in India against the appellant on the strength of the Full Bench decision of the Bombay High Court in *Babu Sakharam* v. *Lahoo Sambhaji*[1] and of another decision in *Rudrappa* v. *Mallappa*[2], which followed it. The decision of the Full Bench has since been overruled by the Privy Council in *Anant Bhikkappa* v. *Shankar Ramchandra*[3].

Question No. 2 was answered in favour of the appellant by the trial Court, but was not considered by the High Court.

The facts of the case may be stated briefly. The relationship of the parties to the suit appears from the following pedigree:

BASANAGOUDA

Shankargouda (d. 29-7-1906) =Neelawa	Limbangouda (d. 1903) =Savantrewa (Defendant-Respondent 2)	Channagouda (d. 1903) =Siddawa (d. 1916)	Rudragouda (d. 1902) =Ningawa (d. 1914)
Shivabasangouda (d. 4-12-1906)	Neelangouda (Plaintiff-Appellant) (adopted on 30-1-1936)		
Ujjangouda (Defendant-Respondent 1) (adopted 1908)			
Rudragouda (Defendant-Respondent 4).			

Shankargouda, Limbangouda, Channagouda and Rudragouda who were four brothers formed members of an undivided Hindu family governed by the Mitakshara School of Hindu Law. Of these, Rudragouda, died in 1902, and Channagouda died in 1903, leaving behind them their widows who died issueless in 1914 and 1916 respectively. Limbangouda died in 1903, leaving behind him his widow Savantrewa (defendant-respondent 2). Shankargouda died on 29th July, 1906, leaving behind him his infant son, Shivabasangouda and his widow Neelawa. Shivabasangouda died on 4th December, 1906, leaving behind him his mother, Neelawa, who succeeded to the inheritance, and, she in 1908, adopted Ujjangouda (defendant-respondent 1), who is in possession of the suit properties. Rudragouda (defendant-respondent 4), is his minor son. C. H. Patil (defendant-respondent 3) is the father-in-law of Ujjangouda, and is added as a party as the alienee of the suit property shewn in Schedule "C."

In February, 1908, defendant-respondent 1 executed in favour of the appellant's adoptive mother (defendant-respondent 2) a maintenance deed, Ex. 145.

On 30th January, 1936, the widow of Limbangouda (Savantrewa) adopted the appellant to her deceased husband. As stated before, the factum of this adoption is not now in question.

1. I.L.R. (1937) Bom. 508 (F.B.).
2. (1939) 41 Bom.L.R. 1277.
3. (1943) 2 M.L.J. 599 : L.R. 70 I.A. 232 (P.C.).

Defendant-respondent 1 pleaded that the adoption would not confer any right to the appellant to the estate in his possession, and that the right of defendant-respondent 2 to adopt, was extinguished in view of the maintenance deed.

On behalf of the appellant, it is contended that since the Full Bench decision of the Bombay High Court on which the decision in this case was based has been reversed by the Privy Council, he is entitled to succeed in this appeal. Whether this is so or not is the first question for the Board to decide.

It will appear from the facts stated above, that at the time of the adoption of Ujjangouda (defendant-respondent 1) there were only two living members of the family, these being the two widows of the two deceased coparceners, viz ; Neelawa, adoptive mother of defendant-respondent 1 and the appellant's adoptive mother, Savantrewa. Neelawa had succeeded to the estate of the last surviving coparcener, her son. It was after the property thus became vested in Neelawa, that the appellant was adopted by his adoptive mother, Savantrewa. The question of an adoption by a widow after the death of the last surviving coparcener came up for decision before a Full Bench of three learned Judges in the Bombay High Court in *Babu Sakharam* v. *Lahoo Sambhaji*[1]. In that decision it was held by a majority of the learned Judges that the adoption in such case was valid for spiritual purposes only, and could not affect the property vested in the next reversioner. In that case, the estate of the last surviving coparcener had upon the re-marriage of his widow passed to his sister and the contest was between a purchaser from the latter, and a son adopted by a widow of another deceased coparcener before the widow of the last surviving coparcener had re-married. One of the propositions laid down in that case was that :

"Where the adoption takes place after the termination of the coparcenary by the death, actually or fictionally, of the last surviving coparcener, the adoption by a widow of a predeceased coparcener has not the effect of reviving the coparcenary, and does not divest property from the heir of the last surviving coparcener (other than the widow) or those claiming through him or her."

Commenting on this, Sir George Rankin delivering the judgment of the Board in *Anant Bhikkappa* v. *Shankar Ramchandra*[2], observed as follows :

"If, then, the appellant's adoption was valid, can it be held that it does not take effect on the property which had belonged to the joint family because there was no coparcenary in existence at the date of the adoption ? On this point their Lordships, differing from the majority decision in *Babu Sakharam* v. *Lahoo Sambhaji*[1], hold that the adoption being valid cannot be refused effect. That the property had vested in the meantime in the heir of Keshav is not of itself a reason, on the principles laid down in *Amarendra* v. *Sanatan*[3], why it should not divest and pass to the appellant."

For the purpose of the present appeal it is not necessary to refer further to the detailed reasons given in the judgment of the Board.

In their Lordships' view the present case falls within the principles of the decision by the Board in *Anant Bhikkappa* v. *Shankar Ramchandra*[2]. The learned counsel for the respondents after some argument expressed his inability—in their Lordships' opinion rightly—to distinguish the decision of the Board on the facts from the present case. Their Lordships therefore hold, differing from the Courts below, that the appellant is entitled to claim a half share in the suit properties.

The next question is whether the appellant's adoptive mother has lost her right to adopt in view of the maintenance deed executed by defendant-respondent 1, in her favour. The deed is styled Potgi-patra (maintenance deed). It is Ex. 145 in the suit. It runs as follows :

"On . . . . 10th day of February, 1908, A. D. maintenance deed is passed in favour of Sawantrewa, widow of Nimbangouda Patil, by Ujjangouda . . . . as follows :—'You are the wife of the younger brother of my adoptive father, Shankargouda. You have no issue. Your husband Nimbangouda died before my father, Shankargouda died. Up till now, we have been living together in a joint family. As you do not agree now to live in union, the immovable properties of my ownership and in my management situate at the village of Haveri . . . . are given to you for your maintenance during your lifetime".

* * * * * * *

1. I.L.R. (1937) Bom. 508 (F.B.).
2. (1943) 2 M.L.J. 599 : L.R. 70 I.A. 232 (P.C.).
3. (1933) 65 M.L.J. 203 : L.R. 60 I.A. 242 : I.L.R. 12 Pat. 642 (P.C.).

I have given properties as above for your maintenance during your lifetime and have this day handed over possession thereof to you. You should live in the said house and maintain yourself from the income derived from the said lands. As these (lands) have been given to you only for your maintenance during your lifetime, you are not entitled to alienate the said properties in any manner whatever, nor am I entitled to do so. After your death, I alone shall be the absolute owner thereof. I myself shall pay the Government assessment of the said lands and the municipal taxes of the house. Deed of maintenance is duly given in writing as above of my free will . . . ."

The deed is called a maintenance deed, pure and simple. There is nothing in it to show that it is anything more than a mere arrangement by which provision has been made for the maintenance of the appellant's mother by Ujjangouda, the head of the family. The appellant's mother as a widow of the undivided Hindu family is entitled to be maintained from the family properties. The deed says that as she does not agree " to live in union " with the other members of the family, the properties mentioned in it are allotted to her for her maintenance during her lifetime. The properties are not given to her absolutely, she is not entitled to alienate them in any manner; after her death they will revert to the family.

Their Lordships are unable to find in the document any reference to the appellant's mother's right to make an adoption, or abandonment by her of such a right. It was stated by the learned junior counsel for the respondents that the expression " as you do not agree now to live in union " impliedly shows that she has left the family, giving up all her right, including the right to adopt, for the properties stated expressly as given to her for her maintenance. Their Lordships are unable to draw this inference from the deed. It is not stated that the translation of the document is incorrect. If there was any implied reference to abandonment by the appellant's mother of her right to adopt indicated in the Kannada language in which the document is written, the learned Subordinate Judge who knew the language, would certainly have referred to it. The question whether it is open to the appellant's mother to give up by agreement her right to adopt, does not arise for decision in this case, as the document in question does not refer to abandonment of any such right. Agreeing with the Subordinate Judge, their Lordships hold that the appellant's adoptive mother's right to adopt was not extinguished by Ex. 145.

For the above reasons, the decrees of the Courts in India should be set aside and the appeal should be allowed with costs throughout, which should be paid by respondents 1, 3 and 4. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for Appellant: *Cassavetti Coustas & Co.*

Solicitors for Respondent: *T. L. Wilson & Co.*

K.S. ——— *Appeal allowed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Madras.)

PRESENT :—LORD UTHWATT, LORD MACDERMOTT AND SIR MADHAVAN NAIR.

Sara Veeraswami *alias* Sara Veerraju .. *Appellant**

v.

Talluri Narayya (deceased) and others .. Respondents.

Privy Council—Practice—Issue of fact—Decision of trial Judge who has observed the witnesses—Weight to be attached to—Evidence Act (I of 1872), section 92, proviso 2—Agreement for reconveyance of property sold—Oral evidence of—Admissibility—Considerations.

Conclusions of fact reached by a trial Judge based primarily on oral testimony and his estimate of the witnesses who all gave their evidence in his presence should not be disturbed if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial.

* P. C. A. No. 10 of 1947. 17th June, 1948.

Watt v. *Thomas*, (1947) A.C. 484 (486), referred.

Where a sale of land is in truth a mortgage the vendor cannot claim specific performance of an oral agreement to reconvey, for in that case the oral agreement would obviously contradict the terms of the deed and evidence of such agreement cannot be let in. But where there is an outright sale an oral agreement that upon the happening of a certain event it was to be followed by a reconveyance of what has been sold the oral agreement cannot be held to contradict, vary, add to or subtract from the terms of the sale deed. To add a stipulation which is quite unconnected with the terms of sale is not an addition of the kind struck at by section 92 of the Evidence Act. Accordingly, oral evidence is admissible to prove such agreement though it may be contemporaneous with the original sale.

Harkisondas Bhagwandas v. *Bai Dhanu*, (1926) I.L.R. 50 Bom. 566 (F.B.) and the view of Maung Ba, J., in *Ma Nan Shein* v. *U Taing*, A.I.R. 1927 Rang. 314, approved.

J. P. Eddy and *R. Parikh* for Appellant.

Sir Herbert Cunliffe and *P. V. Subba Rao* for Respondents.

Their Lordships' Judgment was delivered by

LORD MACDERMOTT.—These consolidated appeals are from two judgments and two decrees, dated 3rd February, 1943, of the High Court of Judicature at Madras which reversed a judgment and two decrees dated 29th July, 1941, of the Court of the Subordinate Judge of Cocanada.

The appeals arise out of two connected suits. Of these one—No. 38 of 1940—was brought by the appellant, Sara Veeraswami or Veerraju (hereinafter called the appellant-plaintiff) against the first and second respondents for specific performance of an alleged oral agreement to reconvey certain properties which had been sold to them. The other suit—No. 32 of 1940—was brought by these respondents against the appellants and others to obtain possession of the said properties. The first named respondent having died in the course of the proceedings his legal representative, the third respondent, was added as a party to each suit.

The circumstances of the dispute leading to this litigation have been fully stated in the judgments of the Courts in India and for present purposes the narrative may be limited to a brief summary of the salient features. In November, 1932, the appellant-plaintiff and his father (who died in 1939) found themselves in urgent need of a sum of Rs. 6,000 to save their lands from sale in execution proceedings initiated by a judgment-creditor named Bandaru Sooranna. They succeeded in obtaining this amount by transferring the properties now in question to the original respondents. The sale deed effecting this transaction was executed on 30th November, 1932, and duly registered. It evidences an outright and unconditional sale. On the same day the original respondents leased the properties to one Pothula Kondayya, the father-in-law of the appellant-plaintiff. In 1937 this lease was renewed at a reduced rent for further three years. These facts were not in dispute, but there was an acute conflict between the parties as to what took place when the sale and the subsequent extension of the lease were arranged. The appellants contended that the first approach to the original respondents was for a loan of Rs. 6,000 to be secured by a mortgage of the lands ; that the original respondents refused to take a mortgage and insisted on a sale; and that it was then orally agreed that the properties should be sold for Rs. 6,000 and that the original respondents would reconvey what was sold if the said price was repaid to them within a period of five years. The appellants further contended that in 1937 the appellant-plaintiff and his father offered the Rs. 6,000 and sought a reconveyance, but that the original respondents met this offer with a counter-proposal which was then accepted, namely, that the rental payable under the lease should be reduced and the period within which the lands might be brought back under original arrangement extended for another three years. The respondents denied these allegations in their entirety and contended, that, apart from the leases, the only agreement concerning the lands was that manifested by the sale deed. In 1940 the appellants again sought a reconveyance. This was refused by the original respondents and on 24th June, 1940, they and the appellant-plaintiff filed their plaints in the present suits.

The issues raised for determination by the Board are two in number. They may be stated thus :—

(1) Did the parties to the sale deed orally agree (*a*) that the lands sold would be reconveyed if the price of Rs. 6,000 was repaid within the period of five years and (*b*) that this period should be extended for a further three years ?

(2) If so, can the appellants avail themselves of such agreement having regard to section 92 of the Indian Evidence Act, 1872 ?

The first of these issues is altogether one of fact. Both sides led oral evidence before the Subordinate Judge which he believed, was amply sufficient to support their respective versions of what occurred. The appellant's case turned mainly on the evidence of two witnesses, P.Ws. 1 and 3. The Subordinate Judge accepted their testimony in preference to that of the witnesses called for the respondents. He states in his judgment that he was much impressed by the evidence of P.Ws. 1 and 3 and adds—

> " In my opinion there is a ring of truth in what P. Ws. 1 and 3 say while there is a ring of untruth in what D. Ws. 1, 3 and 5 say."

He then sets out a series of circumstances which need not be detailed here but which, in his opinion, went to support the appellant-plaintiff's case. The High Court did not attach the same weight to these circumstances. It found none of them conclusive and some of no value at all. Much may indeed be said for this view ; but it is clear that the conclusion of fact reached by the Subordinate Judge was based primarily on the oral testimony and his estimate of the witnesses who all, it must be remembered, gave their evidence in his presence. That, as has been repeatedly pointed out, is an important consideration. The gist of the numerous decisions on the subject is clearly stated by Viscount Simon in *Watt* v. *Thomas*[1], where he says :

> " But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially, if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a Judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to Courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

The High Court, however, found itself unable to accept the evidence of P.Ws. 1 and 3 with regard to the oral agreement and, in consequence, decided for the respondents. The reasons given for disregarding the testimony of these witnesses are stated very shortly in the judgment of the Court as follows :—

> " P. W. 1 is the plaintiff himself, and it has been shown in cross-examination that P. W. 3 was not a disinterested witness."

In the opinion of their Lordships these reasons afford no adequate ground for disturbing the view taken by the trial Judge ; nor can they find any other fact or circumstance in the case which would justify the conclusion that his judgment of fact was unsound. Their Lordships therefore hold that the oral agreement alleged by the appellants has been established and they accordingly answer the first issue in the affirmative.

The second issue was decided by the Subordinate Judge in the appellant's favour. The High Court passed no opinion upon it having ruled as already stated on the issue of fact.

Section 91 of the Indian Evidence Act makes provision as to the proof of the terms of contracts, grants, and other dispositions of property which have been reduced to documentary form. Then comes section 92, the relevant parts of which read as follows :—

1. (1947) A.C. 484 at 486.

"When the terms of any contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from, its terms :

Proviso 2. The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document."

On the wording of this enactment the question under discussion comes to this—does the oral agreement as to reconveyance contradict, vary, add to or subtract from the terms of the sale deed ? If such be the effect of the oral agreement then, on the facts of the present case, the purpose for which it was tendered in evidence cannot well be disassociated from its effect and—unless saved by one of the provisos to the section—it will be inadmissible and must be disregarded in determining the rights of the parties to it.

The answer to this question demands enquiry as to the true character of the relevant transaction and it therefore becomes necessary to regard more closely the nature of the arrangement which led to the execution of the sale deed on 30th November, 1932. There can be little doubt that the arrangement contemplated and provided for the lease and the reconveyance as well as for the sale to the original respondents. The agreements to sell and to reconvey may therefore be taken as contemporaneous. Such an arrangement may, on occasion, amount to but a single transaction of the nature of a mortgage. On the other hand it may contemplate two distinct transactions, an absolute sale followed by a re-sale in certain events. It is not always easy to discern the true intendment but that an arrangement of this sort can constitute an agreement for an absolute sale and a subsequent re-sale without any relationship of debtor and creditor about it has long been recognised by this Board, as in *Bhagwan Sahai* v. *Bhagwan Din*[1], and by the Courts in India. Here, if the arrangement was in truth a mortgage the appellants must fail ; for in that case the oral agreement would obviously contradict the terms of the deed. Neither side, however, sought to establish a mortgage relationship and, apart from that consideration, there is nothing to indicate that such a relationship existed at any material time between the parties or that any agreement they made was incompatible with the plain terms of the sale deed. In their Lordships' opinion the correct way of stating the position is to say that the agreement reached covered several matters but that the intention was that each of these should be effected as a separate and independent transaction. There was to be an outright sale and that, upon the happening of a certain event, was to be followed by a reconveyance of what had been sold. The second transaction, by its very nature, premised the previous completion of the first. Both, it is true may be taken as arranged at the same time and agreement upon one part of the bargain may well have promoted agreement as to the rest. But such considerations do not necessarily affect the final result of the bargaining. The determining factor lies in the ultimate shape of the agreement rather than in the process by which it is reached. An oral stipulation may be purely collateral to the written agreement which it has induced and that though both touch on a common subject-matter. See, for example, the well-known cases of *Morgan* v. *Griffith*[2] and *Erskine* v. *Adeane*[3].

Such being the character of the agreement in question their Lordships find it impossible to hold that it contradicted, varied or subtracted from the terms of the sale deed. On the contrary, it left those terms and the interest passing thereunder to the purchaser entirely unaffected. Can it then be said to have *added* to the terms of the sale deed ? The words "adding to" which are part of section 92 must receive their due weight, but in the opinion of their Lordships they do not suffice to exclude the oral agreement relied upon by the appellants. It is, of course, literally correct to say that as the agreement for reconveyance related to the lands

1. (1890) L. R. 17 I.A. 98 : I.L.R. 12 All. 387 (P.C.).
2. (1871) L.R. 6 Ex. 71.
3. (1873) 8 Ch. App. 756.

sold it added a further stipulation respecting those lands. That, however, is not an appropriate test of the applicability of the section which is concerned to defeat the modification of a particular document. It is not enough to ask if the oral agreement relates to what has been sold. To be excluded it must bear, in some one or more of the ways specified in the section, upon the terms of sale as contained in the instrument. To add a stipulation which is quite unconnected with the terms of sale is not, in the view of their Lordships, an addition of the kind struck at by the section.

On the facts none of the provisos to the section is in point with the possible exception of the second. But on the view just expressed its precise scope ceases to be a material and it becomes unnecessary to discuss it further.

In dealing with this second issue their Lordships have refrained from embarking on detailed consideration of the Indian cases which were cited in the course of the argument and which in so far as they touch upon the matter in hand, are not altogether in harmony. They would add, however, that the conclusion they have reached reflects, in respect of the principles concerned, much that has already been accepted in several of the Indian Courts, and they would refer in particular to the judgments of the Full Bench in *Harkisondas Bhagwandas* v. *Bai Dhanu*[1] and the judgment of Maung Ba, J., in *Ma Nan Shein* v. *U. Yaing*[2].

For these reasons their Lordships think that the Subordinate Judge was right in his view of section 92 and they accordingly hold in the appellant's favour on the second issue as well as the first.

They will, therefore, humbly advise His Majesty that the consolidated appeals be allowed, that the decision of the High Court be reversed and the decision of the Subordinate Judge restored. The respondents will pay the costs of the appeals to the High Court and to the Board.

Solicitors for Appellant : *Lambert and White.*

Solicitors for Respondents : *Hy. S.L. Polak and Co.*

K.S. *Appeals allowed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Madras.)

PRESENT :—LORD NORMAND, LORD MORTON OF HENRYTON AND SIR MADHAVAN NAIR.

Mosur Subramania Sastri .. *Appellant**

v.

Seshama Raju and others .. *Respondents.*

Mortgage—Decree in suit by third mortgagee impleading fourth mortgagee but not the sub-mortgagee of the fourth mortgagee—Sale in execution—Sub-mortgagee how far bound.

In a suit by a third mortgagee impleading the prior mortgagees and the fourth mortgagee a decree was passed and property sold in execution. The purchase price was duly paid and applied in discharge of incumbrances ranking in priority to the fourth mortgage. The fourth mortgagee having been a party to the suit his charge on the property was extinguished. The sub-mortgagee of the fourth mortgagee who was not made a party in the third mortgagee's suit obtained a decree on his sub-mortgage without bringing to the notice of the Court the sale of that item of property in execution in the previous suit, sought to sell that property.

Held, the claim of the sub-mortgagee to sell that property was wholly unfounded. Though the sub-mortgagee was not made a party to the third mortgagee's suit, when an offer to give him an opportunity to redeem the earlier mortgage (though at a late stage) had been refused by him, the omission to implead him as a party in the third mortgagee's suit was of no avail. If the sub-mortgagee had been made a party to that suit his rights could have been no higher than those of the fourth mortgagee through whom he derived his title and the rights of the fourth mortgagee ceased when he failed to redeem and the property was sold.

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1. (1926) I.L.R. 50 Bom. 566 (F.B.). 2. A.I.R. 1927 Rang. 314.

* P. C. A. No. 33 of 1946. 18th February, 1948.

Khambatta and *Umrigar* for Appellant.

Subba Row for Respondents.

Their Lordships' Judgment was delivered by

LORD MORTON OF HENRYTON.—This is an appeal from a judgment and decree of the High Court of Judicature at Madras, dated the 31st March, 1944, which reversed a judgment and decree of the Court of the Subordinate Judge of Chittoor, dated the 7th July, 1943.

The only question arising on the appeal is whether the appellant can properly claim, in the execution petition mentioned hereafter, an order for the sale of a village named Mylaravada. The Subordinate Judge has decided that he can, the High Court has decided that he cannot.

The facts of the case are not in dispute and are as follows : The village of Mylaravada belonged to the Raja of Karvetnagar. On 2nd February, 1882, he effected a mortgage covering this village and another village in favour of D. Krishna Reddi and D. Venkatarami Reddi for about Rs. 33,000. On the 21st February, 1885, he created a second mortgage over the said villages in favour of the same persons for Rs. 6,500. On the 6th March, 1891, he mortgaged for the third time the same properties to one Seshama Raju, who is the predecessor-in-title of the respondents, for Rs. 7,500. On the 9th June, 1894, he created a fourth mortgage on the village of Mylaravada and many other villages in favour of Saravana Pillai and Gurusami Ayya for about Rs. 54,000. Subsequently Saravana Pillai acquired the interest of Gurusami Ayya and became the sole mortgagee. Saravana Pillai in his turn effected sub-mortgages of the properties comprised in his fourth mortgage. One of these sub-mortgages was dated the 21st February, 1902, and was in favour of one Pedda Subbaraya Chetti. In 1921, the appellant acquired the sub-mortgage rights of Pedda Subbaraya Chetti.

On the 16th February, 1903, the third mortgagee Seshama Raju filed O.S. No. 7 of 1903 on the file of the District Court of North Arcot on his mortgage, dated the 6th March, 1891. The prior mortgagees of 1882, and 1885, and also the fourth mortgagee Saravana Pillai were made defendants to this suit, but Saravana Pillai's sub-mortgagee Pedda Subbaraya Chetti was not made a defendant.

On the 28th March, 1904, the District Judge delivered judgment and passed a preliminary decree in favour of Seshama Raju. He held that the fourth mortgagee had "no rights of interests superior to those of the plaintiff" Seshama Raju. He ordered the village of Mylaravada to be sold, subject to a lien on the sale proceeds in favour of the 1st and 2nd mortgagees for Rs. 15,382. On the 6th February, 1907, the decree was made final. On the 22nd December, 1916, the said village was sold in execution and the sale was confirmed on the 23rd February, 1917. The village was purchased by Narasaraju, the son of Seshama Raju, the decree-holder for Rs. 35,768. Of this amount a sum of Rs. 15,382 was deposited in Court to the credit of the 1st and 2nd mortgagees and the balance of Rs. 20,385 was applied in payment of the decree debt of the 3rd mortgagee. Satisfaction of the decree in O.S. No. 7 of 1903 was duly entered.

In 1917, the said Narasaraju sold the village in question to Papi Reddi and Venkata Subba Reddi, who created a charge for Rs. 20,000 in favour of Narasaraju the vendor for the balance of the purchase money. This charge is still subsisting, and Venkata Subba Reddi has acquired the interest of Papi Reddi in the village. Thus, apart from the other proceedings about to be described, the title to the village in question would appear to be perfectly clear, Venkata Subba Reddi being the owner subject to the charge for Rs. 20,000 just mentioned.

On 7th December, 1906, after Seshama Raju had obtained the preliminary decree already mentioned, the representatives of Saravana Pillai, the fourth mortgagee, brought suit No. 33 of 1906 on their fourth mortgage. The suit was transferred to the Subordinate Judge of Chittoor and was ultimately numbered as O.S.

No. 18 of 1911. It is hereafter referred to as "the suit of 1911". In this suit Narasaraju, Ramasami Raju and Appala Raju the then successors-in-title of Seshama Raju, the third mortgagee, were brought on the record as defendants Nos. 78 to 80. The reason for their being made parties was that these defendants had prior charges on certain villages, other than Mylaravada, which were included in Saravana Pillai's fourth mortgage. Schedule C to the plaint purported to set forth the prior mortgages on the properties comprised in the fourth mortgage. The village of Mylaravada was mentioned in this schedule and reference was made to the second mortgage of 21st February, 1885, but curiously enough there was no reference to the first mortgage, or to the third mortgage of 6th March, 1891, in favour of Seshama Raju. Nor was there any mention in the plaint of O.S. No. 7 of 1903. Pedda Subbaraya Chetti, the predecessor-in-title of the appellant, as sub-mortgagee of the fourth mortgage, was made a defendant to this suit.

On the view which their Lordships take of this appeal, it is unnecessary to trace the somewhat complicated course of the suit of 1911. A final decree was passed in that suit on the 1st December, 1920. The effect of that decree, stated shortly, was that in default of payment of certain sums to the plaintiffs certain villages, including the village of Mylaravada, should be sold subject to certain prior mortgages expressly mentioned, which did not include the third mortgage on that village. It does not appear that the existence of the third mortgage was brought to the attention of the Court at any stage of the proceedings, either by the plaintiffs or by the defendants Nos. 78 to 80 or by Pedda Subbaraya Chetti. It will be noted that, prior to the passing of the decree of 1920, the village of Mylaravada had been sold under the order of the Court in O.S. No. 7 of 1903.

On the 6th June, 1921, Pedda Subbaraya Chetti the sub-mortgagee of the fourth mortgage assigned his sub-mortgage to the present appellant.

In 1926, the appellant filed a suit on his sub-mortgage, O.S. No. 1 of 1926, impleading only his mortgagors and in 1928 he obtained a decree for the sale of certain other properties sub-mortgaged to his assignor by Saravana Pillai. There was a direction in the decree that the appellant should give credit for any amount that he might recover in execution of the decree in the suit of 1911.

On the 1st December, 1932, the appellant instituted the execution petition giving rise to the present appeal in the Court of the Subordinate Judge of Chittoor, asking for sale, *inter alia*, of Mylaravada village in execution of the mortgage decree obtained in the suit of 1911.

He impleaded as defendants 157 people including the present respondents, who were then the successors-in-title of Seshama Raju, the third mortgagee.

In his petition the appellant claimed, *inter alia* :—

(1) That the petitioner's right to execute the decree in the suit of 1911 be recognised.

(2) That the villages mentioned in Schedule A of the decee (which included Mylaravada) might be sold subject to the prior rights expressly mentioned in the said decree.

(3) That the sale proceeds might be paid to the petitioner, subject to the conditions mentioned in the decree in O.S. No. 1 of 1926.

By their counter-petition, dated the 30th June, 1939, the respondents stated, *inter alia*, the facts in regard to the orders made in O.S. No. 7 of 1903, the sale to Narasaraju under the decree of the Court and the subsequent devolution of title to Venkata Subba Reddi. They prayed that the village of Mylaravada should not be sold. The views taken by the Subordinate Judge and by the High Court respectively have already been stated.

Their Lordships entertain no doubt that the claim of the appellant to have the village in question sold was wholly unfounded. That village was sold in 1916, pursuant to orders of the Court made in O.S. No. 7 of 1903. The purchase price of Rs. 35,768 was duly paid and was applied in discharge of incumbrances ranking

in priority to the fourth mortgage. The fourth mortgagee, Saravana Pillai, through whom the appellant claims, was a party to that suit, and the effect of the orders and the sale was to extinguish his charge on the village. These orders have never been rescinded or varied, and the validity of that sale has apparently never been challenged. Their Lordships are far indeed from suggesting that any application should be made for any of these purposes. In these circumstances, no order should have been made in respect of this village in O.S. No. 18 of 1911, which began after the preliminary decree of 28th March, 1904, had been passed. Their Lordships entertain no doubt that if, in the suit of 1911, the attention of the Court had been called to the orders made in the 1903 suit, the village of Mylaravada would have been excluded from the scope of the orders made in the suit of 1911.

Counsel for the appellant sought to rely upon the fact that in the suit of 1911 the predecessors-in-title of the respondents put forward no claim in respect of their third mortgage, or in respect of the orders made in O.S. No. 7 of 1903. He submitted that by reason of this fact, they were precluded, in the appellant's execution petition, from relying upon the third mortgage, or upon the orders made in the suit of 1903. A somewhat similar argument succeeded before the Subordinate Judge; but in their Lordships' view the argument has no substance. It is not necessary for the respondents to put forward any claim, as prior mortgagees or otherwise, in the present execution proceedings. They need only draw the attention of the Court to the orders made in the suit of 1903, and to the sale carried out pursuant to these orders. These orders, followed by that sale, constitute a complete bar to the sale now claimed by the appellant. The circumstances just stated distinguish the present case from all the cases relied upon by the Subordinate Judge and cited by counsel in support of this appeal.

Counsel further relied upon the fact that the appellant's predecessor-in-title as sub-mortgagee of the fourth mortgage, Pedda Subbaraya Chetti, was not made a party to O.S. No. 7 of 1903, although the sub-mortgage to him was dated 21st February, 1902. He contended that the sub-mortgagee ought to have been made a party, in accordance with the terms of section 85 of the Transfer of Property Act, 1882, and that, as this was not done, the proceedings in O.S. No. 7 of 1903 are not binding on the appellant as successor-in-title of the sub-mortgagee. Counsel for the respondents conceded that under the Statute of 1882 the sub-mortgagee ought to have been made a party, and it is necessary to consider the result of this omission. The fourth mortgagee, who was a party to the suit, could have preserved his rights as mortgagee only by redeeming the prior mortgages. This he failed to do, and his sub-mortgagee was not given any opportunity of redeeming, as he was not before the Court. For this reason, the Subordinate Judge in the present proceedings offered to give the appellant an opportunity to " redeem the prior mortgage" even at this late stage, but that offer was refused by the appellant. Their Lordships are prepared to assume, without so deciding, that the offer was rightly made; as it was made and refused, the omission to make the sub-mortgagee a party to the suit of 1903 in no way assists the present appeal. If the sub-mortgagee had been made a party to that suit, his rights could have been no higher than those of the fourth mortgagee, through whom he derived his title, and the rights of the fourth mortgagee ceased when he failed to redeem and the property was sold.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the costs of the appeal.

Solicitors for Appellant: *Douglas, Grant & Dold.*

Solicitors for Respondents: *Lambert & White.*

K.S. *Appeal dismissed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Patna.)

PRESENT :—LORD SIMONDS, LORD MACDERMOTT AND SIR MADHAVAN NAIR.

The Bank of Bihar, Limited .. *Appellant**

v.

Sarangdhar Singh and another .. *Respondents.*

Executing Court—When can go behind decree and look into judgment—Sale of property as belonging to judgment-debtor—Defendants against whom suit has been dismissed—Right of, to object to sale.

An execution Court cannot go behind the decree and question its correctness; but when the decree is silent and gives no indication as to what property should be sold in execution, it is permissible for the Court to look into the judgment in order to find out whether upon any issue properly raised and determined as between the parties interested the property brought to sale has been held to belong to the judgment-debtor. Where in a money suit against the two brothers and the widow of the borrower an item of property has been held to be joint family property and the suit against the brothers has been dismissed as the loan was found not to have been taken for joint family business or family necessity, an observation in the judgment that the widow had a one-third share in the property is unnecessary for the decision of the case. Where the order of the Court does not say that " the one-third share of the widow in the property should be sold" in execution it is open to the brothers to say that the property could not be sold as it was joint family property especially as the suit had been dismissed against them.

Their Lordships' Judgment was delivered by

SIR MADHAVAN NAIR.—This is an appeal from the judgment and order of the High Court of Judicature at Patna, dated 20th April, 1942, which set aside an order passed by the Subordinate Judge, First Court, Patna, dated 29th November, 1941, dismissing a petition of the respondents under section 47 of the Code of Civil Procedure.

The appeal arises in an execution proceeding of the money decree passed by the Subordinate Judge, First Court, Patna, in money suit No. 5 of 1939, dated 22nd August, 1940.

The appellant before the Board is the decree-holder (plaintiff) the Bihar Bank, Limited. The respondents are defendants Nos. 1 and 2 in the suit.

The order passed by the Subordinate Judge in the suit was as follows :

" Suit decreed against defendant No. 3 in the presence of defendants 4 to 6. . . . The suit is dismissed as against defendants 1 and 2 with costs. . . . . . ."

In the execution of the decree which was for Rs. 15,718-7-0 with interest and costs, one-third share in certain joint family property called the Khadga Vilas Press held to belong to the third defendant was brought to sale.

The respondents objected to the attachment and sale on the ground that the property was joint family property.

The Subordinate Judge disallowed the objection, but the High Court allowed it and set aside the Subordinate Judge's order.

The question for determination in this appeal is whether one-third share in the Press could be sold in execution of the decree obtained by the appellant against the third defendant.

The money suit was instituted by the appellant against the respondents—the brothers, defendant No. 3—the widow, and defendants 4 to 6—the daughters of one Rai Bahadur Ram Ran Vijoy Singh—who will hereinafter be referred to as the Rai Bahadur—for Rs. 15,718-7-0 which was said to have been borrowed by him on an overdraft account. The Rai Bahadur carried on the business of printing and was the proprietor of the press called the Khadga Vilas Press. He died in 1936.

* P. C. A. No. 86 of 1947. 19th July, 1948.

The appellant alleged that the money was lent for carrying on a joint family business of the Rai Bahadur and his brothers.

The respondents (his brothers) admitted that they were joint with the Rai Bahadur, and the business was joint family business, but they denied that the money was borrowed for the joint family business or family necessity. The widow, the third defendant, alleged that her husband, the Rai Bahadur, was separate from his brothers and the business was a partnership business carried on by the Rai Bahadur and his brothers in partnership, but that the money was not taken for the purpose of that business.

The sixth issue in the case was :

"Was the debt in question created by the Rai Bahadur for the purpose of his business and other family necessities as alleged by the plaintiff and was the same binding upon the defendants ?"

The Subordinate Judge held that the Rai Bahadur died in a state of jointness, that the business was joint family business and that the appellant failed to prove that the loan had been taken for joint family business or for family necessity. He however decided that

"the debt is binding upon defendant No. 3 to the extent of the share of the Rai Bahadur in the joint properties in her hand" as "defendant No. 3 under section 3 (2) of the Act 18 of 1937 (the Hindu Women's Rights to Property Act) as amended by Act 2 of 1938 got in the joint family property the same interest as her husband had."

It may be stated that at the time when the execution of the decree was taken an appeal against the decree was pending.

It is common ground that as the Rai Bahadur died in 1936 the Hindu Women's Property Act of 1937, as amended could not be made applicable in the case of his widow but in view of the finding of the learned Subordinate Judge in the money suit that the Rai Bahadur's widow had one-third share in the joint properties left by her husband and the Khadga Vilas Press was a joint family property, the Subordinate Judge held that it was not open to the respondents to object to the sale of the property in the execution proceedings.

On appeal, the order of the Subordinate Judge was set aside by the High Court. After referring to the opinion of the Subordinate Judge who tried the money suit that the widow was entitled under the Act to the share which her husband had in the joint family property and is liable for his debts, the High Court observed as follows :

"Had the Court which made the decree gone no further than its findings that the Rai Bahadur and the appellants were joint, that the business was a joint family business and that the loan was not taken for the joint family purpose there would have been no difficulty in this case ; but the observations in the judgment which followed these findings have given rise to the ground on which the decree-holder and the widow resist this appeal. Those observations were unnecessary for the decision of the case and were not raised either between the decree-holder and appellants who both alleged that the family was joint and that the business belonged to the joint family, or between the widow and the appellants."

Their Lordships agree with the above view. The rule is well established that an execution Court cannot go behind the decree and question its correctness ; but when the decree is silent, as in the present case, and gives no indication as to what property should be sold in execution, it is permissible for the Court to look into the judgment in order to find out whether upon any issue properly raised and determined as between the parties interested the property brought to sale has been held to belong to the judgment-debtor. On the main issue raised in the case the property has been held to be joint family property and the suit has been dismissed as against the respondents. The question as regards the liability of the widow was not in issue either between the defendants *inter se* or between the decree-holder (plaintiff) and the defendants. The observations in the money suit—as pointed out by the High Court—were unnecessary for the decision of the case, and were not in issue between the parties ; and further, the order of the Court does not mention that one-third share of the widow in the property should be sold. In this

connection it may also be noted, as pointed out by the Subordinate Judge in his order, that

"it is conceded by both parties that the Rai Bahadur died in 1936 . . . . and Act II of 1938 could not therefore be made applicable to the widow."

In the circumstances their Lordships hold that it was open to the respondents to say that the property could not be sold as it was joint family property, especially so, as the suit had been dismissed as against them.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for Appellant : *W. W. Box & Co.*

Solicitors for Respondents : *Douglas Grant & Co.*

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

N. S. Subramanya Ayyar .. *Petitioner**

v.

The Official Liquidator, Mocheri Co-operative Society in Liquidation and Deputy Registrar of Co-operative Societies, Vellore .. *Respondent.*

Court-Fees Act (VII of 1870), Schedule II, Article 17 (1)—Civil Court—Registrar of Co-operative Societies acting under section 57-A of Madras Act VI of 1932—If 'Civil Court'—Suit to set aside order—Court-fee.

A registrar acting under section 57-A of the Madras Co-operative Societies Act (VI of 1932) and in accordance with the rules framed by the Government must be deemed to be a Civil Court for purposes of Article 17 (1) of Schedule II of the Court-Fees Act. For a suit by a claimant to set aside an order by the Registrar only a court-fee of Rs. 15 is payable.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Ranipet in O.S. No. 225 of 1946.

T. R. Arunachalam for Petitioner.

Respondent not represented.

The Court delivered the following

JUDGMENT.—This petition raises a very simple question of court-fee. The point for determination is whether a Deputy Registrar of Co-operative Societies acting under section 57-A of the Madras Co-operative Societies Act No. VI of 1932 is a Civil Court within the meaning of Article 17 (1) of Schedule II of the Court-Fees Act. The suit was one by a claimant to set aside an order by the Deputy Registrar dismissing his claim to some moveables attached valued at Rs. 750. If he acted as a "Civil Court" only a court-fee of Rs. 15 is payable. The District Munsiff held that he was not a Civil Court and directed the plaintiff to pay *ad valorem* court-fee of Rs. 750. The District Munsiff's finding clearly cannot be upheld. He has referred to no authority. In *Narayana Venkatachalamiah* v. *Putika Venkatiah and others*[1], it was held that the Registrar was a Court within the meaning of section 52 of the Transfer of Property Act although the question whether he was a Civil Court appears to have been kept specifically open. In *Velayuda Mudali and another* v. *The Co-operative Rural Credit Society*[2], it was held that,

"the Registrar of Co-operative Societies acting under rule 14 of the Rules framed under the Co-operative Societies Act is a Court and proceedings before him are proceedings before a Court for the application of the doctrine of *lis pendens*."

The Registrar or the Deputy Registrar acting under the Act has judicial functions to perform analogous to those of a Civil Court. Section 65 (2) of the Co-operative Societies Act empowers the Provincial Government to frame rules, *inter alia*,

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* C. R. P. No. 367 of 1947. 25th November, 1948.

1. (1941) 2 M.L.J. 588. 2. (1933) 66 M.L.J. 90.

"to provide for the investigation of claims and objections that may be preferred against any attachment effected by the Registrar or any officer empowered by him."

It is only necessary to peruse rules XXII and XXIII of the Rules framed by Government to see that the Registrar in execution proceedings has substantially similar powers and has to follow substantially the same procedure that a Civil Court has to follow under Civil Procedure Code in the domain of attachment and claim applications. Under rule XXII 17 (*c*) a claimant against whom a claim order is made may institute a suit within six months from the date of the order. It is under this provision that the present suit is filed. There are only three categories of Courts so far as I am aware, (1) Criminal, (2) Civil and (3) Revenue. I have no hesitation in finding that a Registrar acting under section 57-A and in accordance with the rules framed by Government must be deemed to be a Civil Court for purposes of Article 17 (1) of Schedule II of the Court-Fees Act.

The court-fee of Rs. 15 paid is correct. The petition is allowed. Costs of this petition will abide the result and be provided for in the lower Court.

K.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

The Corporation of Madras .. *Appellant**

v.

The Scindia Steam Navigation Co., Limited, by their agents K.P.V. Sheik Mahomed Rowther and Co. .. *Respondents.*

Madras City Municipal Act (IV of 1919), *section* 401 *and Schedule IV, rule* 7—*Assessment of company—Return of income—Mistake in giving gross receipts instead of gross income—Appeal not filed—Suit to declare assessment to be illegal—Maintainability.*

The Corporation of Madras sought to assess the respondent company under rule 7 of Schedule IV of the Madras City Municipal Act on its gross income and called on the company to disclose what its gross income was. The company made a return which showed a certain amount as its gross income. Subsequently, however the company intimated to the corporation that a mistake had occurred in making the return as the gross receipts had been given instead of the gross income but no steps were taken to take up the matter in appeal. The company filed a civil suit for a declaration that the amount was not legally payable and for an injunction restraining the corporation from taking coercive steps to realise the amount.

Held, that the assessment by the corporation authorities was not rendered illegal on account of the mistake committed by the company, and that the suit was not competent.

Appeal against the judgment and decree of the Additional Judge, City Civil Court, Madras, dated 31st October, 1946, and passed in O.S. No. 357 of 1945.

John and Row for Appellant.

V. Rajagopala Mudaliar for Respondents.

The Court delivered the following

JUDGMENT.—This appeal is by the Corporation of Madras against a decree of the Additional Judge, City Civil Court, granting a declaration that the amount to which the plaintiff, the Scindia Steam Navigation Company, Limited, hereinafter called the Company, was assessed is not legally payable by it and an injunction restraining the Corporation from taking any coercive steps to realise the amount to which the Company was assessed.

Under section 110 of the City Municipal Act, companies are liable to pay half-yearly tax in accordance with the rules laid down in Schedule IV of the Act. According to rule 7, Schedule IV, companies are ordinarily liable for a tax on the basis of their paid-up capital; but in cases where the head or principal office is not in the City of Madras, but elsewhere, the tax is assessed on the gross income derived from or received in the City. Since the company has its headquarters at Bombay, the Corporation sought to assess the company at the rates specified in rule 7, Schedule IV, on its gross income; and so it asked the Company what its

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* C. C. A. No. 16 of 1947. 7th September, 1948.

gross income was. The company made a return which showed its gross income at a figure not far below four lakhs; but the Corporation made an allowance for the fact that two of the vessels of the Company had been commandeered by the Government. That reduced the gross income to two lakhs odd, on which, according to the rules laid down in part II of the schedule, the tax was Rs. 1,000 a half year. The Commissioner accordingly assessed the Company at their own figure and demanded payment. On 31st January, 1945, by Ex. P 6, the Company replied that it had by mistake given as gross income the gross receipts and asked the Commissioner to revise his previous assessment. The Assistant Revenue Officer pointed out that as a sum equal to the tax due during the previous years had not been deposited as required under rule 12 of Schedule IV before a revision application can be entertained, the Company must pay the amount to which it had been assessed. In the ensuing correspondence the Company made some attempt to estimate its net income, but said that it was found impracticable to do so as the necessary details and figures were not available locally. Finally, on 16th July, 1945, the company filed the present suit for a declaration and injunction as stated.

Schedule IV prescribes the procedure to be adopted in connection with the assessment of taxes and the reliefs open to the assessee if he feels aggrieved by the assessment. Rule 12 makes provision for a revision of the assessment if an application is made within 15 days and the tax based on the assessment prevailing in the previous year has been paid. If the assessee is still aggrieved, he has a remedy under rule 14 by way of appeal to the Taxation Appeals Committee. Finally, he can appeal against an adverse decision of the Taxation Appeals Committee to the Court of Small Causes, after giving notice to the Commissioner and paying the tax to which he has been assessed.

Section 401 says:

> "No assessment . . . . imposed under the authority of this Act shall be impeached . . . . by reason of any mistake . . . . .
>
> (c) in respect of the amount assessed . . . . . . :
>
> Provided that the provisions of this Act have, in substance and effect, been complied with."

This section substantially lays down the recognised law as to the circumstances under which a Civil Court can intervene when remedies are afforded in the statute itself to a person aggrieved by any act done or an order passed against him under that statute. It is conceded that the question that the Court has here to decide is whether the Corporation made this assessment substantially in accordance with the rules laid down in Schedule IV.

It is argued for the Company that the rules were not complied with, because the assessment was not levied on the gross income but on the gross receipts. The Corporation does not admit that there was any mistake. They contend that what the Company gave as its gross income was in fact its gross income and not its gross receipts; but it is immaterial for the purpose of this appeal to consider whether in fact the assessment was made on the correct figure or not; for no figures were placed before the Corporation which would have enabled it to make any calculations. The Corporation, as already stated, asked the Company to state what its gross income was; and it gave a figure which, after certain deductions in favour of the Company had been made, was adopted as the correct gross income. It was on the basis of that figure that the Corporation made its calculations and assessed the Company to tax. It is conceded that in doing so the Corporation at that stage acted in accordance with the rules; and it has not been shown that at any stage subsequent to this the Corporation did not continue to act in accordance with the rules. The only circumstance which the learned advocate for the Company has been able to point to is that subsequently the Company drew the attention of the Commissioner to the fact that the figure on which the calculations had been made was not the correct one. That however does not render the assessment already made *bona fide* by the Corporation an illegal one. The Company had an opportunity, if it had chosen to deposit within the 15 days allowed the amount

to which it had been taxed the previous year, to ask the Commissioner to set the assessment aside. Since the deposit was not made, the Commissioner was justified in rejecting the revision application. No further steps were adopted by the Company by way of appeal to the Taxation Appeals Committee and thereafter to the Court of Small Causes. No suit therefore lay to the City Civil Court.

The appeal is allowed, the decree of the lower Court set aside, and the suit dismissed with costs in both Courts.

B.V.V. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BELL.

Sri Vasudevandra Saraswathiswami .. *Plaintiff**

v.

Sridhara Sivarama Moorthy .. *Defendant.*

Counter-claim—Jurisdiction—Limits of defendant's rights.

A counter-claim may be set up only in respect of claims as to which the party could bring an independent action in the Court in which the counter-claim is brought.

In a suit on the Original Side of the High Court for repayment of certain moneys entrusted by the plaintiff to the defendant, for the purpose of being handed over to the plaintiff's son, the defendant, the son-in-law of the plaintiff, raised a counter-claim in the written statement that the plaintiff had owed him a greater amount owing to his acting on defendant's behalf in certain other transactions, which took place hundreds of miles away from Madras and that accounts should be taken and/or that the plaintiff should pay him a further sum of money. On a preliminary point as to the jurisdiction of the High Court to entertain such a counter-claim,

Held: The plaintiff's preliminary point of jurisdiction should be upheld and the counter-claim should be excluded, because it is only when the defendant had had any claim arising against the plaintiff within the jurisdiction of the High Court that the plaintiff would have laid himsel open to a counter-claim in respect of it and the High Court would have been entitled to entertain such a claim. But it does not follow that because the plaintiff has done something which he was entitled to do, the defendant's rights will become limitless.

C. Srinivasachari for Plaintiff.

V. Radhakrishnayya and *G. Venkatarama Sastri* for Defendant.

The Court delivered the following

JUDGMENT.—In this suit the plaintiff claims a sum of Rs. 9,000 which he says the defendant must repay him in the following circumstances. In January, 1945, according to the plaintiff he came to Madras from Bezwada, which is his permanent residence in order to take part in a scheme in Insolvency whereby he was to be the guarantor. He says that he came to Madras with the sum of Rs. 9,000 but found, on arrival, that the scheme was not going to materialise. Happening to meet his son-in-law, the defendant, he decided to send the money back to his son who lived in Tenali, the defendant representing to him that he was proceeding in a few days to Tenali on his own business. According to the plaint, the money was therefore handed to the defendant for the purpose of delivering it to the son in Tenali. The plaint says that the defendant failed to pay the money over and has retained it ever since. Hence this suit.

The defence denies the whole of the plaintiff's story except and in so far as the defendant admits receiving the Rs. 9,000 although on a slightly a different date; and he says that the money was paid to him on account of a larger sum of money due by the plaintiff to him as the result of a quasi agency which the plaintiff had performed on the defendant's behalf between the years 1929 and 1931. According to the defence, the plaintiff, who as indicated was the defendant's father-in-law, managed the defendant's affairs or some of them, and according to the defendant, has never to this day properly accounted for the same. The defence says that the plaintiff on a taking of accounts would be found to be liable to pay at least Rs. 12,000, if not, more thousand rupees. The defence therefore argues that accounts should

* C. S. No. 82 of 1945. 26th October, 1948.

be taken and/or that the plaintiff should pay the defendant a sum of Rs. 3,592-8-0, the balance, which he says is due to him.

The written statement is of great length and sets out in great detail numerous transactions regarding promissory notes, purchases of land and other things, with which the defendant says the plaintiff was involved on his behalf. This is a very substantial case therefore which is put up by the defence, and as stated, it relates to the period 1929 to 1931, and to transactions which took place hundreds of miles from Madras.

In the interlocutory proceedings which came, I understand, before the late Kuppuswami Aiyar, J., it was agreed between the parties that the question of jurisdiction to try this counter-claim which was raised by the plaintiff in his reply to the written statement should be tried as a preliminary issue before the counter-claim is taken up for trial or before any evidence is let in on the counter-claim. This agreement was apparently made an order by the learned Judge. On that footing the case has been got ready for trial, and this is the preliminary point with which I have now to deal. It has been laid down in many cases that a counter-claim may be set up only in respect of claims as to which the party could bring an independent action in the Court in which the counter-claim is brought. (*See* Halsbury's Laws of England, 2nd edition, Vol. 29, page 503). A list of authorities is cited in support of that proposition going back to 1879. Furthermore, in *Williams Bros.* v. *Ed. T. Agius, Ltd.*[1], Lord Dunedin states the proposition in this way at page 522 :

"But this at least is certain, that no counter-claim can be given effect to as a defence unless the Court dealing with the original action has also jurisdiction in the matter of the counter-claim."

Support for this proposition can also be got from the Privy Council case, *Bow, Mc Lachlan & Co.* v. *Ship "Camosun"*[2], where a question of Admiralty Jurisdiction arose ; and it was held that to an action brought in an Admiralty Court a counter-claim which ordinarily would not be triable by an Admiralty Court could not be put forward. In the notes to the Original Side Rules under Order 5, rule 3, it is said :

"A counter-claim is substantially a cross-action ; not merely a defence to the plaintiff's claim. It must be of such a nature that the Court would have jurisdiction to entertain it as a separate action."

and the above authorities are cited in support. Mr. Radhakrishnaiya has contended on the other hand that wherever a plaintiff goes to a Court he thereby gives that Court jurisdiction to entertain any counter-claim which may be put forward by the defendant. The words on which he relies, however, are not quite explicit. They appear in Dicey's Conflict of Laws, page 221 :

"A person, further, who comes before the Court as a plaintiff in general gives the Court jurisd tion to entertain a counter-claim, or in other words, a cross-action against him but not an action on an independent ground"

It is to be observed that the words are "a person . . . . . who comes as a plaintiff *in general* gives the Court jurisdiction ;" that is to say, not in every case. In my opinion it means no more than if a plaintiff has sought the assistance of a Tribunal the defendant may also seek the assistance of that Tribunal if that Tribunal has jurisdiction to give him the assistance he prays. It is wrong, in my view, to say that the Original Side Court here by reason of the fact that the plaintiff quite properly appears and claims the return of money which he handed over within the jurisdiction thereby enables the defendant to bring proceedings which he otherwise could not bring in this Court or to do things which he could not do either here or anywhere else if the defendant were filing his counter-claim as a separate suit. There can be no doubt that the plaintiff had a perfect right to bring his suit here and if the defendant had had any claim arising against the plaintiff within the jurisdiction of this Court, then the plaintiff would have laid himself open to a counter-claim in respect of it, and this Court would have been entitled to try such counter-claim. But because the plaintiff has done something which he was

1. (1914) A. C. 510. 2. (1909) A. C. 597.

entitled to do, it does not mean that the defendant's rights become limitless, *e.g.*, to put forward a claim which nobody else could put forward as a plaintiff, and for which there is no justification in the Letters Patent or in the Civil Procedure Code. For these reasons, I hold therefore that the preliminary point as to jurisdiction should succeed and the counter-claim is excluded and therefore dismissed with costs.

A second preliminary point was taken as to whether the parties were suing each other in the same character. In any opinion there is no substance in this point. It is not as if the plaintiff was suing as executor and has been counter-claimed in his personal capacity. Both sides are appearing actually in their own personal character. This point therefore fails and I need say no more about it. The preliminary point therefore as to jurisdiction having succeeded, all that remains to be tried is as to whether or not the money was received by the defendant in the manner suggested by him or in that alleged by the plaintiff.

K.C. *Counter-claim excluded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

S. K. S. Ayyathurai Mudaliar .. *Petitioner**

v.

Ibramsa Rowther and another .. *Respondents.*

Limitation Act (IX of 1908), Articles 74 and 75—Instalment bond with default clause—Default in payment of one instalment—Creditor if bound to sue for the whole amount—Limitation.

In a suit on an instalment bond with a default clause, Article 75 will only operate if the plaintiff elects to enforce the default clause which it is always open to him to waive or forego. In such cases his right to recover the instalments as on an ordinary instalment bond within three years prescribed by Article 74 of the Limitation Act remains unaffected.

Reading the two articles together, Article 75 is no bar to a suit on the instalment bond itself either after or before the expiry of the instalment period for the recovery of the instalments which the debtor has contracted to pay and which have not become themselves time-barred under Article 74. The two remedies are co-existent and open to the creditor and he has his choice either to wait and sue for the instalments in default under Article 74, or to enforce the default clause in a suit contemplated by Article 75. A suit falling under Article 75 may be dismissed on the debtor proving waiver by the creditor of the default which entitles the creditor to file such a suit, in which case the creditor can of course still fall back on his right to sue for instalments within the time limits prescribed by Article 74. He has also the other alternative of suing to enforce the default clause for a subsequent default which he has not waived within the period prescribed by Article 75.

Jawahar Lal v. *Mathura Prasad,* (1934) I. L. R. 57 All. 108 (F.B.) and *Gopala Menon* v. *Abdul Azeez,* (1934) 68 M.L.J. 244, referred to.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge, Madura, in S. C. S. No. 128 of 1946.

T. S. Vaidyanatha Aiyar for Petitioner.

N. S. Srinivasan for Respondents.

The Court delivered the following

JUDGMENT.—This petition raises an interesting point of limitation law applicable to a defaulting member of a chit fund.

The plaintiff was a stakeholder who conducted in Madura what is called an auction chit of the usual type. There were 100 chit subscribers who contracted to pay Rs. 20 a month for a period of 50 months from 5th December, 1941. The chit auction was to be held on the 20th day of each Tamil month, the bid commencing from Rs. 1,000. At the eleventh call the defendant who had subscribed only to a half share in the chit bought it for Rs. 343 and executed an instalment bond on 9th October, 1942, for Rs. 390, undertaking to pay future subscriptions

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* C. R. P. No. 287 of 1947. 2nd December, 1948.

as they fell due. The bond contained a clause that if default was made in the case of one instalment the whole sum would become payable with 12 per cent. interest. The defendant paid up to the 15th call but defaulted at the 16th call due on 3rd March, 1943. The plaintiff's case is that subsequent to this the defendant paid only a sum of Rs. 8 on 6th September, 1943. After the expiry of the chit period in 1945 the plaintiff sued to recover on the bond he had executed. The defendant pleaded the bar of limitation. The Subordinate Judge held that the suit was barred by limitation under Article 75 of the Limitation Act and dismissed the suit with costs.

There are two articles of limitation applicable to instalment bonds. The first is Article 74 which applies to "a promissory note or bond payable by instalments." It prescribes three years in respect of each instalment from the expiry of the respective terms of payment, in other words, three years from the date on which the instalment becomes payable under the bond. Article 75 provides specifically for an instalment bond :

"payable by instalments, which provides that if default be made in payment of one or more instalments, the whole shall be due."

It prescribes three years from the date :

"when the default is made, unless where the payee or obligee waives the benefit of the provision, and then when fresh default is made in respect of which there is no such waiver."

Had the matter been *res integra* I should have had no difficulty or hesitation in construing these Articles as they stand. Different opinions have been however taken in decided case-law in which there is no Bench decision of our High Court or any other decision by which I appear to be bound. I shall refer to these decisions presently ; but I should like to give my own reasons why the finding of the Subordinate Judge cannot be sustained, that the suit should be held to be governed solely by Article 75.

In an instalment bond with a default clause, as it appears to me, there are two covenants independent of each other, one by the debtor to pay monthly a particular sum and the other that if he defaulted and the creditor did not waive the provision of the default clause he was entitled to recover the whole amount due on the bond. It is only in cases where the creditor elects to enforce the default clause and sues to recover the whole sum, as may well happen long before the expiry of the whole instalment period, that Article 75 becomes operative. It prescribes three years from the date of the default provided that a plaintiff has not waived such default. The plea of waiver has, as it appears to me, obviously to be set up by the debtor who is entitled in defence of such a suit to enforce the default clause, to show that the plaintiff has by his conduct or other circumstances in the case condoned or waived the default committed by him. If the defendant succeeds in proving waiver of a particular default, another suit can be filed under Article 75 to enforce the default clause within three years of the next default provided again the defendant cannot establish that this default has been waived. This appears to me to be the ordinary meaning to be attached to Article 75. As I read the two articles together Article 75 is no bar to a suit on the instalment bond itself either after or before the expiry of the instalment period for the recovery of the instalments which the debtor has contracted to pay and which have not become themselves time-barred under Article 74. The two remedies appear to me to be co-existent and open to the creditor and he has his choice either to wait and sue for the instalments in default under Article 74 or to enforce the default clause in a suit contemplated by Article 75. A suit falling under Article 75 may be dismissed on the debtor proving waiver by the creditor of the default which entitles the creditor to file such a suit, in which case the creditor can of course still fall back on his right to sue for instalments within the time limits prescribed by Article 74. He also has the other alternative of suing to enforce the default clause for a subsequent default which he has not waived within the period prescribed by Article 75. I find myself unable reading the two

Articles together to accept the contention that because the whole amount becomes payable on default, the creditor must sue on the whole bond within three years of such default. This if taken to a logical conclusion will result in somewhat astonishing anomalies, one exemplified in the present case of a debtor pleading his own default in bar of a suit. Another is that a creditor on such instalment bonds containing a default clause which was inserted for the benefit of the creditor will be left with no option, but to sue within three years for the whole amount in the case of any default, although the instalment period itself may cover 10, 15 or 20 years. Otherwise, the creditor would be exposed in suits after or even before the expiry of the instalment period to a defence by a debtor that he had defaulted in an instalment several years before, and as the plaintiff had not sued within three years to enforce the default clause on the basis of that default he was precluded from enforcing his rights under the bond under Article 75. If this were the legal position it would be disastrous for debtors who under such instalments bond with a default clause will receive no forbearance or mercy from their creditors in the event of any default, which no creditor will under any circumstances waive. It would indeed be regrettable to propound such a legal position at the instance of a defaulting and dishonest debtor such as the defendant undoubtedly is, who having received Rs. 343 from the chit fund now seeks to repudiate liability on this technical bar of limitation.

Article 75, to my mind, clearly and specifically lays down the right of the payee or obligee to waive the benefit of the provision, namely, the default clause. The argument is that if he does not do so, he is compelled to sue straightaway on the whole bond and is allowed three years' time from such default. If this view is accepted, limitation will depend on the question of waiver, and we shall have the plaintiff desparately trying to establish that he waived a default by the defendant who will plead to the contrary to invoke Article 75 whereas this Article, as I read it, does not contemplate any such contingency and only entitles the defendant to resist a suit to enforce a default clause on the ground that the plaintiff has waived or condoned that particular default. The view that I have taken on the wide construction of the two Articles as they stand therefore without any reference to decided case-law, which is in conflict, is that the plaintiff has the option of enforcing the default clause in Article 75 and if he does not do so, he must be deemed to have waived the benefit of the provision, and he then can fall back on his ordinary right of suit on the covenant to pay by instalments under Article 74. The view that I have taken is that taken by Mukerji, J., in his dissenting judgment in a Full Bench decision of the Allahabad High Court in *Jawahar Lal* v. *Mathura Prasad*[1]. The majority opinion of that Bench prevailed which was to the effect that Article 75 only applied to a case of this kind of an instalment bond with a default clause, and that the only suit that could be filed on such a bond after a default was within three years of such default under this Article, unless the default was waived. With the greatest respect to the majority view I find myself in agreement with Mukerji, J., and unable to accept it. The majority view appears to have been based on an obligation on the creditor to show that he waived the benefit of default clause in order to show that his suit more than three years after the default is in time. This seems to be so from the following observation of King, J.:

> "I think that Article 75 is clearly applicable. This means that limitation began to run from the time when the default was made, unless the creditor is proved to have waived the benefit of the default clause. No waiver is proved."

As I have said *supra* I find it difficult to read into Article 75 any obligation at all on a creditor to prove waiver in order to bring his suit within time. That is, as it appears to me, only a defence open to the defendant to show that the default on which the suit to enforce the default clause is filed was condoned or waived by the creditor.

There is one material difference in the facts in *Jawahar Lal* v. *Mathura Prasad*[1] and the present case, namely, that in the former the creditor gave a notice to the debtors on the 21st May, 1928, claiming that on account of the default the whole

1. (1934) I.L.R. 57 All. 108 (F.B.).

amount had become due and demanding payment thereof. He filed no suit until 25th July, 1931. In the present case however no such demand was made. The stakeholder kept an account of the monies owed by the subscribers, and also in making up the defendant's account gave credit to some commission due to the defendant under the chit fund rules on the basis that he had committed no default. The ledger, Ex. P. 2, shows credit for Rs. 8 on 6th September, 1943, the only payment which according to the plaintiff the defendant made subsequent to 3rd April, 1943 when he defaulted at the 17th call. A faint attempt was made to rely on this further payment as bringing the plaint filed on 22nd June, 1946, within time on another ground. There are no grounds for doubting the correctness of that credit; nor does that part payment affect the question of limitation either under Article 74 or Article 75 of the Limitation Act.

My attention has been drawn to the decision in *Gopala Menon* v. *Abdul Azees*[1], by Madhavan Nair, J., (as he then was) sitting singly in 1934 in which he appeared in agreement with the majority view in *Jawahar Lal* v. *Mathura Prasad*[2] and held that Article 75 barred such a suit. In that case the default occurred on 23rd May, 1922, and a suit was filed on 3rd January, 1927. There is direct support in this decision to the view that I have taken about waiver in the following observation :

> "Obviously according to this article unless waiver by the plaintiff is pleaded by the defendant time will start from the date when the default is made."

It was also observed that no decision directly bearing on the question of waiver was brought to notice, and indeed no such decision on the subject of waiver being pleaded in a suit to enforce a default clause on an instalment bond under Article 75 of the Act has been placed before me. The view I have taken is also in accordance with *Gulab Rao* v. *Ganpati*[3], a Nagpur decision by Bose, J.

I have considered whether it is necessary to place this case before the learned Chief Justice for reference to a Full Bench; but as there appears to be no Bench decision by which I am strictly bound, as the learned advocates before me concede, I think I am entitled to decide this matter in accordance with my own opinion. I accordingly find that in a suit on an instalment bond with a default clause Article 75 will only operate if the plaintiff elects to enforce the default clause which it is always open to him to waive or forego. In such cases his right to recover the instalments as on an ordinary instalment bond within three years prescribed by Article 74 of the Limitation Act remains unaffected. The suit therefore is, in my opinion, not time barred and all instalments recoverable under Article 74 on 22nd June, 1946, the date on which the suit was filed can be recovered.

The plaint claimed 33 instalments commencing from that payable on 3rd May, 1943. The suit was filed on 22nd June, 1946, on the day the Sub-Court opened after the recess. All the instalments claimed in the plaint are admittedly due excluding commission and default interest at 12 per cent. to which both advocates agree. On my finding *supra* plaintiff will have a decree for Rs. 330 with interest at 6 per cent. from the date of suit with costs to the extent plaintiff has succeeded. Petition is allowed in the result with costs.

V.P.S. *Petition allowed.*

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1. (1934) 68 M.L.J. 244.
2. (1934) I.L.R. 57 All. 108 (F.B.).
3. I.L.R. (1943) Nag. 630.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CLARK.

Chadalavada Satyanarayana .. *Appellant**

v.

Alladi Suryanarayana .. *Respondent.*

Transfer of Property Act (IV of 1882), *section* 76—*Civil Procedure Code (V of* 1908), *Order* 34, *rule* 8, *Order* 2, *rule* 2 *and Order* 43, *rule* 1—*Mortgage with possession—Liability of mortgagee to account for profits between the date of the preliminary decree and the passing of the final decree—Appealability of order of refusal of final decree.*

A mortgage suit continues until the final decree is passed, and the relationship of a mortgagor and mortgagee continues until then. Accordingly, a mortgagee in possession has until the expiry of that period the liabilities imposed on him by section 76 of the Transfer of Property Act. It is true that Order 34, rule 8, Civil Procedure Code, does not in terms provide that a mortgagor in a suit for redemption applying for a final decree is entitled to have an account taken of the profits received by the mortgagee in possession between the date of the preliminary decree and the date when possession is given. But the provisions of Order 34, rule 8, as a whole indicate that such an account must necessarily be taken. Even if they did not, the right of the mortgagor to such an account is established beyond question by the provisions of section 76 of the Transfer of Property Act. It is also settled beyond question that when a suit whether for sale or redemption of a mortgage is filed, it is the duty of the Court to decide in that suit all the claims of the mortgagor and mortgagee under the mortgage up to date when the final decree is given. Such claims can and indeed must be included in the mortgage suit itself. If they are not included the person failing to include them is barred thereafter under the provisions of Order 2, rule 2, Civil Procedure Code, from filing a suit in respect of them.

Case-law reviewed.

Where in a mortgage suit a preliminary decree was passed and thereafter the mortgagor filed an application for accounts being taken of the profits received by the mortgagee in possession of the mortgaged property between the date of the preliminary decree and the passing of the final decree, on the questions whether an appeal lay against a refusal to grant such an application and whether such an application for taking of accounts would at all lie,

Held : (1) that account must necessarily be taken of all profits received by the mortgagee prior to date of the final decree without any qualification whatever, and

(2) that an appeal lay under the provisions of Order 43, rule 1, Civil Procedure Code, from a refusal to pass a final decree.

Appeal against the order of the District Court of Nellore dated 25th February, 1946, and made in C.M.A. No. 124 of 1945, preferred against the order of the Court of the District Munsiff of Kavali, dated 4th October, 1945, and made in I.A. No. 691 1944, in O.S. No. 50 of 1942.

K. Umamaheswaram for Appellant.

T. K. Srinivasa Thathachariar for Respondent.

The Court delivered the following

JUDGMENT.—The appellant mortgaged certain property to the respondent's father. The mortgage was in simple form but at some time, whether at the date of the mortgage or subsequently is immaterial, the respondent's father went into possession of the mortgaged property. Thus the mortgagee was a mortgagee in possession. The appellant filed a suit for redemption in the Court of the District Munsiff of Kavali and obtained a preliminary decree on the 6th of October, 1942. The respondent's father died during the pendency of these proceedings and the respondent was joined as his legal representative. The preliminary mortgage

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* A.A.A.O. No. 237 of 1946. 22nd January, 1948.

decree for redemption followed the form prescribed in Order 34, rule 7, Civil Procedure Code. The District Munsiff in granting a preliminary decree arrived at a decision as to the amount payable by the mortgagor after making due allowance for the profits of the mortgaged property received by the respondent's father or the respondent up to the date of the preliminary decree. On the 14th of July, 1944, the appellant filed an application for an account to be taken of the profits received by the respondent after the date of the preliminary decree and before the passing of the final decree. In the meantime the appellant had paid into Court the amount fixed by the preliminary decree and the respondent had delivered up possession to the appellant. The dates on which payment was made and possession was given are immaterial. It is sufficient to note that both these acts had been done at the time when the appellant applied for a final decree. The appellant appears to have described his application as one falling under rule 7 of Order 34, and it has been so referred to in both the Courts below.

This was clearly a mistake as the application must necessarily have been one under rule 8 of Order 34. The District Munsiff held that as the preliminary decree gave no direction for the taking of an account in respect of the profits after the date of that decree such an application would not lie. He held that the appellant would " have to seek his remedy elsewhere " and dismissed the application. The appellant appealed to the District Court of Nellore. The respondent resisted that appeal on two grounds both of which were upheld by the District Judge. The respondent's first objection was that no appeal lay. His second was the ground found in his favour by the District Munsiff. The District Judge held that the order dismissing the appellant's application was not an order appealable under the provisions of Order 43, rule 1, and accordingly that no appeal lay. The learned Judge was clearly in error on this point, and counsel for the respondent before me conceded at an early stage that this decision could not be supported. As I have observed, the appellant's application was for a final decree. He has been refused that relief. It is beyond question that an appeal would lie from a final decree, and it cannot be contended that a similar right will not lie when the relief is refused.

On the respondent's second point of objection the District Judge agreed with the decision of the District Munsiff that in the absence of any provision in the preliminary decree for the taking of an account no such account could be ordered.

On second appeal to this Court, the appellant urges that an appeal lay to the District Judge and that he was entitled to an account of the profits received by the respondent after the date of the preliminary decree and up to the date on which possession was given as a necessary preliminary to the passing of a final decree. That he is so entitled is well-settled law. A mortgage suit continues until the final decree is passed and the relationship of a mortgagor and mortgagee continues until then. Accordingly a mortgagee in possession has until the expiry of that period the liabilities imposed on him by section 76 of the Transfer of Property Act. It is true that Order 34, rule 8 does not in terms provide that a mortgagor in a suit for redemption applying for a final decree is entitled to have an account taken of the profits received by the mortgagee in possession between the date of the preliminary decree and the date when possession is given ; but the provisions of Order 34 read as a whole clearly indicate that such an account must necessarily be taken. Even if they did not, the right of the mortgagor to such an account is established beyond question by the provisions of section 76 of the Transfer of Property Act. Again it is beyond question that when a suit whether for sale or redemption of a mortgage is filed it is the duty of the Court to decide in that suit all the claims of the mortgagor and mortgagee under the mortgage up to the date when the final decree is given. Such claims can and indeed must be included in the mortgage suit. If they are not included the person failing to include them is barred thereafter under

the provisions of Order 2, rule 2, Civil Procedure Code, from filing a suit in respect of them. There are a large number of cases both in this Court and in the other Indian High Courts in which these propositions are laid down beyond question. *Vinayak* v. *Dattatraya*[1], *Rukmani Bai* v. *Venkatesh*[2], *Satyabadi Behara* v. *Harabati*[3], *Kashi* v. *Bajrang Prasad*[4], *Ram Din* v. *Bhup Singh*[5], *Chandulal* v. *Bharat Singh*[6], *Papla Chakrapani Chettiar* v. *Ramaswami Thenkondan*[7] and *Suppan Chettiar* v. *Rangan Chetty*[8].

When these authorities were referred to, counsel for the respondent conceded that the Courts below were in error in refusing to order an account to be taken, but he urged that that the account could be taken only for the period between the date of the preliminary decree and the date fixed for redemption. I can find no justification for this qualification. On the contrary I am satisfied after a consideration of the authorities to which I have referred that no such qualification can be justified ; the account must necessarily be an account of all profits received by the respondent prior to the date of the final decree. I think it is more convenient to put it that way than to say up to the date when possession is given ; for in some cases possession may not be given until after the final decree is passed. I refrain from expressing any view whether in such cases the account can properly take into consideration the profits arising after the date of the final decree as that question does not arise in this case for decision.

Accordingly the District Munsiff must deal with the application for a final decree and take an account of the profits which accrued to the respondent or his father, as the case may be, between the date of the preliminary decree and the date on which possession was given to the appellant and the case will be returned to the District Munsiff's Court for that purposes. In taking that account due regard will be paid to the provisions of section 76, particularly sub-sections (*g*) and (*i*) of that section.

The appeal is accordingly allowed and the decisions of the Courts below are both reversed, with costs throughout.

No leave.

K. C. *Appeal allowed.*

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1. (1902) I.L.R. 26 Bom. 661.
2. (1907) I.L.R. 31 Bom. 527.
3. (1907) I.L.R. 34 Cal. 223.
4. (1907) I.L.R. 30 All. 36.
5. (1908) I.L.R. 30 All. 225.
6. A.I.R. 1935 All. 96.
7. (1917) 42 I.C. 230.
8. A.I.R. 1938 Mad. 405 at 411.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL AND MR. JUSTICE GOVINDA MENON.

Sri Baktavatsalu Naidu, Industrial Tribunal, Madura, at the Commercial Tax Office, North Beach Road, Madras .. *Appellant**

v.

The Chrome Leather Co., Ltd., and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947)—Purpose and scope of—Dispute on matters outside the terms of contract and existing legal rights—Jurisdiction of Tribunal to consider—Trade disputes—Re-instatement of dismissed workmen, bonuses, gratuities, pensions and amenities like houses for workmen and schools for their children—Claim relating to—Jurisdiction of tribunal.

The purpose of the legislation enacted in Act XIV of 1947 (a descendant of Rule 81 (*a*) of the Defence of India Rules) is to settle disputes that arise between the workers and the management which, if not settled, would result in a strike or lock-out and dislocation of business essential to the life of the community. It is rarely that such disputes relate to the infringement of existing contracts between the management and the workmen. Industrial arbitration (unlike a commercial arbitration) is more often an extension of the process of collective bargaining and may involve the extension of an existing agreement, or the making of a new one, or in general the creation of new obligations or modifications of old ones. It cannot be said that one should read Act XIV of 1947 with Act XX of 1946. Act XX of 1946 has for its sole purpose the clarification of the existing contract between the parties and has no machinery at all for the changing of existing conditions in pursuance of an industrial dispute.

If persons strike in pursuance of an industrial dispute, the termination of their service makes them dismissed workmen who are entitled to have their dispute with their employers (question of re-instatement) adjudicated upon under the Act. Disputes relating to demand for bonus, gratuity, pensions, provident fund and Pongal presents will be industrial disputes which the Tribunal can consider. So also the disputes relating to the provision of houses, the re-opening of a school (for the children of the employees) the provision of text books and the like and other amenities are all industrial disputes which the Tribunal has jurisdiction to consider.

On appeal from the judgment and order of the Hon'ble Mr. Justice Subba Rao, dated 12th August, 1948, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 1673 of 1948.

The Advocate-General (*K. Rajah Aiyar*), instructed by the Government Pleader (*K. Kuttikrishna Menon*), for appellant.

O. T. G. Nambiar, instructed by *King & Partridge*, for 1st Respondent.

A. Ramachandran, instructed by *Row & Reddy*, for 2nd Respondent.

The Judgment of the Court was delivered by

Horwill, J.—This is an appeal against the order of Subba Rao, J., on an application under section 45 of the Specific Relief Act by the Chrome Leather Co., Limited, directing the appellant, the Industrial Tribunal, Madura, at Commercial Tax Office, North Beach Road, Madras, not to enquire into the issues, framed by it in the dispute between the Chrome Leather Co., Limited, and the Chrome Leather Company Workers' Union, of which the second respondent is the Secretary, and further directing the Tribunal to frame fresh issues in the light of his findings.

By G. O. No. Ms. 1349 of the Development Department, Government of Madras, dated 18th March, 1948, the Government declared that an Industrial dispute had arisen between the workers and the management of the Chrome Leather Co., Limited, and as the parties to the dispute had been unable to arrive at an amicable settlement, the Government directed that the dispute be referred to the Industrial Tribunal, Madura, for adjudication under section 10 (1) (*c*) of the Industrial Disputes Act, 1947. The Tribunal thereupon called upon the parties to file statements of their claims ; and in accordance with the cases set out by the two parties, the Tribunal framed a number of issues, which can, roughly speaking, be classified under three heads ; (1) The re-instatement of dismissed workmen ;

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*O.S.A. No. 45 of 1948. 17th November, 1948.

(2) The granting of an annual bonus, gratuities upon retirement, pensions, provident fund, and presents to be given each year at the Pongal festival; and (3) The providing of houses for the workmen, or, in default, the granting of house allowance, the revival of the school which formerly existed for the children of the workmen, and the granting of certain other amenities. In general, the learned Judge found that the Tribunal had no jurisdiction to grant any of the workers' demands, except in so far as they had a legal right to them under existing and legally enforceable contracts.

It might be well to deal first with the contention of the management, which was generally accepted by the learned Judge, that the Tribunal could only enforce the existing rights of the workmen and could not give them anything to which they did not have a pre-existing right; for example, it is stated in the affidavit filed by the management that

> " no tribunal has jurisdiction to add to or vary the terms of contract entered into between an employer and his workmen except with the consent of both or under statutory powers which do not exist in the present case."

The summary of their argument on this point is expressed by the learned Judge in these words:

> " The Tribunal's jurisdiction is only to decide whether the terms of the contract between the parties have been complied with or whether the conditions of service have been violated. It has no power to add to the terms of the contract or to introduce any new condition of service and thereby make out a new contract between the parties."

The learned Judge found himself in general agreement with this argument, except that he was prepared to say that the Tribunal had a right to increase wages. In giving his findings with regard to the jurisdiction of the Tribunal to decide the questions raised, he emphasised again and again the necessity of enforcing the terms of the contract between the parties. For example, on the question of re-instatement of the dismissed workmen, he held:

> ". . . . . . the only question the Tribunal would be entitled to decide is whether or not all or any of the workmen in question have been wrongfully dismissed and if they have been wrongfully dismissed, the Tribunal could treat the employees to be in service and give a declaration to that effect. If they have been legally discharged, the Tribunal has no power to direct their re-instatement."

On the question of the general revision of the Standing Orders framed under Act XX of 1946, the learned Judge stated:

> " If the workmen have grievance, it is open to them to agitate the same in the manner provided by that Act. The Tribunal has no jurisdiction to amend the Standing Orders."

In other words, the conditions of contract of the employment between the management and the workers cannot be changed under Act XIV of 1947. With regard to the questions of gratuity, bonus, and Pongal presents, the learned Judge stated:

> " A dispute in regard to gratuity, bonus or Pongal presents cannot be an industrial dispute unless it is one of the terms of the contract between the parties that such payments should be made. The jurisdiction of the Tribunal is confined only to enquire and find whether the contract between the parties provided for gratuity, bonus and Pongal presents. It has no jurisdiction to direct the employer to provide for them in case there was no contract between the parties to that effect."

The purpose of the legislation enacted in Act XIV of 1947, is to settle disputes that arise between the workers and the management which, if not settled, would result in a strike or lock-out and dislocation of business essential to the life of the community. It is very rarely that such disputes relate to the infringement of existing contracts between the management and the workmen. In almost every case, the workmen are agitating for a higher standard of living, generally conceded by the community to be permissible for workers as well as for those in more comfortable circumstances. The most frequent cause of strikes is a refusal by the management to increase wages beyond those agreed upon when the workers were first employed. Another common cause of disputes arises out of the dismissal of workmen, because of the part they have played in demanding something of the management which the management considers unreasonable, and the consequent unrest caused by such agitators among the general body of workers. Workmen frequently demand, too, where suitable house accommodation is not available within reasonable

distance of the works, that the management should provide houses with a reasonable standard of comfort and hygiene. It is also considered reasonable to expect that managements will provide dispensaries to treat the workers, not only in cases of accidents arising out of employment, but also in cases of sickness due to other causes; and such relief is often extended to the members of the families of the workers who live in houses provided by the management. If one were to seek to enumerate all the amenities granted by some managements and often demanded by the workmen, it would indeed be a long list; and it is because some managements refuse to provide such amenities as are granted by the other managements to their workmen, that disputes frequently arise. The above and other matters for which workmen agitated are not ordinarily to be found in the terms of the contract of employment. They are demands for something beyond the terms of the agreement between the parties, to meet the ever-advancing ideals of the public with regard to the conditions under which the employees should work.

It should not be necessary to discuss this matter at greater length; but since it has been made the main plank of the argument of the learned Counsel for the management, as well as of the judgment of the learned Judge, it would perhaps not be out of place to refer to two authoritative volumes, one of which has been issued by the International Labour Office. There is a paucity of Judicial decisions on this point, although we find scattered dicta here and there amongst the reports. One does not expect many judicial rulings on this question in the English reports; because it is presumed in England that the questions that arise out of the dispute between management and labour do not spring from existing contracts, but from demands for better terms. There is, however, one case which has been quoted in the judgment under appeal and in the decisions of the Bombay and Calcutta High Courts, *viz.*, *The National Association of Local Government Officers* v. *Balton Corporation*[1]. Section 1 of the Local Government Staffs (War Service) Act, 1939, made provisions permitting local authorities to make up the remuneration of their employees who had undertaken War Service in the forces of the Crown or in civil defence to the level of the remuneration which they would have received if they had continued to serve in their civil capacity; but there was no obligation under this section for them to do so. The employees demanded of the Bolton Corporation that their salary should be made up as permitted by section 1 of that Act; but the Corporation refused to do so, whereupon the employees, under the conditions of Employment and National Arbitration Order, 1940, referred the matter as a Trade dispute. It was there argued that since there was no obligation on the Corporation to make up the salaries to what they would have been had the employees continued to serve in a civil capacity, the Tribunal could not enforce it. The argument put forward there, as here, though in a different way, was that the Tribunal was bound to apply the law. At page 187, Lord Wright stated:

> " There was here, I think, a "trade dispute" within the jurisdiction of the Tribunal. It is true that the respondents, in consequence of the reference by the Minister of the dispute to the Tribunal may have an award made against them. . . ."

It was held that a Tribunal could consider whether it would direct the Corporation to make a payment to its employees, despite the fact that no legal obligation lay upon the employers to do so.

At page 6 of " Conciliation and Arbitration in Industrial Disputes", a publication of the I. L. O., we find the following passage:

> " For the settlement of collective disputes of this kind it is not a question of applying and interpreting existing law, but rather of finding first of all the equitable basis according to which these disputes should be regulated. The aim of each party is to make the standard as favourable for itself as possible, as for instance when a workers' organisation endeavours to obtain the highest possible evel of wages. In essence, this is the same distinction as is made in international law between legal disputes on the one hand and political disputes or struggles for power on the other."

At page 19 of the same book we find this observation:

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1. (1943) A.C. 166.

" On the whole, however, the basic policy of separate treatment of the administration of Justice (application of law) on the one hand and the settlement of disputes (creation of law) on the other is almost everywhere either explicitly or implicitly recognised. Despite the fact that the conciliation and arbitration institutions are often actually described as Courts. . . . they are sharply distinguished from the ordinary Courts of Law."

Again, at page 90:

" . . . . . the function of conciliation and arbitration is to establish a compromise between the interests of the parties to a dispute and create a new basis for their mutual relations,—that is to say, to make law and not, as in the judicial settlement of a dispute on rights, to interpret it. The result is that the elucidation of the facts plays two very different parts in the two types of procedure. In a case in civil law the object is to establish the facts of the case, on which the Judge bases his decision in application of the law; but in disputes on collective interests, knowledge of the circumstances is needed to enable the conciliation or arbitration institution to form an opinion as to what regulation of the dispute will first be voluntarily adopted by the parties, or what compulsory solution is likely to be the most just, if need be with due reference to public interests. In the first case, therefore, elucidation of the facts is the basis for a settlement of the legal position by a Judge; in the second, it is the basis for the creation of fresh law, whether in the form of an agreement between the parties or of a solution imposed by the Court or board on its own authority or directly by the State".

At page 127, in discussing legal remedies against conciliation and arbitration decisions, the learned author says:

" This characteristic limitation of a conciliation proposal's force as a final judgment is another manifestation of the difference between conciliation and arbitration proceedings on the one hand and judicial proceedings on the other. The latter deal with disputes on rights, existing law is expounded and applied, and judgments given are of a different nature and far more final. The settlement of disputes on collective interests by conciliation and arbitration is in fact less a judicial than an administrative and even a legislative function of the State, and in its performance the principles of civil law concerning finality can be applied only after careful adaptation to the special needs of this branch of law."

In Chapter VII, page 131, the learned author, dealing with " Conciliation and Arbitration as Contrasting Principles," makes the following observation:

" First of all, it may be useful to recall what is in general the object of conciliation and arbitratation in trials of strength between workers and employers concerning the regulation of labour conditions. The essential object is to arrive, by recourse to a given form of procedure, at the legal regulation which is always necessary for the maintenance of peaceful relations between parties, *i.e.*, without open conflicts such as are likely to interrupt production and entail other dangers. The problem is similar to that of the peaceful regulation of the conflicting interests of States, and similar also to that before a national constitution in its widest sense. Such a constitution must provide the legal basis for the combination of rival groups in one unit of life and labour, the commonwealth; it must arrange for the adjustment of their conflicting interests within the unit, and at the same time ensure the legal continuity of its own existence by adapting itself to changing needs and forces, so as to avoid subversive violence."

The above passages set out the contrast between the scope of commercial arbitration and the ordinary Courts of Law on the one hand and the settlement of trade disputes on the other, the latter having little or nothing to do with existing law which binds the parties.

In Volume one of " Labour Disputes and Collective Bargaining," by Ludwig Teller, we find passages which bring this out even more clearly.

In Chapter Eleven, " Arbitration Agreements " we find the following observation at page 534:

" The kernel of the distinction between commercial and industrial arbitration is said to be found in the fact that commercial arbitration is an aspect of the administration of justice, and, more particularly, a substitute for the judicial process, while the arbitration of labour disputes is more often an extension of the process of collective bargaining."

At page 536, the learned author goes on to say:

" Then too, industrial arbitration may involve the extension of an existing agreement, or the making of a new one, or in general the creation of new obligations or modifications of old ones, while commercial arbitration generally concerns itself with interpretation of existing obligations and disputes relating to existing agreements."

In the following page, in dealing with various statutes drawn up for the adjustment of labour controversies, it is pointed out that:

" their application is limited to the settlement of existing disputes, they find their source not so much in thoughts intended to implement the administration of justice, but rather in public policy designed to keep the peace, and they are generally hybrids of conciliation and mediation."

Further down, the learned author says :

"Compromise by contending advocates rather than justice by impartial men is thus the purpose of the procedure adopted under such statutes."

We are in entire agreement with the views expressed in the above two volumes; and so it is unnecessary for us to consider the cases quoted by the learned advocate for the management dealing with the obligation of an arbitrator in a commercial dispute to apply the ordinary principles of law unless the arbitration agreement makes it clear that the law should not be applied.

Although we are not disposed to repel an argument that in construing a statute we should presume that the ordinary law of the land is to be applied unless the statute makes it clear that the ordinary law is to be abrogated and that we should not lightly read into it a power in anybody to deprive parties of their freedom to contract or take away from them existing rights; yet we cannot ignore the history of Industrial Legislation or overlook the circumstance that the Legislature now frequently passes legislation which interferes with freedom of contract and takes away from persons their existing rights. We need only refer in passing to such legislation as "the Madras Estates Land Act," "The Madras Agriculturists' Relief Act," "The Usurious Loans Act," "The Malabar Tenancy Act," "The Rent Restriction Act," to say nothing of such pending legislation as "The Abolition of the Zamindaries Act." It is incumbent on a Court in construing a statute to look at the general purpose of the Act. Not only does Act XIV of 1947 follow in a general way similar legislation in England, but it follows and extends the existing law in this country. Similar provisions to those found in Act XIV of 1947 were to be found in rule 81 (*a*) of the Defence of India Rules, which, however, was applied only for maintaining supplies and services essential to the life of the community. The application of these rules was extended by an Ordinance after the termination of the war and kept in operation until the present legislation was passed. In the statement of objects and reasons for the present Act, it is stated that it was considered desirable to extend the principle of conciliation and arbitration to industries other than those covered by the Defence of India Rules. In India, as in England, all the various questions that have arisen in the present dispute, have been adjudicated upon under earlier Acts and Ordinances. The records of various references to arbitration under the Defence of India Rules show that these questions were being considered and adjudicated upon by the various Tribunals set up by the Government; and so when the present Act was drawn up it is reasonable to presume that the Legislature intended, since the language used is very similar to that found in the Defence of India Rules and since the statement of Objects and Reasons in the present Act makes this clear, that under the present Act Tribunals should have the same powers of deciding these questions as they had under the Defence of India Rules.

The learned advocate for the management has placed some reliance on the word "adjudication" in section 10 (1) (*c*) of the Act. That section runs :

"If any industrial dispute exists or is apprehended, the appropriate Government may, by order in writing . . . . . refer the dispute to a Tribunal for *adjudication*."

We may, however, in this connection refer to the preamble to the Act which does not use the word "adjudication," but says :

"Whereas it is expedient to make provision for the investigation and *settlement* of industrial disputes, and for certain other purposes hereinafter appearing . . . . . ."

We are not prepared to attach any significance to the use of the word "adjudication" and its etymological connection with the word "Judge." It is erroneous to think that a Judge can decide only according to the general law of the country. If so required by a statute, he may apply any standards for his decision, such as fairness and reason, rather than the common law. Ramesam, J., in *Venkatanarasimha Rao Bahadur* v. *The Municipal Council of Narasaraopet*[1], refers with approval to a dictum of May, C.J., in *Reg* v. *Dublin Corporation*[2], to this effect :

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1. (1930) 60 M.L.J. 260. 2. L.R. (1878) 2 Ir. 371.

"In this connection the term 'judicial' does not necessarily mean acts of a Judge or legal Tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others. And if there be a body empowered by law to inquire into facts, make estimates to impose a rate on a district, it would seem to be that the acts of such a body involving such consequence would be judicial acts."

We see no reason to think that any decision arrived at by a Judge in exercise of his powers of settling a dispute between the parties by granting to employees what he thought fair and reasonable, outside the terms of the existing contract, enforcing terms which he thought necessary to preserve industrial peace and in consonance with present public opinion, would not be as much an adjudication as if he were deciding a question of law and fact in an ordinary civil suit.

One of the arguments of the learned Counsel for the management, which found approval in the judgment of the learned Judge, was that one should read Act XIV of 1947 with Act XX of 1946. This argument overlooks the fact that Act XIV of 1947 is a descendant of rule 81 (*a*) of the Defence of India Rules and similar English legislation. It does not flow out of Act XX of 1946. Since however, this argument has found acceptance with the learned Judge, it is necessary for us to consider in some detail the provisions of Act XX of 1946. The preamble of this Act reads :

" Whereas it is expedient to require employers in industrial establishments to define with sufficient precision the conditions of employment under them and to make the said conditions known to workmen employed by them. . . . . "

Other provisions of this Act show that it is what it purports to be in the preamble ; *i.e.*, an Act designed to make clear to the workmen most of the terms of their contract with the management, other than wages ; so that they may know precisely what their rights are and what, by implication, they are not entitled to under their existing contracts. This is made particularly clear by section 4, which provides for the certification of Standing Orders. The general procedure is for the management to draw up draft Standing Orders, that the workmen, should have an opportunity of stating their objections to them, and that the certifying officer should then certify the orders with such modifications as he thinks necessary. In doing so, as will be seen by section 4, it is his duty to see that provision is made in the Standing Orders for every matter set out in the schedule to the Act and that the Standing Orders are otherwise in conformity with the provisions of the Act. It is expressly stated in that section that

" It shall not be the function of the certifying officer or appellate authority to adjudicate upon the fairness or reasonableness of the provisions of any Standing Orders."

In other words, the Certifying Officer has no power to add to, or extend the rights of the workmen ; but merely to see that existing rights are clearly expressed in the Standing Orders, whether they are reasonable or not. Neither the Certifying Officer nor the appellate authority has any power to interfere with the existing contract between the workmen and the management. They can only ensure that all the existing rights of the workmen find expression in the Standing Orders. It is noteworthy that although in this Act provision is made for the employers to have additions and changes made to the Standing Orders, no such right exists in the employees. Section 10 (1), by implication, permits of the Standing Orders being modified at any time by agreement between the employer and the workmen, and section 10 (2) permits an employer to apply to have them modified. It is thus seen that the purpose of this Act is very circumscribed and has, for its sole purpose, the clarification of the existing contract between the parties and affords no machinery at all for the changing of existing conditions in pursuance of an industrial dispute.

We may now discuss the various heads of dispute between the parties set out in the second paragraph of this judgment, and consider whether under any one of them the Tribunal has no jurisdiction to make any enquiries. We will take up first the question of re-instatement, which is one of the most vexed questions that has arisen between the management and labour and which has come up most for discussion in judicial decisions. There can be little doubt, upon reading the

definition of " Industrial Dispute," that this question of whether a workman should be, or should not be, re-instated, is one that comes under the title of " Industrial Dispute." That expression is defined in section 2 (*k*) as :

" Any dispute or difference between . . . . employers and workmen . . . . which is connected with the employment or non-employment . . . . . . of any person."

A workman is so defined in section 2 (*s*) as to include a workman discharged during the dispute ; so that if a dispute has arisen between the management and the workers and any person is discharged during the course of that dispute, then that workman is entitled to bring the matter before the Government for reference to an Arbitration Tribunal. The dismissal of a workman, whether before or during the dispute, may also be the subject of a dispute between the management and workmen not dismissed.

The chief argument against the claim of the Tribunal that it can order in suitable cases the re-instatement of workmen is that there is no provision in the statute or otherwise under which the re-instatement of a workman can be enforced, and that in the administration of the law of Equity, no Court would order an employer to re-employ a workman, the only remedy of a person improperly dismissed lying in damages. As regards the second part of the argument, we have already made it abundantly clear that in arbitrating in an industrial dispute, the Tribunal is not ordinarily concerned with the administration of law, but with the settlement of a dispute that has arisen between the management and its workmen. There is also no force in the argument that there is no means provided in the Act or otherwise for compelling the management to re-employ the workmen ; for it is often the case that the Court has no direct means of enforcing its decisions ; for example, a Court may order restitution of conjugal rights ; but the only method of enforcing it is by way of contempt if the injunction of the Court is not obeyed. This is also the case with regard to many other mandatory decrees passed by Civil Courts. This difficulty of enforcement does not however prevent the Court from passing a decree. The same argument would apply to the claim of a Tribunal to a right to enhance wages. No method is provided under the Act for compelling the management to pay higher wages ; but if it does not do so, the Government can prosecute the employer ; and the employer would be liable to be punished with a fine, which may extend to two hundred rupees, and in the event of a second or subsequent conviction with fine which may extend to five hundred rupees. It has been pointed out that this fine is so small that it could not have the practical effect of compelling the management to do something in accordance with the award ; but it is not reasonable to base any argument upon the extent of the punishment. The case of the management is largely based upon *Rex* v. *The National Arbitration Tribunal*, ex parte *Horatio Crowther & Co., Ltd.*[1], where it was held that the award directing the re-instatement of workmen was made without jurisdiction and must be quashed. The learned Judges pointed out that under the law a Court would not order an employer to employ workmen and that the Legislature did not intend that an employer in an industrial dispute should be compelled to do so was clear from the fact that there was no means of compelling the employer to do so, because no penalty was provided.

Rule 2 (5) of the Conditions of Employment and National Arbitration Order, 1940, upon the interpretation of which this decision was made reads :

"Any agreement, decision or award made by virtue of the foregoing provisions of this Article shall be binding on the employers and workers to whom the agreement, decision or award relates and . . . it shall be an implied term of the contract between the employers and workers . . . . . that the rate of wages to be paid and the conditions of employment to be observed under the contract shall be in accordance with such agreement, decision or award . . . . . ."

Thus a provision is made for the embodying of the award in the contract of employment, in so far as it relates to wages and conditions of employment, but not to the re-instatement of the dismissed workmen. In an important particular, Act XIV

1. (1948) 1 K. B. 424.

of 1947, differs from the English Statutes; for section 29 makes provision for the punishment of any person who commits a breach of *any term* of the award. The learned trial Judge relied on and followed the decision of Coyajee, J., of the Bombay High Court on this question of re-instatement; but the decision of Coyajee, J., was appealed against; and we have had the advantage which the learned trial Judge, had not, of reading the appellate Judgments which reversed the decision of Coyajee, J. We have also had the advantage of reading the judgments of the Calcutta High Court in the matter of an application and In the matter of *the Indian Pulp Company, Limited* (not yet reported) which deals with this question of re-instatement. In these cases it was held that whatever might be the state of the law in England, arbitration tribunals in India can order the re-instatement of a dismissed workman. Chakravarti, J., had the opportunity of reading the judgment of the learned trial Judge in this case; and although we cannot approve of the manner in which the learned Judge has expressed his views, we agree with his general line of argument.

There has been some discussion based on the wording of the Standing Orders of the Chrome Leather Co., Ltd., with regard to the termination of service. The relevant order is to the following effect:

"Employees who strike thereby terminate their respective contracts of service. If they are allowed to return to work they will be re-employed on new contracts on such terms as may be agreed.

An employee who is absent without leave for more than 8 consecutive working days will be deemed to have left the Company's employment without notice. He may apply for re-instatement on showing good cause and each case will be decided on its merits."

It is argued that according to these orders, a person automatically ceases to be an employee if he is absent without leave for more than eight consecutive days or goes on strike. In the Standing Orders the use of the word "dismissed" has been avoided; but we must regard the substance of these orders and cannot agree that because the use of the word "dismissed" is avoided, that the employees are never dismissed. The termination of service against the wishes of the employee is a dismissal. The two paragraphs in the Standing Orders referred to above obviate the necessity of any notice being given by the management to the employees; but the termination of their service, whether with or without notice, is a dismissal. The purport of these two paragraphs is that a man who strikes must regard himself as being dismissed without notice, as must a person who absents himself without leave for more than eight consecutive working days. If persons strike in pursuance of an industrial dispute, the termination of their service makes them dismissed workmen who are entitled to have their dispute with their employers adjudicated upon under the Act.

The second group of disputes relates to bonus, gratuity, pension, provident fund, and Pongal presents. The general argument with regard to these items is that they are *ex gratia* payments and can be given or withheld by the management at their pleasure. Here again, the general principle followed by the learned Judge is that the Tribunal cannot compel the management to give what they are not legally bound to give. That contention has been dealt with fully in the earlier paragraphs of this judgment and it is unnecessary to repeat the discussion here. The granting of bonuses, gratuities, pensions, and the like to employees is not out of charity. They are given in order to make labour more contented, and form part of the remuneration of the workers for their services. Bonuses, for example, may in one sense be regarded as a recognition of the right of the workers to share in some measure in the profits of the company and encourages workmen to work harder, in the knowledge that by doing so they will secure more gain to themselves. Payments of gratuities, pensions, and provident fund may be regarded as deferred wages, payable upon retirement, and affording a means, which the individual worker may be unable to do for himself, of putting by a little to provide for the days when he will no longer be able to work. In the same way, presents given at Pongal may be regarded as deferred wages payable annually at a time when custom and necessity require that new clothing should be purchased. The question whether

a bonus can be awarded by an Industrial Tribunal has come up for decision in many cases: for example, it was the subject of discussion in *National Association of Local Government Officers* v. *Bolton Corporation*[1], referred to above. At page 187, Lord Wright said:

"This payment, if made, cannot properly, in my opinion, be regarded as a mere gratuity. Though there is an element of bounty in it, the bounty, if granted, is given for good reasons of national policy. If the employees insist, as a term of their contract, that the respondents should promise to make the payments in the appropriate event and if the respondents should promise to do so, there is a promise on each side on the part of the respondents to make the payments, on the part of the employees to continue to work. The risk of a strike is avoided. But if the respondents refuse to give the promise, there is then a difference connected with the conditions of employment. I do not see why this does not fall within the definition of a trade dispute in the Act, just as much as a dispute as to the rate of wages or salary . . . . It is obvious that a dispute as to what the remuneration should be can properly be described as a trade dispute under the order."

The learned trial Judge referred to and dissented from a decision of the Bombay High Court in *Indian Hume Pipe Co.* v. *Nanavaty*[2], in which the decision of the trial Judge that the consideration of payment of bonus was within the jurisdiction of the Tribunal was confirmed in appeal. Bhagwati, J., said:

"I am of opinion that it would be open to the workmen to contend that the payment demanded by the workmen from the employer was a payment as of right; a payment which could be made by the employer not as a matter of grace but as extra remuneration for the work done by the employee under a contract express or implied, and if a demand was made by the workmen for such payment from the employer and the employer refused to make such payment, there would arise a trade dispute."

The learned Chief Justice in appeal referred to the demand of the workers for a bonus equal to 1/6th of the earnings from January 1 to December 31, 1944, and the refusal of the company to pay, and said:

"In my judgment as soon as the appellant company refused to comply with this demand which it was in its unfettered discretion to grant, it is quite impossible to say that there was no dispute or difference between the employers and their workmen which was connected with the terms of employment . . . . . But even accepting that the primary meaning of the word 'bonus' is 'gift' or 'gratuity', it is not asked in this case as a matter of patronage or bounty. It is demanded, and strike action is threatened, if such demand is not complied with. So that as soon as the demand is declined, all the elements of a trade dispute arise."

This case was sought to be distinguished by the learned counsel for the management, as being a case in which the workers had expressly stated that the management had agreed to pay bonus; but it is seen from the passage just quoted from the judgment of the learned Chief Justice that his conclusion was not based upon any promise, but upon the demand made by the workers and the refusal of that demand by the employers. The learned trial Judge, in commenting on this judgment, stated that the words of the learned Chief Justice are not very clear and that he did not think that the learned Chief Justice meant to lay down such a wide proposition. We feel that the learned Chief Justice carefully weighed his words; and we are in entire agreement with the opinion expressed there. The question of bonus arose for decision in the Calcutta High Court in the case above referred to, *viz.*: In the matter of an application and in the matter of *the Indian Paper Pulp Company, Limited* (not yet reported), the learned Chief Justice said with regard to the claim for a bonus:

". . . . . . . In my view such a claim is not necessarily a claim as a gratuity. It is a claim that the workmen should be entitled as of right to these payments in certain circumstances. If that be so, it appears to me that a dispute relating to the payment of such a bonus can well be regarded as a dispute relating to the terms of employment and therefore an industrial dispute within the definition of that term in section 2 (*k*) of the Industrial Disputes Act."

Then again:

"Mr. Atul Gupta on behalf of the workmen contended that as the payment of a bonus could be a term of employment there was clearly an industrial dispute. He urged, and I think rightly, that it was immaterial that the present terms of employment did not contemplate the payment of a bonus. All that was required to constitute an industrial dispute was a claim that the terms of employment should in future contain provisions for the payment of a bonus and, if necessary, the

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1. (1943) A.C. 166.
2. I.L.R. (1946) Bom. 915.

payment of a bonus in respect of past years. In my judgment the reasons given in the *Bolton Corporation Case*[1] . . . . apply with equal force to this claim for bonus."

Later on, the Chief Justice observed :

"It was further contended that a bonus by way of profit sharing could never be anything but a gratuity as the amount of the bonus could not be fixed until the net profit of the particular undertaking had been ascertained . . . . . . In my view however a claim by workmen that they should be entitled to some share of the profits by way of bonus can be made a term of employment or of a contract of service. That being so, a dispute relating to such a claim can be an industrial dispute."

We respectfully agree and are of opinion that the Tribunal can consider these claims.

The third category of dispute between the parties relates to the provision of houses, the re-opening of a school, the provision of text-books and the like, and other amenities. It is difficult to draw any hard and fast line between this class of demand and those contained in the second category. The reliefs asked for arise indirectly from the employment of the workmen and the consequent necessity of their residing within a reasonable distance of the workshop with a concomitant need for the provision for the schooling for their children, and reasonable provision for the maintenance of their health and their recreation. In their application to this Court, the management has given a number of cogent reasons why the demands of the workmen should not be acceded to ; but it is not the duty of this Court to consider the reasonableness or otherwise of the demands made by the workmen. The Tribunals are presided over by gentlemen who have distinguished themselves in the Judicial department ; and one can feel assured that in considering whether these demands can be acceded to, their reasonableness will be the prime consideration. The claims will no doubt be rejected unless reasonable. For example, in considering whether the provision of housing for the workmen is unnecessary or unreasonable, the Tribunal will doubtless consider whether suitable housing is available in the vicinity and whether the employers have available land on which they can conveniently construct dwellings. With regard to the demand for the opening of a school, the Tribunal would ordinarily reject the demand if there was suitable provision in the neighbourhood for the education of the children by public bodies or otherwise.

On all the headings, therefore, we are of opinion that the Industrial Tribunal appointed by the Government has jurisdiction to consider the questions referred to it. The appeal is therefore allowed, the order passed by the learned trial Judge set aside, and the application dismissed. All parties will bear their own costs in both the Courts.

K.S. *Appeal allowed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Madras[2].)

PRESENT :—LORD SIMONDS, LORD NORMAND, LORD OAKSEY, LORD MACDERMOTT AND SIR JOHN BEAUMONT.

Maharajah of Pittapuram .. *Appellant**

v.

Province of Madras .. *Respondent.*

Riverain rights—Non-tidal navigable river—Right to the bed—Applicability of English Common Law Rule to India—Navigable river—Embanked river including a navigable channel.

The bed of a navigable river in any part of India, whether tidal or not, is vested in the Government, unless it has been granted to private individuals. The English Common Law Rule that the bed of non-tidal rivers belongs to the riparian proprietors does not apply to Madras.

An embanked river which includes a navigable channel is to be treated as without qualification a navigable river between its embankments.

Maharajah of Pithapuram v. *Secretary of State for India in Council,* (1942) 1 M.L.J. 344 : I.L.R. 1942 Mad. 532, affirmed.

1. (1943) A.C. 166.
2. (1942) 1 M.L.J. 344 : I.L.R. 1942 Mad. 532.

* P. C. No. 37 of 1945. 15th July, 1948.

Sir Herbert Cunliffe and *P. V. Subba Rao* and *M. A. Rahman* for Appellant.

Sir Andrew Clark and *R. K. Handoo* for Respondent.

Their Lordships' Judgment was delivered by

LORD NORMAND.—These are consolidated appeals from three decrees of the High Court of Judicature at Madras, affirming three decrees of the Court of the Subordinate Judge of Coconada in suits instituted by the appellant, the Maharajah of Pittapuram, against the respondent, the Province of Madras, in which he claimed the ownership of certain alluvial islands called "lankas" in the bed of the river Godavari.

The facts of the case may be conveniently stated at this stage in broad outline. On 5th May, 1803, a sanad or deed of permanent property was granted by Lord Clive, then Governor-in-Council of Fort St. George, to the appellant's predecessor-in-title, settling in perpetuity the assessment of the zamindari of Pittapuram and authorising the appellant's predecessor-in-title to hold the Zamindari in perpetuity to his heirs, successors and assigns on condition of his performing certain stipulations specified in the deed and the duties of his allegiance to the British Government. The sanad did not define or describe the lands of the Pittapuram zamindari but it is not disputed that they included lands on the east side of the river Godavari and a number of lankas in the river bed. The village of Mulakallanka was part of the lands included in the zamindari at the date of the sanad, and it is near this lanka that the lankas which are subject of the suit are situated. These lankas did not exist in 1861, for in that year the Revenue Department of the Government of India had the locality surveyed and the survey plans show no trace of their existence. They had appeared, however, by 1901, as is shown by the survey of the river undertaken then by the River Conservancy authorities. The exact date of their appearance is unproved, but after their formation, the then Zamindar of Pittapuram took possession of them and leased such portions as were suitable for cultivation to tenants. This continued until the year 1921 when the appellant was called upon to show cause why he should not be proceeded against under the Madras Land Encroachment Act of 1905 for unauthorised occupation of land belonging to the Government. After much correspondence a demand for the revenue assessed on the new lankas for the year 1917 to 1926, amounting to Rs. 1,16,229-2-8, was made upon the appellant who paid it under protest on 1st June, 1927. On 26th June, 1927, the appellant was called upon to vacate the new lankas and was informed that in default he would be summarily evicted. Thereupon he instituted the present proceedings by filing his plaint, in what came to be known later as the main suit in the Court of the Subordinate Judge of Coconada on 4th July, 1927. Plaints in connected and supplementary suits were filed in the same Court on 8th June, 1929, and 30th September, 1930, respectively. In the main suit he prayed for *inter alia* a declaration that he was the owner of the 18 lankas and for directions to the respondent to refund the sum of Rs. 1,16,229-2-8 which he had paid, under protest as revenue due thereon.

The appellant originally based his claim chiefly on the proposition that the English Common Law Rules governing riverain rights apply in Madras and that the bed of a navigable river, except where it is tidal, vests in the riparian proprietors and not in the Crown; but partly on the ground that the lankas claimed by him are comprehended within the area granted to his predecessor by the sanad, and partly also on the ground that the new lankas were accretions to or re-formations *in situ* of old lankas which were admittedly part of his property, and from which the new formations became separated in course of time through natural causes. He also claimed by adverse possession but this ground was abandoned when the case reached the High Court.

The Subordinate Judge awarded two lankas to the appellant on the ground that they had been accretions to or reformations *in situ* of old lankas which were admittedly his property. In the proceedings before the High Court he gave up

his claim to two lankas including one of those awarded to him by the Subordinate Judge, and the High Court found that he was entitled to three lankas in all on the same ground as that on which the Subordinate Judge had proceeded. The number of lankas still in dispute is, therefore, reduced to 13. Both the Subordinate Judge and the High Court rejected the contention that in Madras the English Common Law Rules apply to riverain rights; they also rejected the appellant's construction of the sanad.

In the present appeal the appellant did not claim any of the lankas which are still in dispute on the ground that they were accretions to or re-formations of lankas which were admittedly his, and if the appeal is to succeed to any extent it must be either on the legal ground that the Common Law of England on riverain rights applies, without modification, to the Godavari and that as a riparian proprietor he owns the bed of the river and *insulæ natæ in alveo* opposite his lands *usque ad medium filum aquæ*, or on the ground that the sanad of 1803, properly construed, granted to his predecessor an area which included the bed of the river in which the disputed lankas are situated.

The first question therefore is whether the English Common Law is, without modification, applicable to the river Godavari. The additional facts relevant to this question must be stated. The High Court has adopted from an official document dated 1907 the following description of the river:

"Among the great rivers of India the Godavari takes rank next after the Ganges and Indus. It runs nearly across the peninsula, its course is 900 miles long, and it receives the drainage from 115·000 square miles, an area greater than England and Scotland combined. Its maximum discharge is calculated to be one and a half million cubic feet per second, more than two hundred times that of the Thames at Staines and about three times that of the Nile at Cairo."

At the part of the river with which the dispute is concerned it is non-tidal but it has been found to be navigable by the Subordinate Judge. It flows between embankments and the navigable channel lies up and down river and considerably nearer to the west than to the east bank. In the High Court the argument proceeded, as the judgment records, on the footing that the Godavari is a public navigable river, but counsel for the appellant submitted to their Lordships that because the river was not navigable at all seasons in all parts of the eastern side at the *locus* it must be treated as non-navigable on the eastern side. Their Lordships have no hesitation in rejecting this novel contention, or in holding that an embanked river which includes a navigable channel is to be treated as without qualification a navigable river between its embankments.

Under the Common Law of England the bed of a river does not vest in the Crown unless it is tidal; the contention of the respondent is that in India the bed of a navigable river, whether tidal or not, vests in the Government. It is not disputed, and the Courts in India in this case have recognised, that the Common Law of England is applicable in India so far as is consistent with justice, reason, equity and good sense; but there is obvious good sense in the High Court's comment that it is impossible to compare a river like the Godavari with any river in England and that that is sufficient in itself to make one hesitate to apply to it Common Law Rules of riverain rights. The propriety of applying these rules to great rivers has been considered judicially both in India and in the United States of America. In one of the Indian cases, *Srinath Roy* v. *Dinabandhu Sen*[1], Lord Sumner, delivering the judgment of this Board, said:

"The question how far a rule established in this country can be usefully applied in another, whose circumstances, historical, geographical and social, are widely different, is well illustrated by the case of navigability, as understood in the law of the different States of the United States of America. Navigability affects both rights in the waters of a river, whether of passing or repassing or of fishing, and the rights of riparian owners, whether as entitled to make structures on their soil which affect the river's flow, or as suffering in respect of their soil quasi-servitudes of towing, anchoring, or landing in favour of the common people. The Courts of the different States, minded alike to follow the common law where they could, found themselves in the latter part of the eighteenth and the early

1. (1914) 27 M.L.J. 419 : L.R. 41 I.A. 221: I.L.R. 42 Cal. 489 (P.C.).

part of the nineteenth centuries constrained by physical and geographical conditions to treat it differently. In Massachusetts, Connecticut, New Hampshire, and Vermont, where the rivers approximated in size and type to the rivers of this country, the English common law rule was followed, that tidality decided the point at which the ownership of the bed and the right to fish should be public on the one and private on the other. Other States, though possibly for other reasons since they possessed rivers very different in character from those of England, namely, Virginia, Ohio, Illinois, and Indiana followed the same rule. But in Pennsylvania, North Carolina, Iowa, Missouri, Tennessee, and Alabama, this rule was disregarded, and the test adopted was that of navigability in fact, the Courts thus approximating to the practice of western Europe : (*see* Kent's Commentaries, iii, 525). The reasoning has been put pointedly in Pennsylvania. Chief Justice Tilghman says in 1810, in *Carson* v. *Blazer*[1], ' the common law principle concerning rivers ' (*viz.*, that rivers, where the tide does not ebb and flow, belong to the owners of adjoining lands on either side), ' even if extended to America, would not apply to such a river as the Susquehanna, which is a mile wide and runs several hundred miles through a rich country, and which is navigable and is actually navigated by large boats. If such a river had existed in England no such law would ever have been applied to it.' [See, too, *Shrunk* v. *Schuylkill Navigation Co.*[2]]. Thirty years later, in *Zimmerman* v. *Union Canal Co.*[3], President Porter observes, ' the rules of the common law of England in regard to the rivers and the rights of riparian owners do not extend to this commonwealth, for the plain reason that rules applicable to such streams as they have in England above the flow of the tide, scarcely one of which approximates to the size of the Swatara would be inapplicable to such streams as the Susquehanna, the Allegheny' the Monongahela, and sundry other ' rivers of Damascus. ' A similar deviation equally grounded in good sense from the strict pattern of the English law of waters lies at the bottom of the current of Indian cases previously referred to, and forms its justification. In proposing to apply the juristic rules of a distant time or country to the conditions of a particular place at the present day regard must be had to the physical, social and historical conditions to which that rule is to be adapted . . . . Above all the difference, indeed the contrast, of physical conditions is capital. In England the bed of a stream is for the most part unchanging during generations, and alters, if it alters at all, gradually and by slow processes. In the deltaic area of Lower Bengal change is almost normal in the river systems and changes occur rarely by slow degrees, and often with an almost cataclysmal suddenness."

It will be observed that the judgment refers to a current of authority in India agreeing with the law of those American States which have deviated from the pattern of Common Law. In fact most of these authorities, including the case cited, deal with the rivers in Bengal, but there is nothing either in the reasoning of the judgment or in its language to indicate an intention to differentiate one part of India from another. It is, however, the fact that in Bengal a Regulation (No. XI of 1825) was made for the purpose of making known the rules established by the law and custom of the country for regulating disputes occasioned by the frequent changes which might take place in the channels of the principal rivers of Bengal. The regulations were promulgated after consulting the law officers on the Mohammedan and Hindu Law, and they were without doubt intended to be declaratory of the pre-existing law. They have been extended to other parts of India but not to Madras. One of the regulations provides that :

"When a chur or island may be thrown up in a large and navigable river (the bed of which is not the property of an individual) or in the sea and the channel of the river or sea between such island and the shore may not be fordable it shall according to established usage be at the disposal of the Government."

Counsel for the appellant did not dispute that, according to the law of Bengal, the bed of a navigable river belongs to the Government but he denied that this was the law of Madras. It has not indeed been shown that the riverain law of Madras was the same as that of Bengal before 1825, and perhaps it is not possible to attain certain knowledge about the law of Madras at that time; but at least it can be said that no reason has been advanced for supposing that there was any difference between the riverain law of Madras and that of Bengal at the beginning of last century, and it can also be said that the rules which are suitable and convenient for regulating rights in navigable rivers in Bengal may be suitable and convenient for regulating rights in navigable rivers in Madras. In Bengal the Common Law of England did not oust the pre-existing law now embodied in the Regulation of 1825, and the respondent aruges that, since the Common Law in its native purity was as inapplicable to navigable rivers in Madras as to navigable rivers in Bengal, it is to be inferred that the pre-existing law was allowed to continue in Madras also and that it was the same as the law

1. (1810) 2 Binney 475 at 477.
2. (1826) 2 Sergeant & Rawle 71.
3. (1841) 1 Watts & Sergeant 346 at 351.

of Bengal ; or that the Common Law was modified in its application to Madras, as it was in certain states in America, in order to fit the geographical conditions. On either alternative the result is the same and it accords with the overriding principle that the Common Law should not be applied except so far as is consistent with justice, reason, equity and good sense.

The respondent's argument commends itself to their Lordships and it is fortified by the authorities that were cited. It is needless to refer in detail to all the Bengal decisions for they have been adequately discussed in the judgments of the Subordinate Judge and of the High Court. There is in all of them a notable absence of any suggestion that the law laid down was peculiar to Bengal or to those provinces to which the Bengal Regulation has been extended. They do not in general make specific reference to the Regulation of 1825 and they proceed rather upon the character of Indian navigable rivers as determining the type of law to be applied to them. Thus in *Haradas Acharjiya Chowdhuri* v. *Secretary of State for India*[1], Lord Buckmaster, delivering the judgment of this Board in a case in which the Ganges was concerned, said :

" The river Ganges in its course through the district of Dacca rests so uneasily in its bed that its boundaries can never at any moment be defined with the certainty that their limitation will be long observed. Frequently, the river leaves its course, flows over large tracts of land, leaving other areas bare, and then again its waters recede, giving back the lands submerged in whole or in part to use and cultivation. It is obvious that difficulties as to ownership must arise in these circumstances, and of the extent and complication of these difficulties the present case affords an excellent illustration. The general law that is applicable is free from doubt. The bed of a public navigable river is the property of the Government though the banks may be the subject of private ownership."

In *Tarakdas Acharjee Chowdhury* v. *Secretary of State for India*[2], where the Ganges was again under judicial consideration, Sir Shadi Lal, in delivering the judgment of the Board, referred like Lord Buckmaster in the last cited case to the character of the river and stated that it was beyond question that the bed of a public navigable river was presumed to be the property of the Government and not that of a private person. Neither of these judgments hinted at any difference between the law of Bengal and other parts of India. The Madras cases are fewer and in none of them is there a decision on the point, but in two cases there are *dicta* which add weight to the respondent's argument. In *Sri Balusu Ramalaksmamma* v. *Collector of Godavari District*[3], a claim was made to a lanka formed by *alluvio* in the river where it was nagivable but not tidal. Their Lordships expressed grave doubts whether the presumption applicable to little English rivers applied to great Indian rivers such as the Godavari, but they did not decide the question. In that case the plaintiff's claim rested on the rules of the English Common Law. In *Secretary of State for India* v. *Venkatanarasimha*[4], it was held that the *alveus* did not belong to the Government because the river was not navigable. The case, therefore, did not decide the point at issue in the present appeal, but the learned Judges treated tidality as immaterial and pointed out that conditions in Madras are so unlike those in this country that the English Common Law might well be thought inapplicable without some modification as a test of the public or private ownership of the beds of those rivers which are non-tidal but navigable. Two further cases must be mentioned. *Dawood Hashim Esoof* v. *Tuck Shein*[5], was concerned with rights of a river in Rangoon at a part which was tidal but not navigable. In delivering the judgment of the Board Sir George Lowndes said :

" In India it has long been recognised that the beds or channels of tidal navigable rivers are the property of the Government in right of the Crown."

and in *The Secretary of State for India in Council* v. *Subbarayudu*[6], Lord Dunedin delivering the judgment of the Board made use of similar language in discussing rights in the Godavari at a point where it is both tidal and navigable. In neither case was the Board concerned with the rights of the Government in the bed of a river

1. (1917) 26 C.L.J. 590 (594) (P.C.).
2. (1935) 69 M.L.J. 171 (P.C.).
3. (1899) L.R. 26 I.A. 107 : I.L.R. 22 Mad. 464 (P.C.).
4. (1920) 11 L.W. 256.
5. (1931) 60 M.L.J. 593 : L.R. 58 I.A. 80 : I.L.R. 9 Rang. 122 (P.C.).
6. (1932) 62 M.L.J. 213 : L.R. 59 I.A. 56 : I.L.R. 55 Mad. 268 (P.C.).

which was navigable but not tidal. No inference adverse to the respondent's case can, therefore, be drawn from the judgments themselves or from the use of the expression " tidal and navigable " in relation to the Crown's proprietary rights in the *alveus*. Finally it may be noted that in Doss's Tagore Lectures on the Law of Riparian Rights the law of Bengal on the point at issue is treated as typical of India as a whole.

Their Lordships consider that the appellant's contention, that the English Common Law Rule that the bed of non-tidal rivers belongs to the riparian proprietors should apply to Madras not only runs counter to the trend of judicial dicta but conflicts with good sense, and that the rule to be applied is that the bed of a navigable river in any part of India, whether tidal or not, is vested in the Government unless it has been granted to private individuals.

The remaining ground of appeal must therefore be considered. The sanad of 1803 makes no mention of the bed of the river, it does not define the zamindari by boundaries and it says nothing of the extent of the area comprehended in it. On the face of it, it does no more than confirm the right of the zamindar and his heirs, successors and assigns in what he owned at the date of the grant. It is known that at the date the zamindari, including lankas, amounted to 1,360 acres. The fact is established by a contemporary official document and by admissions made in the case. Now the appellant claims that his rights as owner extend over 6,400 acres, including the bed of the river, bounded by certain boundaries which are set forth in his pleadings. The boundaries were, he asserts, established in litigations which took place between his predecessors and other private owners, and in one instance between his predecessor and the Government. But within these alleged boundaries, unfortunately for his case, there are to be found lankas which admittedly belong to the Government and lankas which admittedly belong to other zamindars. The boundaries contended for by him would imply also that he owned land on the west bank of the river but this is contrary to an express admission made by him in the High Court after judgment was delivered. Moreover, an examination of such evidence as the appellant has produced shows that the alleged boundaries are merely straight lines drawn between fixed points for the restricted purpose of defining the two limited areas in dispute in each of the litigations. Those lines were not in the proper sense a boundary enclosing the zamindari.

The appellant next sought to interpret the sanad by a reference to accounts in which the area comprised in the zamindari is stated as 800 putties, the equivalent of the 6,400 acres claimed. These accounts belong to a period about half a century after the date of the sanad ; they were kept by persons appointed by the appellant's predecessors-in-title and they were kept for the purpose of enabling the zamindar to claim an apportionment of the revenue assessment in the event of an alienation of a part of the zamindari. It is not competent to interpret the sanad by evidence of this sort. Even if, contrary to their Lordships' opinion, the sanad could be regarded as an ancient document, the evidence offered is not evidence of *contemporanea expositio,* and the appellant is in truth attempting not to construe the sanad but to add to the area confirmed by it to his predecessor-in-title. But accounts such as he has produced, though accepted by the Revenue authorities, could not have effect as an additional grant for it is not even alleged that these officials had power to alienate Government lands. Equally irrelevant is some other evidence tending to show that Government officials were cognisant that the appellant's predecessors were exercising the rights of ownership over the disputed lankas. This evidence is indeed open to the additional criticism that evidence of possession not sufficient to establish a claim by adverse possession is of no value for the purpose of interpreting or adding to the grant made by the sanad.

The judgments of the Courts in India have dealt exhaustively and satisfactorily with the contentions of the appellant and they contain a valuable exposition of the law of riverain rights in India. Their Lordships will therefore humbly advise

His Majesty that the appeal should be dismissed. The appellant will bear the costs of the appeal.

Solicitors for Appellant : *Chapman-Walkers.*

Solicitors for Respondent : *Solicitor, High Commissioner for India.*

V.S. *Appeal dismissed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Madras.)

PRESENT :—LORD NORMAND, LORD OAKSEY AND SIR JOHN BEAUMONT.

C. S. Nataraja Pillai (now deceased) and another .. *Appellants**

v.

C. S. Subbaraya Chettiar .. *Respondent.*

Privy Council—Practice—Suit for declaration of title and possession based on adoption—Defence of right to possession rested upon title conferred either by a gift or a will—Decree in favour of plaintiff—Plea in appeal on claim based upon possession—Maintainability.

Where a plaintiff has put forward his title to possession and ownership on an adoption by the previous owner and the title put forward by the defendants is alternatively a gift *inter vivos* or by will and there is a decision in favour of the plaintiff and an order for delivery of possession to him, the defendants cannot in an appeal against it raise a plea on a claim based on possession which is contradicted by their own pleadings.

R. A. Parikh for Appellants.

W. W. K. Page and *T. B. W. Ramsay* for Respondent.

Their Lordships' Judgment was delivered by

LORD NORMAND.—The present appeal arises out of a suit brought by the respondent, as plaintiff, against the appellants, as defendants.

The subject-matter of the suit was a property which had belonged to a certain Vasavambal Ammal. There had been a previous suit (No. 53 of 1924) between the same parties and in his pleading in the present suit the plaintiff (the respondent) stated " that the property was in the possession of his adoptive mother," that is Vasavambal Ammal whose adopted son he claimed to be, " on his behalf till her death and subsequently, taking advantage of her death and the plaintiff'syoung age, the defendants" (the appellants), "seem to have intermeddled with the property and claim to have taken possession of the property after the tenants (of Vasavambal) vacated the premises." He went on to state that shortly after the institution of suit No. 53 of 1924, on an application made by the plaintiffs in that suit a receiver was appointed by the Court " to take charge of and collect the rents in respect of the suit property and he " (the receiver) " continues to be in possession and management thereof. After the disposal of the said suit, however, the defendants" (the appellants) " claiming to have been in possession of the properties just prior to the appointment of the Receiver, filed an application to this Honourable Court for the handing over of the property, together with the rents accrued during the pendency of the litigation, from the receiver, and the Master of this Honourable Court has, by his order dated 25th October, 1928, directed possession and the amount to be handed over to them, granting time to file a suit for the adjudication of the rights of the parties."

The remedies asked for in the plaint included a declaration that the plaintiff (the respondent) as the adopted son of Vasavambal is entitled to the property, a direction that possession be delivered to him, and a direction that the accrued rents be paid over to him together with such mesne profits as might become payable.

In their written statement, the appellants said in answer :

" The allegations made in para. 20 of the plaint are incorrect and false. After the death of Vasavambal, these defendants gave notice to the lessee, Messrs. Glen & Co., that they were rightful owners of the property and, on the lessees vacating, they entered into peaceful possession of the

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* P. C. A. No. 5 of 1944. 17th June, 1948.

premises. After the dismissal of suit No. 53 of 1924, these defendants applied to the Court for restoration of possession and for payment of the accumulated rents and His Honour, the Master, ordered the same. But the plaintiff envious of the defendants' success, has interjected this vexatious suit with a view to prevent or delay their quietly enjoying the property that they have legitimately acquired."

Accordingly there is no room for dispute about the state of possession at the time of the institution of the present suit. The receiver, on behalf of the Court, was in actual possession of the property and both parties were anxious to establish a right to have the receiver ordered to transfer the possession to themselves. The title to possession and ownership put forward by the respondent was his adoption by the previous owner. The title put forward by the appellants was alternatively a gift *inter vivos* or by will. The action proceeded in the High Court of Judicature of Madras, acting in its ordinary original civil jurisdiction, and a decree was pronounced declaring that the plaintiff (respondent) was entitled to the suit property as the adopted son of Vasavambal, and ordering the receiver to deliver to him possession of the property together with the amounts collected by the receiver from it, less his remuneration.

On appeal, that order was affirmed by the High Court of Judicature of Madras, acting in its appellate jurisdiction. In the proceedings in both those Courts the claim of the appellants continued to be a claim to recover possession and to be rested upon a title consisting either of a gift *inter vivos* or a gift by will. It is now unnecessary to enter into the reasons for which these Courts found against the appellants and in favour of the respondent.

When the case was opened before this Board it was soon apparent that it was impossible to maintain that the appellants had a right by title, either by gift *inter vivos* or under a will. However, their counsel with bold ingenuity invited the Board to reverse the decision of the Courts in India on the ground that the appellants were in possession and that the respondent had failed to make out any title to the property and could therefore claim no right to eject them.

It appears, therefore, that the appellants have been compelled to depart altogether from the only grounds upon which they maintained their defence in the Courts in India and that they now attempt to found their appeal against the decision of those Courts upon a ground which was neither maintained nor maintainable upon the pleadings in those Courts. No doubt it is true that it was for the respondent to make out to the satisfaction of the Court that he had a title which would warrant an order for delivery of possession to him. That he succeeded in doing. The appellants cannot oppose to that order a claim based upon possession, which is contradicted by their own pleadings, and their appeal cannot be maintained.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed.

Solicitors for Appellants : *Chapman Walkers.*

Solicitors for Respondent : *Lambert and White.*

V. S. *Appeal dismissed.*

[PRIVY COUNCIL.]

(On appeal from the Supreme Court of Ceylon.)

PRESENT :—LORD UTHWATT, LORD MORTON OF HENRYTON, LORD MAC DERMOTT AND SIR JOHN BEAUMONT.

M. G. Perera .. *Appellant**

v.

Andrew Vincent Peiris and another .. *Respondents.*

Defamation—Privilege—Principles governing, in regard to publication in newspaper of the Report of a statutory commission without any comments thereon—Report containing the alleged defamatory statement regarding the plaintiff's conduct as a witness—Absence of malice.

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* P. C. A. No. 2 of 1947. 13th October, 1948.

Reports of the judicial and parliamentary proceedings and, it may be, of some bodies which are neither judicial nor parliamentary in character, stand in a class apart by reason that the nature of their activities is treated as conclusively establishing that the public interest is forwarded by publication of reports of their proceedings. As regards reports of proceedings of other bodies, the status of those bodies taken alone is not conclusive and it is necessary to consider the subject-matter dealt with in the particular report with which the Court is concerned. If it appears that it is to the public interest that the particular report should be published privilege will attach. If malice in the publication is not present and the public interest is served by the publication, the publication of the report must be taken for the purposes of Roman Dutch Law as being in truth directed to serving that interest. *Animus injuriandi* is negatived.

The Report of a statutory commission appointed to enquire into alleged cases of bribery among members of the State Council of Ceylon containing its findings on the various allegations together with its comments was published by the Government of Ceylon. A newspaper in Ceylon published in its columns practically the whole of the Report verbatim without any comments of its own. The Report contained a statement that " Dr. M. G. Perera, who gave evidence was completely lacking in frankness and pretended that he knew very much less about the transactions than he actually did." In an action by Dr. M. G. Perera against the proprietor and editor of the newspaper for damages for defamatory libel,

Held, that in the circumstances, the public interest of Ceylon demanded that the contents of the Report should be widely communicated to the public and that the due administration of the affairs of Ceylon required that this Report in the light of its origin, contents and relevance to the conduct of the affairs of Ceylon and the course of legislation should receive the widest publicity. The proprietor and editor of the newspaper and the public had a common interest in the contents of Report and in its dissemination. In the absence of any plea or proof malice on the part of the defendants, it must be held that the immunity afforded by privilege attached to publication by the defendants of the Report considered as a whole.

G. O. Slade and *Stephen Chapman* for Appellant.

D. M. Pritt and *Sir Valentine Holmes* and *R. K. Handoo* and *E. E. L. Wickremesinghe* for Respondents.

Their Lordships' Judgment was delivered by

LORD UTHWATT.—This is an appeal from the judgment of the Supreme Court of Ceylon affirming the dismissal by the District Court of Colombo of an action brought by the appellant Dr. M. G. Perera in which he claimed damages for defamatory libel from the respondents who are the printer and owners of a newspaper called *The Ceylon Daily News*. The libel complained of appeared in the issue of that paper of 25th May, 1943 and consisted of an extract from the published report of a Commissioner who had been appointed under statutory powers to enquire into certain matters. The extract ran as follows

" Dr. M. G. Perera who gave evidence was completely lacking in frankness and pretended that he knew very much less about the transaction than he actually did."

The respondents took all defences. They denied that the words were defamatory—a formal defence in the circumstances. The other defences were not formal. They pleaded justification in the sense that the statement was true and that its publication was for the public benefit. Fair comment was pleaded. Privilege was relied on upon two grounds, first, that the proceedings before the Commissioner were judicial proceedings and the extract was part of an accurate report of those proceedings, and second, that, apart from the supposed judicial nature of the proceedings, the circumstances were such that the publication in the newspaper of the Report was made on a privileged occasion. Neither the pleadings, the issues settled in the course of the proceedings, nor the conduct of the case at the trial, in any way limited the field of defence open to the respondents.

On the settlement of the issues in the action it was made clear that the appellant did not set up express malice with a view to destroying any qualified privilege that might exist.

The action arose in the following circumstances. It appears that in 1941 there were rumours in Ceylon that bribes had been offered to and accepted by members of the State Council. On 13th August, 1941, the Governor, pursuant to a resolution passed by the State Council on 15th May, 1941, set up a Commission of Inquiry under the Commissions of Inquiry Ordinance (No. 9 of 1872). Under the

terms of the appointment Mr. De Silva, K.C., was appointed the Governor's Commissioner for the purpose of inquiring into and reporting upon the following questions :—

(*a*) whether gratifications by way of gift, loan, fee, reward, or otherwise, are or have been offered, promised, given or paid to members of the existing State Council, with the object or for the purpose of influencing their judgment or conduct in respect of any matter or transaction for which they, in their capacity as members of that Council or of any Executive or other Committee thereof, are, have been, may be, or may claim to be, concerned, whether as of right or otherwise : and

(*b*) whether such gratifications are or have been solicited, demanded, received or accepted by members of the existing State Council as a reward or recompense for any services rendered to any person or cause, or for any action taken for the advantage or disadvantage of any person or cause, or in consideration of any promise or agreement to render any such services or to take any such action, whether as of right or otherwise, in their capacity as members of that Council or of any Executive or other Committee thereof.

The instrument of appointment then contained the following direction by the Governor :—

"And I hereby authorise and empower you to hold all such inquiries and make all such investigations into the aforesaid matters as may appear to you to be necessary ; and I do hereby require you to transmit to me a report thereon under your hand as early as possible."

To assist the Commissioner in this particular enquiry a further Ordinance (No. 25 of 1942) was passed which empowered the Commissioner to hear the evidence or any part of the evidence of any witness *in camera*. Sections 5, 6 (1) and (2) and 10 (*b*) of the Ordinance run thus :—

"5. The Commissioner may, in his discretion, hear the evidence or any part of the evidence of any witness *in camera* and may, for such purpose, exclude the public and the press from the enquiry or any part thereof.

6. (1) Where the evidence of any witness is heard *in camera*, the name and the evidence or any part of the evidence of that witness shall not be published by any person save with the authority of the Commissioner.

(2) A disclosure, made *bona fide* for the purposes of the enquiry, of the name or of the evidence or part of the evidence of any witness who gives evidence *in camera* shall not be deemed to constitute publication of such name or evidence within the meaning of sub-section (1).

10. Nothing in this Ordinance shall—

(*b*) prohibit or be deemed, or construed to prohibit the publication or disclosure of the name or of the evidence or any part of the evidence of any witness who gives evidence at the inquiry, for the purpose of the prosecution of that witness for any offence under Chapter XI of the Penal Code."

The Commissioner duly held his enquiry, and on 3rd April, 1943, the Commissioner made his report to the Governor. In light of the claim to privilege, the general nature of the Report and the circumstances in which it was produced are of importance. It appears from the Report that the Commissioner by public advertisement and otherwise made, wide appeals to persons who were in possession of relevant information to place that information before him. Despite the immunity given to witnesses by the Ordinance, the public response was small and of the 124 witnesses examined only 12 were volunteers. All the evidence was taken *in camera*. There were made to the Commissioner allegations of gratification in respect of matters which came before open Council and in respect of matters which came before the Executive Committee. The chief items in respect of which complaints were made were :—

(1) appointments to various offices ;

(2) nominations to Municipal and Urban Councils ; and

(3) decision on policy, the repercussions of which resulted in advantage or disadvantage to private parties.

The Commissioner states in his report (para. 16) that suggestions were made against 19 Councillors. In some cases, he states, the allegations were made upon

slender material. He found that eight members, whom he was able to identify, had received gratifications. Among that number were three European members who had taken gratifications openly. He also came to the conclusion that there were in all probability four other members whom he had not been able to identify who received gratifications. In other cases he found room for strong suspicion. He stated that there was a widespread belief that the number of Councillors who received gratifications was much greater than the number he had found so to do. On consideration of the evidence, the reading of debates in the Council and articles in the Press he had no doubt that this belief was honestly held, but he thought that popular belief was exaggerated.

The Commissioner in the main body of the Report dealt with the broad results of his enquiry, reserving details to appendices. In each appendix he states the witnesses examined on the particular subject-matter, makes his comment, summarises the evidence and gives his finding.

Among the matters investigated by the Commissioner was an affair which he called the " Arrack contract gratification incident," and it is in connection with his treatment of this affair that the appellant appeared on the scene. The appellant, it should be stated, was, among other activities, engaged in distilling arrack. He complied with the Commissioner's request to attend, and his evidence was taken *in camera*. The arrack incident is dealt with by the Commissioner in para. 18 of his Report and in Appendix C.

Para. 18 and Appendix C were as follows :—

" 18. *Arrack contract gratification incident.*—There was evidence before me that in 1939 contractors to the Government for the supply of arrack decided to pay to the same four members a sum of about Rs. 2,000 for the purpose of having their contracts extended without competition from outside. There is evidence, which I believe, that money for this purpose was paid to one of the members, now dead, Mr. C. Batuwantudawe, but there is no evidence that it was paid by him to the others. I did not for this reason call upon the members now alive to answer the allegation as it cannot be held against them that, with regard to this particular incident, they actually received the money. This matter is more fully discussed and reasons for my view given in Appendix C.

APPENDIX C.

Allegation of payment of gratifications to Messrs. C. Batuwantudawe, E. W. Abeygunasekara, E. R. Tambimuttu and H. A. Gunasekara for the purpose of securing their services in the Executive Committee of Home Affairs in the matter of the extension of a Government contract.

Witnesses examined.—Messrs. M. F. P. Gunaratne, D. E. Seneviratne, W. F. Wickremasinghe, M. G. Perera, C. M. Rodrigo and A. J. Siebel.

Allegation.—These witnesses gave evidence with regard to the alleged payment of gratifications to four Councillors, Messrs. C. Batuwantudawe, E. W. Abeygunasekara, E. R. Tambimuttu, and H. A. Gunasekara, for the purpose of securing their services in the Executive Committee of Home Affairs. Certain contracts held by distillers for the supply of arrack to Government were due to expire on 30th April, 1939. The allegation was that money was paid to the Councillors mentioned in order to secure their support to a proposal that the contracts should be extended without calling for tenders. The proposal itself was put forward by the Excise Commissioner for reasons which I need not go into. It was ultimately adopted by Government.

Finding.—My finding upon this matter is that without a doubt a sum of Rs. 2,000 was paid by the distillers to Mr. Batuwantudawe. The distillers earmarked this sum for payment to members of the Executive Committee. They believed that portion of the sum would find their way to the other Councillors mentioned. One distiller at least thought that the money would be paid direct to them. Others received the impression that it would be paid through Mr. Batuwantudawe. Mr. Batuwantudawe is now dead and there is no evidence that he distributed money among the others. I do not think that any direct payments were made to them.

Comment.—In 1939 there were eight distilling plants in Ceylon, the proprietors of which were supplying arrack to Government. These suppliers consulted each other in matters of common interest and were loosely associated with each other as a body without a formal set of rules or any of the other formalities adopted by Associations proper. They regarded Mr. D. E. Seneviratne, proprietor of the Diyalagoda Distillery, as Treasurer, and Mr. W. F. Wickremasinghe, proprietor of the Anvil Distillery, as Secretary. They collected money from time to time as occasion required for meeting various expenses.

Mr. Gunaratne, the owner of Strilanda Distillery, Kalutara, stated to me that either Mr. Wickremasinghe or Mr. Seneviratne or both came to see him and asked him for a contribution towards a fund from which the four Councillors mentioned were to be paid. Mr. Gunaratne says that

Messrs. Wickremasinghe and Seneviratne (either or both) mentioned the names of the four Councillors and that he paid Rs. 500. There is no doubt about this payment. The only question is what the conversation was. Messrs. Seneviratne and Wickremasinghe deny that they mentioned the four names in the explicit manner deposed to by Mr. Gunaratne. After carefully weighing up the evidence, I feel that none of these witnesses is deliberately stating an untruth. Mr. Gunaratne says that he was told by Messrs. Wickremasinghe and Seneviratne that Mr. Batuwantudawe was the go-between between them and the other members. Mr. Seneviratne states that he paid Rs. 2,000 to Mr. Batuwantudawe but that he paid no money to any of the other Councillors. It is common ground that there were informal conferences at which the distillers discussed various matters of importance to themselves. It appears that at these conferences the distillers sat in small groups for the purpose of informal discussion and that there was no meeting in the proper sense of that word. Mr. Seneviratne says that the names of the other Councillors were mentioned at these conferences as persons to whom Mr. Batuwantudawe would probably have to pay something. But he says that there was no definite arrangement with Mr. Batuwantudawe that they should be so paid. Mr. Wickremasinghe says that Mr. Seneviratne told him that Rs. 2,000 was paid to Mr. Batuwantudawe and that Mr. Seneviratne undertook to obtain the votes of the four Councillors mentioned through Mr. Batuwantudawe. He also states that at the time it was common talk that these four members took bribes. The clear impression which I have formed is that as a result of the general talk that these four members took bribes their names were mentioned at conferences and discussions, that the manner of approach to them, if agreed upon at all, was not agreed upon with any degree of precision but that the distillers believed that the money would reach them. I believe that Mr. Seneviratne is speaking the truth when he says he paid Rs. 2,000 to Mr. Batuwantudawe and that it is also true that neither he nor Mr. Wickremasinghe nor anyone else paid any money direct to the other Councillors.

Dr. M. G. Perera, who gave evidence was completely lacking in frankness and pretended that he knew very much less about the transaction than he actually did.

Mr. C. M. Rodrigo the other witness referred to above, was a clerk of Mr. Gunaratne and was able to speak only to the conferences and not to anything that took place at them.

Mr. Siebel was merely an officer of a bank producing certain cheques before me.

April 3, 1943." L. M. D. De Silva.

The Governor having received the Report caused the Report to be printed as a Sessional Paper. The instructions given to the Government Printer were that it should not appear before the publication of a Government Gazette Extraordinary which was to contain a Bill to be introduced into the State Council connected with the Report. Those instructions were carried out, and simultaneously with the publication of the Report on 19th May, 1943, there was published in the Gazette the text of a Bill enabling the State Council to expel any member on the ground of the acceptance of a pecuniary reward or other gratification in connection with the performance of his duties as a member.

Two hundred and twelve copies of the Report were published for circulation, 250 for sale to the public and 20 for the Commissioner. The 250 available to the public were quickly sold at the Public Record Office. Two hundred and twenty-five reprints were immediately asked for and they became available on 24th May. They, too, it appears, were also quickly sold.

The practice in Ceylon is that Government Sessional Papers are issued free of charge to the Press. That practice was followed in the present case and the Sessional Paper was sent to the Ceylon Daily News among other newspapers. In the office of the Ceylon Daily News the view was taken that the Report was a matter of public interest. Practically the whole of the Report was published. Only those portions were omitted which in the opinion of the Associate Editor were not of public interest or which had been sufficiently covered by other portions of the Report which were published. The Commissioner was quoted *verbatim*. Included in the matter published was the whole of para. 18 exactly as it appeared in the Report with an immaterial alteration in the heading, and the whole of Appendix C except the first and the last two paragraphs. Some immaterial cross-headings were inserted and two sentences (neither affecting the appellant) were printed in bold type. The publication of the Report began on 18th May, 1943, and ended on 25th May 1943, para. 18 appearing on 20th May and Appendix C on 25th May. The newspaper did not make any comments of its own.

The appellant forthwith instituted these proceedings.

At the trial there appears to have been some confusion on the issue of justification. Some observations by the appellant's counsel as recorded in the Judge's notes rather support the view that he admitted the peccant statement to be true. No evidence was called directed to prove the truth of the statement. The District Judge, however, did not, in his judgment, rely on any admission of counsel as to truth, and decided that, in the absence of evidence to the contrary, there was a presumption that the findings of the Commissioner were true and correct. He accordingly held that what the respondents published was true in substance and in fact, but he took the view that the publication by the respondents was not for the public benefit. In the Supreme Court, to which the appellant appealed, his counsel did not query the finding of the District Judge that the words were true in substance and in fact and appears so far as the issue of justification is concerned to have dealt only with the question whether the publication was for the public benefit. The Supreme Court answered this question in the affirmative.

The Supreme Court were clearly entitled to determine the case on the footing as to the truth of the statement conceded by the appellant's counsel at the hearing before them. But a determination of the matter at issue on the ground of justification is obviously not satisfactory, for the District Judge's reasons for arriving at a decision that truth was proved are plainly wrong, and the reasons for the concession made by the appellant's counsel in the Supreme Court are not apparent. Their Lordships, having arrived at the conclusion that the respondents are entitled to succeed on other grounds, do not propose to deal further with the issue of justification. They will assume the statement as to the appellant's conduct as a witness not to accord with the fact. Fair comment does not therefore arise for consideration and the only question is whether the publication was made on a privileged occasion, the absence of express malice being conceded. On the question of privilege the District Judge took the view that any privilege which might attach to the publication of the Report in the newspaper did not extend to the matter published as regards the appellant, as it was foreign to the duty which the newspaper owed to the public. The Supreme Court held that this publication was privileged.

Their Lordships will now turn to consider whether this view is or is not correct.

In Roman Dutch Law *animus injuriandi* is an essential element in proceedings for defamation. Where the words used are defamatory of the complainant, the burden of negativing *animus injuriandi* rests upon the defendant. The course of development of Roman Dutch Law in Ceylon has, put broadly, been to recognise as defences those matters which under the inapt name of privilege and the apt name of fair comment have in the course of the history of the common law come to be recognised as affording defences to proceedings for defamation. But it must be emphasised that those defences or, more accurately, the principles which underlie them, find their technical setting in Roman Dutch Law as matters relevant to negativing *animus injuriandi*. In that setting they are perhaps capable of a wider scope than that accorded to them by the common law. Decisions under the common law are indeed of greatest value in exemplifying the principles but do not necessarily mark out rules under the Roman Dutch Law. The "gladsome light of Roman jurisprudence" once shone on the common law: repayment to the successor of the Roman Law should not take the form of obscuring one of its leading principles.

Their Lordships' attention has not been drawn to any case under the Roman Dutch Law or the common law which exactly covers the point at issue. Both systems accord privilege to fair reports of judicial proceedings and of proceedings in the nature of judicial proceedings and to fair reports of parliamentary proceedings, and much time might be spent in an enquiry whether the proceeding before the Commissioner fell within one or other of these categories. Their Lordships do not propose to enter upon that enquiry. They prefer to relate their conclusions to the wide general principle which underlies the defence of

privilege in all its aspects rather than to debate the question whether the case falls within some specific category.

The wide general principle was stated by their Lordships in *Macintosh* v. *Dun*[1], to be the "common convenience and welfare of society" or "the general interest of society" and other statements to much the same effect are to be found in *Stuart* v. *Bell*[2] and in earlier cases, most of which will be found collected in Mr. Spencer Bower's valuable work on Actionable Defamation. In the case of reports of judicial and parliamentary proceedings the basis of the privilege is not the circumstance that the proceedings reported are judicial or parliamentary—viewed as isolated facts—but that it is in the public interest that all such proceedings should be fairly reported. As regards reports of judicial proceedings reference may be made to *Rex* v. *Wright*[3], where the basis of the privilege is expressed to be "the general advantage to the country in having these proceedings made public," and to *Davison* v. *Duncan*[4], where the phrase used is "the balance of public benefit from publicity"; while in *Wason* v. *Walter*[5], the privilege accorded to fair reports of parliamentary proceedings was put on the same basis as the privilege accorded to fair reports of judicial proceedings—the requirements of the public interest.

Reports of the judicial and parliamentary proceedings and, it may be, of some bodies which are neither judicial nor parliamentary in character, stand in a class apart by reason that the nature of their activities is treated as conclusively establishing that the public interest is forwarded by publication of reports of their proceedings. As regards reports of proceedings of other bodies, the status of those bodies taken alone is not conclusive and it is necessary to consider the subject-matter dealt with in the particular report with which the Court is concerned. If it appears that it is to the public interest that the particular report should be published privilege will attach. If malice in the publication is not present and the public interest is served by the publication, the publication of the report must be taken for the purposes of Roman Dutch Law as being in truth directed to serving that interest. *Animus injuriandi* is negatived.

On a review of the facts their Lordships are of opinion that the public interest of Ceylon demanded that the contents of the Report should be widely communicated to the public. The Report dealt with a grave matter affecting the public at large, *viz.*, the integrity of members of the Executive Council of Ceylon, some of whom were found by the Commissioner improperly to have accepted gratifications. It contained the reasoned conclusions of a Commissioner who, acting under statutory authority, had held an enquiry and based his conclusions on evidence which he had searched for and sifted. It had, before publication in the newspaper, been presented to the Governor, printed as a sessional paper and made available to the public by the Governor contemporaneously with a Bill which was based on the report and which was to be considered by the Executive Council. The due administration of the affairs of Ceylon required that this Report in light of its origin, contents and relevance to the conduct of the affairs of Ceylon and the course of legislation should receive the widest publicity.

As regards the newspaper the Report was sent to it by the authorities in the ordinary course. Nothing turns on any implied request to publish—that would in their Lordships' opinion be relevant only if malice were in issue. Their Lordships take the view that the respondents as respects publication stand in no better and no worse position than any other person or body in Ceylon. A newspaper as such has in the matter under consideration no special immunity. But it would be curious to hold that either the editor or the proprietor of the newspaper was disqualified by the nature of his activities from having the same interest in the public affairs of Ceylon as that proper to be possessed by the ordinary citizen. In their Lordships' view the proprietor and editor of the newspaper and the public had a common interest in the contents of the Report and in its wide dissemination.

1. (1908) A.C. 390.
2. (1891) 2 Q.B. 341.
3. (1799) 8 T.R. 293: 101 E.R. 1396.
4. (1857) 7 E. & B. 229: 119 E. & R. 1233.
5. (1868) 4 Q.B. 73.

The subject-matter created that common interest. To this it may, perhaps irrelevantly in law, be added that the ordinary member of the community of Ceylon would indeed conceive it to be part of the duty of a public newspaper in the circumstances to furnish at least a proper account of the substance of the Report.

Taking that view of the facts of the case, and applying the general principle their Lordships have stated, their Lordships are of the opinion that the immunity afforded by privilege attached to the publication by the respondents of this Report considered as a whole.

It remains to deal with two further matters. First, it was argued that assuming that the Report was published by the defendants on a privileged occasion the Report was divisible and that the statement relating to the appellant's conduct as a witness was not referable to any matter on which the privilege was founded. Malice, it will be recalled, was not alleged. Their Lordships cannot accept this contention. The main matter of public interest was the question of the extent to which members of the Executive Council had accepted bribes, and, linked up with that, the value which might properly be attributed to the Report as one which covered the whole ground. No just estimation of the general position as to bribery or as to the value of the Report could be formed without knowledge of the grounds on which the Commissioner stated he had acted and of the difficulties which the Commissioner stated he had encountered in coming to a conclusion, or in failing to come, on particular topics, to a definite conclusion. Their Lordships have recited the facts which bear on the lines on which the Report was framed. It is in their Lordships' view clear that the statement as to the appellant was germane and appropriate to the occasion and does not fall to be distinguished in any degree from the other contents of the Report. Their Lordships would add that a view corresponding to that entertained by their Lordships here was expressed by Cockburn, C. J., in *Cox* v. *Feeney*[1].

Second, it was argued that the publication of the matter complained of was illegal in that it constituted a breach of section 6 (1) of the Special Ordinance and that therefore a defence based on privilege must fail. In their Lordships' opinion the publication was not a breach of that section. On this point they agree with the view of the Supreme Court as expressed by the learned Chief Justice when he said :

"In my opinion publication is not prohibited of the name but of 'the name and the evidence or any part of the evidence'. The name and the evidence or any part of the evidence has not been published."

It is true that section 6 (2) and section 10 (*b*) both say :

"..........of the name *or* of the evidence......"

but this use of the disjunctive accords with the saving or qualifying nature of these provisions and in no way conflicts with the conjunctive form of the prohibition enacted by section 6 (1). Their Lordships can see nothing in the other terms of the Ordinance to justify any modification of the natural meaning of the words of that sub-section :

"......the name *and* the evidence or any part of the evidence...."

On the contrary it may well be said that the context points away from a disjunctive construction, for section 6 (1) clearly relates only to evidence which is heard *in camera* and if, as section 5 contemplates, but part of a witness's evidence was so heard, that construction would have the strange effect of forbidding the disclosure of the witness's name while allowing publication of his testimony.

In the circumstances their Lordships will humbly advise His Majesty that the appeal be dismissed. The appellant will pay the costs of the appeal.

Solicitors for Appellant : *Burchells.*

Solicitors for Respondents : *Darley Cumberland & Co.*

V.S. ——— *Appeal dismissed.*

1. 4 F. & F. 13.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SATYANARAYANA RAO.

R. M. S. M. P. Subramanian Chettiar .. *Petitioner**

v.

The Official Receiver of Ramnad at Madura, representing the estate of A. T. K. P. L. S. P. Subramanian Chettiar .. *Respondent.*

Civil Procedure Code (V of 1908), Order 21, rule 57 and section 47—Attachment—When ceases—Dismissal for non-compliance with unnecessary direction of Court—If entails penal consequences—Purchaser of attached property—Representative of judgment-debtor.

An attachment will cease only if the application on which the attachment is effected is dismissed for default and not when a subsequent application is dismissed for default.

Karuppan Chettiar v. *Rajangam*, (1939) 2 M.L.J. 916, relied on.

Where the dismissal of an execution application is for non-compliance with an unnecessary direction of the Court, it would not entail the penal consequences contemplated by rule 57 of Order 21, Civil Procedure Code.

The purchaser of attached property has to be deemed to be a representative of the Judgment-debtor under section 47, Civil Procedure Code.

Seetharama Chettiar v. *Chidambaram Chettiar*, (1932) 63 M.L.J. 941: I.L.R. 56 Mad. 447, relied on.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Devakottai in E. A. No. 356 of 1946 in E. P. No. 102 of 1944.

A. V. Viswanatha Sastri and *K. Srinivasan* for Petitioner.

T. Krishna Rao for Respondent.

The Court delivered the following

JUDGMENT.—The view of the learned Subordinate Judge that the present application falls under section 47 of the Code of Civil Procedure is correct. The petitioner purchased the property in Court sale on the 28th August, 1944, in execution of the decree in O. S. No. 77 of 1931, Subordinate Judge's Court, Devakottai, and obtained delivery of possession of the property on the 13th December, 1945, and 22nd September, 1946. The property was attached earlier in execution of a decree of the Rangoon High Court in C. R. No. 632 of 1929 in E. P. No. 73 of 1937. By reason of the insolvency of the judgment-debtors the execution petition E. P. No. 73 of 1937 was not pursued and the petition was closed. After the adjudication was set aside, the decree-holder filed Application No. 46 of 1941 to continue the execution as prayed for in E. P. No. 73 of 1937. In this application the Court in the first instance directed the decree-holder to file a draft sale proclamation and after it was filed directed attachment of the properties. It is difficult to see why this order of attachment was made notwithstanding that the properties were already under attachment in E. P. No. 73 of 1937. This petition of 1941, was, however, dismissed ultimately on 10th March, 1941, as batta was not paid for attachment of the property. The direction of the Court that batta should be paid for attachment was an unnecessary direction and the non-compliance with such a direction would not entail the penal consequences contemplated under Order 21, rule 57, of the Code of Civil Procedure assuming that the effect of dismissing E. P. No. 46 of 1941, would terminate the attachment effected in E. P. No. 73 of 1937. The dismissal, therefore, of E. P. No. 46 of 1941 does not terminate the attachment. Further, as held in *Karuppan Chettiar* v. *Rajangam*[1], the attachment will cease only if the application on which the attachment is effected is dismissed for default and not when a subsequent application was dismissed for default. For these reasons, it must be held that the attachment effected in E. P. No. 73 of 1937 still subsists. As the petitioner purchased the properties which were already attached in pursuance of the Rangoon decree, he should be deemed to be a representative of the judgment-

* C. R. P. No. 1291 of 1946. 10th September, 1948.

1. (1939) 2 M.L.J. 916.

debtor under section 47, Civil Procedure Code as held by a Bench of this Court in *Seetharama Chettiar* v. *Chidambaram Chettiar*[1].

The decision of the lower Court is correct and this civil revision petition is therefore dismissed with costs.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

Maragani Ramalingam and others .. *Petitioners**

v.

Maridu Koteswara Rao .. *Respondent.*

Limitation Act (IX of 1908), *section* 5—*Sufficiency of cause for and excusing of delay—Discretion of Court —Interference under section* 115, *Civil Procedure Code.*

The question of excusing the delay and the question whether sufficient cause for excusing the delay is made out are essentially within the discretion of the Court concerned. There is no ground for interfering under section 115, Civil Procedure Code with the exercise of such a discretion by a lower Court.

Ignorance of the death of a defendant would constitute sufficient cause within the meaning of section 5, Limitation Act, for excusing the delay in seeking to set aside the abatement caused by the death of that defendant.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Masulipatam, dated 8th October, 1946, in C. M. P. No. 720 of 1946, in O. S. No. 6 of 1946.

M. S. Ramachandra Rao for Petitioners.

M. Appa Rao and *B. Srinivasamurthi* for Respondent.

The Court delivered the following

JUDGMENT.—This civil revision petition is filed against the order of the learned Subordinate Judge, Masulipatam, excusing the delay in seeking to set aside the abatement caused by the death of the fourth defendant in the suit. The fourth defendant died on the 26th October, 1945. The application for adding the legal representatives was filed by the plaintiff on the 5th April, 1946. He became aware of the death of the fourth defendant only when the summons in the suit was returned with the endorsement that the fourth defendant died. This was made known to the plaintiff on the 13th March, 1946. Within less than a month from that day, he filed the application for impleading the legal representatives. He later filed applications to set aside the abatement and also to excuse the delay in seeking to set aside the abatement. In the affidavit filed in support of the application to set aside the abatement, the plaintiff definitely stated that he became aware of the death of the fourth defendant only on the 13th March, 1946, when it was made known in Court by the return of the summons. Thereafter, presumably some time must have been taken for the plaintiff to ascertain the legal representatives of the fourth defendant and also to ascertain the actual date of the death of the fourth defendant. Within less than a month from that date, the application was filed to implead the legal representatives. The learned Subordinate Judge in view of these circumstances was of opinion that the plaintiff learnt about the death only on the 13th March, 1946, and that there was sufficient cause to excuse the delay in seeking to set aside the abatement. He allowed the petition filed by the plaintiff under section 5 of the Limitation Act, excused the delay to set aside the abatement and directed the legal representatives to be impleaded as parties.

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1. (1932) 63 M.L.J. 941 : I.L.R. 56 Mad. 447.

* C. R. P. No. 637 of 1947. 10th September, 1948.

The question of excusing the delay and the question whether sufficient cause for excusing the delay was made out are essentially within the discretion of the lower Court. There is no ground for interfering with the exercise of such discretion under section 115 of the Civil Procedure Code. All that was urged in this revision petition on behalf of the petitioners was that there were not even allegations in the affidavit disclosing the grounds for excusing the delay in seeking to set aside the abatement. I am not, however, able to accept this contention for the reason that in the affidavit filed in support of the application to set aside the abatement, the plaintiff definitely stated that he became aware of the death only by information which was conveyed to him in Court on the 13th March, 1946. This allegation was not seriously challenged and the subsequent delay of about less than a month was certainly due to the fact that after he became aware of the death of the fourth defendant the plaintiff had to get information about the whereabouts of the legal representatives and who the legal representatives were. In these circumstances, I see no ground for interfering with this Order of the learned Subordinate Judge.

My attention has been drawn to the decision of Horwill, J., in C. R. P. No. 636 of 1947, which arose out of a similar application made by the plaintiff in O. S. No. 5 of 1946. The order of the learned Judge was based on two reasons: firstly that the affidavit in that case did not contain an explanation why the petitions were not filed within time and secondly that the learned Judge gave no reasons in his order for setting aside the abatement. The fact that the petitioner was not aware of the death of the fourth defendant till 13th March, 1946, is certainly sufficient ground to explain the delay in making this application. If he was not aware of the death, it cannot with reason be contended that he should have made the application earlier or should explain the delay. His ignorance of the death is really the reason for the delay. The learned Subordinate Judge in the order now before me gave as the reason for executing the delay that the plaintiff was unaware of the death of the fourth defendant till 13th March, 1946, and that ignorance constituted a sufficient cause within the meaning of section 5 of the Limitation Act for excusing the delay in seeking to set aside the abatement. I am therefore unable to agree with the decision of Horwill, J., in C. R. P. No. 636 of 1947.

The result is that this civil revision petition is dismissed with costs.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

K. V. M. Parameswarayya .. *Accused.**

Criminal Procedure Code (V of 1898), sections 403, 436 and 437—Charge sheet under section 307, Indian Penal Code—Charge framed under section 337, Indian Penal Code and conviction thereunder—Effect—Further enquiry—Section 403, Criminal Procedure Code, if a bar to the trial of the offence under section 307, Indian Penal Code.

Where a charge sheet is filed against the accused under section 307, Indian Penal Code, but the Magistrate frames a charge under section 337, Indian Penal Code and not under section 307, Indian Penal Code, his action amounts to a discharge of the accused of an offence under the latter section. In such a case it is open to the District Magistrate under sections 436 and 437, Criminal Procedure Code, if he considers it necessary, to order a further enquiry or to order commitment to the Court of Session without making a reference to the High Court. The conviction under section 337, Indian Penal Code, will not in any way interfere with the order of discharge under section 307, Indian Penal Code.

The facts and circumstances which according to the Court of first instance constituted the offence under section 337, Indian Penal Code along with other ingredients might constitute an offence under section 307, Indian Penal Code and there is no prohibition in law under section 403, Criminal Procedure Code in trying the accused for the serious offence, the conviction under section 337, Indian Penal Code not being a bar.

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* Crl. R. C. No. 635 of 1948. 3rd November, 1948.
(Case Referred No. 38 of 1948).

Case referred for the orders of the High Court under section 438, Criminal Procedure Code by the District Magistrate of South Kanara in his letter Reference C. 3752 of 1948, C. 3-a dated 26th June, 1948.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—This is a reference by the District Magistrate of South Kanara requesting this Court to set aside the conviction of the accused under section 337, Indian Penal Code by the Stationary Sub-Magistrate, Puttur, in C. C. No. 352 of 1948 and to order a further enquiry against the accused for an offence under section 307, Indian Penal Code, which, according to the evidence adduced is, in the opinion of the District Magistrate, the offence committed by the accused. My learned brother Rajagopalan, J., in issuing notice to the public Prosecutor made the following observations :

"Rule 269 of the Criminal Rules of Practice has not been complied with. There was no call for an explanation from the Sub-Magistrate by the District Magistrate. No doubt it is unlikely the Sub-Magistrate will have anything to add to the lengthy explanation he furnished to the Sub-Divisional Magistrate.

It is virtually a question of appreciation of evidence—mainly of oral evidence.

Notice may be ordered to the Public Prosecutor and the case posted before a single Judge."

After the entire records were translated the matter now comes up for passing orders.

The charge filed against the accused was for an offence under section 307, Indian Penal Code, in that he attempted to murder his son P. W. 1, by shooting him with a single barrelled muzzle loading gun at a distance of 8 yards with such intention or with such knowledge and under such circumstances that if, by that act, he had caused the death of P. W. 1, the act would have amounted to murder.

15 witnesses were examined on the side of the prosecution and two for the defence. Though the inquiry originally began as a preliminary register case, during its progress, the Sub-Magistrate was of opinion that the only offence that was committed on the evidence placed before him was under section 337 Indian Penal Code and thereafter charge was framed under that provision of law and the accused further questioned. Accepting in part, the statement of the accused and the evidence of the two witnesses examined for him, the Court of first instance convicted him of an offence as stated above and sentenced him to pay a fine of Rs. 200. The Sub-Divisional Magistrate of Puttur on perusing the calendar of this case in his administrative capacity called for a report from the Sub-Magistrate on the various questions raised by him and wanted the Sub-Magistrate to state why the case was converted as a calendar case and the accused convicted only of a minor offence. In answer to this, the Sub-Magistrate submitted a lengthy explanation stating the reasons for the course adopted by him. He also expressed his conclusion regarding the credibility of various portions of the prosecution evidence and why the whole of it should not be accepted. The Sub-Divisional Magistrate was not satisfied with the explanation and therefore submitted the papers to the District Magistrate who, after expressing his view, has referred the whole matter to this Court.

My learned brother Rajagopalan, J., has not issued notice to the accused at all and in the circumstances if I were inclined to agree with the expression of opinion made by the Sub-Divisional Magistrate and the District Magistrate, under section 439, clause (2), Criminal Procedure Code, it would not be legally possible for this Court to pass any order to the prejudice of the accused unless he has had an opportunity of being heard either personally, or by pleader. Such being the case, I have to issue notice to the accused before passing an order to his prejudice ; but for the reasons which will be given presently, it seems to me that no further action is necessary in this case.

When the Sub-Magistrate framed a charge under section 337, Indian Penal Code and did not frame one under section 307, Indian Penal Code,

his action amounted to a discharge of the accused of an offence under the latter section. In that case, it is open to the District Magistrate under sections 436 and 437, Criminal Procedure Code, either to order a further enquiry or to order commitment to the Court of Session. The fact that the Court of first instance has convicted the accused of an offence under section 337, Indian Penal Code will not in any way interfere with the order of discharge under section 307, Indian Penal Code.

Section 403, Criminal Procedure Code is clear to the effect that the conviction or acquittal of a person of a minor offence is no bar to the further trial of the same person for a more serious offence which might include the ingredients which already constituted the offence under the minor section. The facts and circumstances which according to the Court of first instance constituted the offence under section 337, Indian Penal Code along with other ingredients might constitute an offence under section 307, Indian Penal Code, and there is no prohibition in law in trying the accused for the more serious offence, the conviction under section 337, Indian Penal Code, not being a bar. The District Magistrate, if he had been so inclined, could have himself ordered a further enquiry for the offence under section 307, Indian Penal Code, instead of making the reference which is the subject-matter of discussion now.

But the learned Public Prosecutor contends that as the case depends mostly, if not solely, on the appreciation of oral evidence, it is very unlikely that on the evidence as it stands, any Court will come to a conclusion that the accused will be guilty of an offence under section 307, Indian Penal Code. He places particular reliance on the evidence of P. Ws. 12 and 13 and contends that since injuries Nos. 13 and 14 could only be caused by the bullet striking against something and, deflecting at an angle to the right or to the left, not necessarily at right angles, it would be impossible that a shot fired at such a close range as eight yards would have been the cause of the injuries of P. W. 1. The evidence of P. Ws. 12 and 13 is clear that the injuries could be caused by one gun-shot passing through a window within a range of 24 feet. According to the learned Public Prosecutor, if the gun was fired at such a short distance, there could not have been this deflection. Moreover, it is pointed out by the learned Public Prosecutor that there are other infirmities in the prosecution evidence which the Court of first instance had rightly taken into consideration. I am inclined to agree with these contentions. I would therefore hold that no further action is necessary. The records are returned to the District Magistrate, South Kanara.

V.S.

Further action held unnecessary.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL AND MR. JUSTICE GOVINDA MENON.

Kodi Makku Naicker and another .. *Petitioners**

v.

Agathiappa Goundar and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order VIII, rule 9—Effect of—Some defendants declared ex parte *—Written statements filed by contesting defendants and issues framed—Application by* ex parte *defendants to set aside* ex parte *order—Dismissal—*Ex parte *defendants if entitled thereafter to file written statements as of right.*

After some of the defendants had been declared *ex parte* the contesting defendants filed their statements and issues were framed. Thereafter the *ex parte* defendants applied to set aside the order declaring them *ex parte*, but it was dismissed. Then they sought to file a written statement. On a question whether they could claim to file the written statement as of right,

Held, that since the stage for the filing of written statements and the framing of issues had been passed, no fresh written statement could be filed as of right according to the provisions of Order 8, rule 9. The Court may grant them permission by way of indulgence ; otherwise, they have no such right.

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* C. R. P. No. 1774 of 1947. 23rd November, 1948.

Venkatasubbiah v. *Lakshminarasimham*, (1925) 49 M.L.J. 273 and *Perumal Naicken* v. *Kondama Naicken*, (1939) 1 M.L.J. 64, considered and applied.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Palni, dated 13th November, 1947, and made in I. A. No. 907 of 1947, in O. S. No. 304 of 1946.

T. P. Gopalakrishnan for Petitioners.

C. A. Seshagiri Sastri for Respondents.

The Judgment of the Court was delivered by

Horwill, J.—The petitioners were defendants 6 and 15 in the suit and they were declared *ex parte* by an order dated 13th February, 1947. The contesting defendants 1 to 3 filed written statements on 14th March, 1947, and issues were framed on 9th April, 1947. On 16th September, 1947, the petitioners filed an application to set aside the *ex parte* order. That application was dismissed on 8th October, 1947. They then sought to file a written statement by an application of 13th November, 1947; but by an order of even date that application was dismissed. In this revision petition against that order, it is contended that the learned District Munsiff was bound to grant the petitioners permission to file a written statement; for such was their legal right. The petition was admitted and posted before this Bench for considering the question whether the petitioners had the legal right claimed by them.

If the petitioners had been successful in their application to set aside the *ex parte* order, then under Order 9, rule 7, of the Code of Civil Procedure, they would have been allowed to answer the suit in the same way as if they had appeared on the day fixed for their appearance. But since the application was dismissed, we have to consider whether under any other provision of law they are entitled to file a written statement, despite the fact that written statements were ordered to be filed on 14th March, 1947, and that issues on the points raised in the pleadings were framed on 9th April, 1947. Order 8, rule 1, Civil Procedure Code requires the defendant, if he wishes to file a written statement, to do so, at or before the first hearing, or within such time as the Court may permit. The first hearing is admitted by Mr. Gopalakrishnan to be the day on which issues are framed, *i.e.*, the defendants had to file their written statement, if they wished to file any at all on or before 9th April, 1947. Order 8, rule 9, Civil Procedure Code, lays down the rule that:

> "No pleading subsequent to the written statement of a defendant . . . . . shall be presented except by the leave of the Court . . . . . . but the Court may at any time require a written statement or additional written statement from any of the parties."

It thus appears that upon the failure of the defendants to file a written statement on the day fixed by the Court, or, at any rate, before the date on which issues are framed, they have no right at all to file a written statement. The Court may grant them permission by way of indulgence or if the Court thinks that a written statement is necessary, it may call upon the defendants to do so under rule 9 of Order 8, Civil Procedure Code. Otherwise, the defendants have no such right.

We should have had no difficulty at all in coming to the conclusion that the petitioners had no right to file a written statement, and this matter would not have been posted before a Bench were it not for certain observations to be found in a judgment of Varadachariar, J., in *Perumal Naicken* v. *Kondama Naicken*[1]. The learned Judge therein refers to the decision of Wallace, J., in *Venkatasubbiah* v. *Lakshminarasimham*[2]; and we respectfully agree with Varadachariar, J., that the following principle enunciated by Wallace, J., is good law in the High Court:

> "Even a defendant who fails to show good cause for his previous non-appearance is not debarred from participating in the further conduct of the case and that the original order (declaring the defendant *ex parte*) only covers the period during which the party was originally absent."

1. (1939) 1 M.L.J. 64. 2. (1925) 49 M.L.J. 273.

The only difficulty however arises with regard to the application of the rule laid down by Wallace, J., in the above-mentioned case. Varadachariar, J., in the course of his judgment said that he experienced :

"some hesitation as to whether or not the first defendant should be permitted to file a written statement"

and proceeded to consider whether the rule laid down by Wallace, J., in *Venkatasubbiah* v. *Lakshminarasimham*[1], afforded any guidance. He pointed out that no evidence had been recorded in the case before him and then went on to say :

"The mere fact that on the new statement, additional issues may have to be framed does not amount to reopening anything that has happened . . . . It may be that on the filing of the petitioner's written statement, the plaintiff might require time to get ready to meet the plea there raised ; but that is an indulgence required by the plaintiff and not an indulgence required by the petitioner. I quite realise that the object of rules 6 and 7 of Order 9, will be frustrated if the defendants could be allowed to absent themselves with impunity at the earlier stages of a litigation. But where by reason of causes for which none of the parties is responsible the case has not made much progress, there is no reason why these rules should be applied as penal provisions depriving parties of the opportunity of putting forward their defence."

We respectfully agree with the learned Judge that we should not strain the natural meaning of the provisions of the Code so as to impose a penalty for the laches of the defendant where the Code does not provide a penalty ; but we feel that the rule laid down by Wallace, J., supports the conclusion we have arrived at from a reading of Order 8, rules 1 and 9, Civil Procedure Code to which Varadachariar, J., made no reference. Wallace, J., held in effect that the defendants could participate in the future proceedings of the case; but not in what was past. Since the stage for the filing of written statements and the framing of issues had been passed, no fresh written statement could be filed as of right.

The petition is dismissed with costs.

V.S. — *Petition dismissed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Bombay[2]).

PRESENT :—LORD SIMONDS, LORD OAKSEY, LORD MACDERMOTT, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

The Commissioner of Income-tax, Bombay Moffussil .. *Appellant**

v.

The Western India Life Insurance Company, Limited, Satara .. *Respondent.*

Income-tax Act (XI of 1922), *sections* 4 (1) *third proviso,* 42 *and Schedule, rule* 2 (b)—*Applicability of third proviso to section* 4 (1) *to an assessment under rule* 2 (b) *of the schedule to the Income-tax Act—Section* 42, *if applies to cases where income had already accrued outside British India.*

The third proviso to section 4 (1) of the Income-tax Act has no application to an assessment of a Life Insurance Company based upon a computation of income under rule 2 (*b*) of the Schedule to the Income-tax Act, by a reference to the annual average of the surplus disclosed by the actuarial valuation made for the last inter-valuation period as it is of a notional and not of the actual income of the year preceding the year of assessment.

Inland Revenue Commissioners v. *Australian Mutual Provident Society,* 1947 A.C. 605, Referred to.

Section 42 of the Income-tax Act, has no application to a case where the income in question had accrued outside British India.

J. Millard Tucker, K.C. and *P. V. Subba Rao* for Appellant.

N. E. Mustoe for Respondent.

Their Lordships' Judgment was delivered by

LORD OAKSEY.—This is an appeal from a judgment of the High Court of Judicature at Bombay dated 26th March, 1945, which was delivered on a reference made under section 66 (1) of the Indian Income-tax Act, 1922.

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1. (1925) 49 M.L.J. 273. 2. (1945) 47 Bom.L.R. 795 : 13 I.T.R. 405.

* P. C. Appeal No. 73 of 1947. 21st October, 1948.

The question for determination in this appeal is whether the respondent-Company, being assessed to tax in respect of the profits and gains of its life insurance business under rule 2 (*b*) of the schedule to the Act, is entitled under the third proviso to section 4 (1) of the Act to a deduction of Rs. 4,500 in respect of certain income derived by it from the investment of part of its business funds outside British India, which income however was not brought into or received in British India.

The facts of the case are as follows :

The respondent Company is resident in British India and carries on the business of Life Insurance in British India with its head office at Satara in the Province of Bombay. It has no branches outside British India. All its profits are derived from its Life Insurance business. Among other investments owned by the Company for the purposes of its business are certain foreign investments from which it receives income. Such income is received by it abroad but is not actually brought into British India.

By section 4 of the Act the respondent Company, being a resident company, is liable to assessment to tax under the Act on all its income, profits and gains from every source, wherever such income accrues, arises or is received, the profits and gains of its life insurance business being assessable under the schedule already mentioned. The Company, however, claims that under the third proviso to section 4 (1) of the Act it is entitled for assessment purposes to the allowance therein mentioned of Rs. 4,500 for each year of assessment in respect of the said investment income so accruing and arising to it outside British India and not brought into British India.

Sections 4 and 42 and rules 1 and 2 of the schedule are so far as material as follows :

"4. (1) Subject to the Provisions of this Act, the total income of any previous year of any person includes all income, profits, and gains from whatever source derived which—

* * * * * *

(*b*) if such person is resident in British India during such year—

* * * * * *

(*ii*) accrue or arise to him without British India during such year.

* * * * * *

(third proviso).

Provided further that if in any year the amount of income accruing or arising without British India exceeds the amount brought into British India in that year, there shall not be included in the assessment of the income of that year so much of such excess as does not exceed four thousand five hundred rupees.

* * * * * *

Section 42 (1). All income, profits or gains accruing or arising whether directly or indirectly, through or from any business connection in British India, or through or from any property in British India, or through or from any asset or source of income in British India or through or from any money lent at interest and brought into British India in cash or in kind, shall be deemed to be income, accruing or arising within British India, and where the person entitled to the income, profits or gains is not resident in British India, shall be chargeable to income-tax either in his name or in the name of his agent and in the latter case such agent shall be deemed to be for all the purposes of this Act the assessee in respect of such income-tax :

THE SCHEDULE.

Rules for the Computation of the Profits and Gains of Insurance Business.

1. In the case of any person who carries on, or at any time in the preceding year carried on, life insurance business, the profits and gains of such person from that business shall be computed separately from the income, profits or gains from any other business.

2. The profits and gains of life insurance business shall be taken to be either—

(a) the gross external incomings of the preceding year from that business less the management expenses of that year, or

(b) the annual average of the surplus disclosed by the actuarial valuation made for the last inter-valuation period ending before the year for which the assessment is to be made, after adjusting such surplus so as to exclude from it any surplus or deficit included therein which was made in any earlier inter-valuation period and any expenditure other than expenditure which may under the provisions of section 10 of the Act be allowed for in computing the profits and gains of a business, whichever is the greater."

On 6th September, 1941, the Income-tax Officer for Satara District made his assessment order in respect of the Company's business profits for the year of assessment 1939-40, under and in accordance with the provisions of the schedule to the Act.

For the years 1939-40 and 1940-41, he assessed the Company under rule 2 (b) upon the average of the surplus disclosed by the actuarial valuation made for the last inter-valuation period, a triennial period ending on December 31, 1938, without allowing the deduction of Rs. 4,500 under the proviso to section 4 (1). It was common ground that in each year of assessment and in each year of the triennial period the amount of the respondent's income accruing or arising without British India exceeded the amount brought into India in that year.

The Company appealed to the Appellate Assistant Commissioner of Income-tax, Belgaum Range, Belgaum, the only material ground of appeal being that, in respect of the income accruing or arising without British India and not brought into India, there should be deducted from the surplus shown for the three years ended 1938 the total sum of Rs. 13,500 being Rs. 4,500 for each year under the third proviso to section 4 (1) of the Act, in respect of the income of the Company from its foreign securities which had been collected by the Midland Bank, Ltd., in London and retained there.

On 19th September, 1942, the Appellate Assistant Commissioner allowed the appeal and made a deduction of Rs. 4,500 for each of the three years, holding that under the third proviso to section 4 (1) of the Act a deduction of Rs. 4,500 for unremitted foreign income was admissible in respect of each of three years, and that the assessable income computed under rule 2 (b) of the schedule for the year 1939-40 should therefore be reduced by Rs. 4,500. He made a similar order in respect of the year of assessment 1940-41. The income-tax Officer appealed to the Income-tax Appellate Tribunal who affirmed the decision of the Appellate Assistant Commissioner on this particular point. The Commissioner of Income-tax, Bombay, thereupon applied to the Income-tax Appellate Tribunal to state a case in respect of each year of assessment and refer it to the High Court of Bombay under section 66 (1) of the Act for its opinion as to whether the Company was entitled to the said deduction of Rs. 4,500. On 22nd June, 1944, the Income-tax Appellate Tribunal accordingly stated the case, for the opinion of the High Court. On 26th March, 1945, the High Court of Bombay, Kania and Chagla, JJ., delivered judgment, holding that the view of the Income-tax Appellate Tribunal was correct.

The question which now arises was not argued in the High Court, the judgments of the learned Judges being based upon the construction of section 42 of the Act which they held only applied to non-residents and had no application to the present case in which the income in question had clearly accrued to the Company outside British India. Their Lordships agree with the High Court that section 42 has no application but express no opinion upon the question whether the section refers only to non-residents.

The argument before their Lordships' Board was principally directed to the construction of the third proviso to section 4 (1) and to the question of its applicability to an assessment of the profits and gains of a life insurance business under the schedule in view of the decision of the House of Lords in *Inland Revenue Commissioners v. Australian Mutual Provident Society*[1].

1. (1947) A.C. 605.

It was contended on behalf of the appellant that assessments for the years 1939—1940 and 1940—1941 based upon a computation of income under rule 2 (*b*) by reference to the annual average of the surplus disclosed by the actuarial valuation made for the last inter-valuation period, namely, the triennial period ending 31st December, 1938, were assessments of a notional and not of the actual income of the year of assessment and that therefore the third proviso to section 4 (1) had no application since the income therein referred to must be the actual income of the year in question and not a notional income arrived at by computing an average income by reference to the income of the other years. It could not, therefore, be said that there had been included in the assessment of the income of that year any part of the actual income of the year, whether derived from foreign investments or otherwise.

The case of *Inland Revenue Commissioners* v. *Australian Mutual Provident Society* (ubi supra) was decided upon provisions of the British Income-tax Act of 1918, which are not the same as the proviso to section 4 of the Act now in question but that the case does draw attention to the distinction between an assessment upon actual income and an assessment upon a notional income and in so far as an average derived from a triennial period is the basis for computation of the income of one year in this Act the case has an important bearing. But apart from authority, their Lordships are of opinion that the appellant's contention is correct and they find it impossible to apply the words of the third proviso to section 4 (1) to an assessment under rule 2 (*b*) of the schedule and they will therefore humbly advise His Majesty that this appeal should be allowed with costs of this appeal, and that the assessment of the Income-tax Officer for Satara should be restored. Their Lordships make no order as to the costs in the Courts below as the question argued before them was not raised in those Courts.

Solicitor for Appellant : *Solicitor, High Commissioner for India.*

Solicitors for Respondent : *Douglas Grant & Co.*

V.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDARAJACHARI AND MR. JUSTICE MACK.

Subbaratnam and others .. *Petitioners.**

Criminal Procedure Code (V of 1898), *sections* 154, 162, 226 *and* 227—*Rough notes of statements to Police during investigation—Right of accused to insist on production—Cognizable offence—Names of accused mentioned in First Information Book—Need not be recorded in the General Diary—Charges framed by committing Court—Sessions Judge not bound and may alter—Charge under section* 147, *Indian Penal Code—Charge of abetment unnecessary—Judgment——Section under which and offence of which found guilty must be given. Madras Probation of Offenders Act (III of* 1937)—*Applicability to cases of grave offences under S.* 436, *I.P.C.*

Section 162 of the Criminal Procedure Code does not impose a statutory obligation on an investigating officer to produce all his rough notes and jottings out of which he writes up his case diary for the day. All that an accused is entitled to demand is that when a written record is kept of the statement of the witness to an investigating officer he shall be entitled to a copy of that record, and if the case diary contains, as it should, the substances recorded separately of the statement of each witness to the police officer, the latter is under no obligation to preserve or produce any other record, rough or otherwise of such a statement. It is only when a police investigating officer makes a written record of a statement of a witness and is shown not to have incorporated it as a separate statement in his case diary that he can be said to be guilty of a breach of a statutory obligation.

The General Diary entry need not give all the names of the accused in cognizable offences and police Standing Order No. 696 specifically says that details of complaints already given in the First Information Book and the case diary need not be recorded in the General Diary.

A trial Judge at Sessions is not bound by the charges framed in the Committing Court and he has ample power to revise and alter them not only at the commencement of the trial under section 226, Criminal Procedure Code but under section 227 of the Code, at any stage of the trial before the verdict of the jury is returned or the opinions of the assessors are recorded.

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*Ref. No. I of 1949 and Crl. As. Nos. 163 to 167, 64 to 69 & 131 to 133 of 1948. 18th August, 1948.

Where the accused are charged under section 147, Indian Penal Code, with forming themselves into an unlawful assembly with the common object of committing arson, a separate charge of abetment is wholly unnecessary and does not in fact arise. There is no necessity for a sessions trial to be cumbered by a medley of minor charges, particularly in a rioting case in which the overt acts constitute evidence of participation in the riots. S. 147, I. P. Code is quite sufficient in its punitive scope adequately to punish such minor overt acts.

Trial Judges must record in their findings the offences of which they find a person guilty and also the section of the Penal Code.

Baliram v. *King-Emperor*, I.L.R. 1945 Nag. 151 and *Subba Reddi* v. *Emperor*, (1947) 1 M.L.J. 193, referred to.

The Madras Probation of Offenders Act cannot be applied to grave offences as arson under S. 436, I. P. Code, which is punishable with transportation for life.

Reference under section 307, Criminal Procedure Code, by the Assistant Sessions Judge of the Court of Sessions, Trichinopoly in case Nos. 28 and 50 of the calendar for 1947, etc.

The Public Prosecutor (*V. L. Ethiraj*) for Crown.

N. Somasundaram, V. Rajagopalachari, P. S. Kailasam, K. Ramachandra Row, G. Balaparameswari Rao and *P. Suryanarayana* for Accused.

The Judgment of the Court was delivered by

Mack, J.—We have heard several batches of appeals which arise out of grave riots in Karur on 20th July, 1946, in the course of which arson was committed in several buildings, and the movables therein including two motor cars, jutkas, bales of yarn, handloom goods, iron safes, etc., were burnt by a frenzied mob composed mainly of weavers who got completely out of hand. We are particularly concerned in these appeals with the family of Mariappa Mudaliar who had a handloom weaving factory in the Coimbatore Road in which he had 140 looms worked by weavers for wages. In the bypass road which takes off to the south almost opposite his factory building, in a portion of which he also resided with his family, there were three other buildings occupied by his brother's sons, Arumugham and Subramaniam and his brother-in-law Manikka Mudaliar. Mariappa Mudaliar had a garage and stable adjoining these buildings in which he kept his Ford car, three jutkas and two horses. His factory and all these buildings including two motor cars, one belonging to Arumugha Mudaliar, were set fire to by a mob in the course of the day.

There were three separate Sessions cases out of which all these appeals arise in which several accused were separately tried on charges of rioting, arson and kindred offences in respect of the buildings of Mariappa Mudaliar, Arumugha Mudaliar and Manikka Mudaliar. Separate trials were found necessary in view of the personnel of the accused not being the same though several were common to all cases. There were in addition two other Sessions Cases arising out of arson in two other buildings, in addition to a number of cases said to have been tried by Magistrates.

There can be no doubt—and this is not disputed by the appellants—that there was rioting and arson on a very grave scale that day in Karur. Some photographs filed bear eloquent testimony to the damage done.

Karur is an important weaving centre with about 5,000 handloom weavers and 76 handloom factories. About 90 per cent. of the weaving population merely work for wages on the looms of capitalist weavers whose factories were supplied with yarn issued to them on ration cards by the Textile Yarn Control Officer on the basis of the number of active looms in their respective factories, in September, 1944. Until September 1946, it appears to have been open to a cooly weaver in the employ of a factory to buy his own loom and become eligible for a ration card, entitling him to the supply of yarn, direct, a corresponding reduction being then made in the factory owner's ration card. But this and other privileges appear to have been severely curtailed mainly because of the insufficiency of yarn available for distribution. It would appear also that no person who was not a

weaver in 1944, could except with the special permission of the Textile Commissioner, buy a loom and obtain independent supplies of yarn on an individual ration card.

There were two weavers' associations in Karur, the Karur Taluk Handloom Weavers' Association of which one Narkirar *alias* Arumugham was the secretary and the United Weavers' Association of which one Subbaratnam, a municipal councillor was the general secretary. They are both incidentally appellants, found guilty of rioting and arson, and each sentenced to five years' rigorous imprisonment in each of these three cases. These associations supported an agitation for the issue of individual ration cards to weavers instead of to the factories. Representations were made to the Government departments concerned with no result, and, on 21st June, 1946, the Secretary in a letter threatened the Textile Officer with direct action if the weavers' demands were not conceded before 7th July, 1946. On 23rd June, 1946, a general meeting of the weavers was held to concert measures, and a committee of action of seven persons was formed, all of whom figured amongst the appellants.

The 11th July, 1946 was fixed by the authorities for the distribution of yarn from the retail dealers to handloom factory owners. On the 10th July, 2,000 weavers marched in procession to the house of the Sub-Divisional Magistrate, demanding a postponement till they made representations in Madras. The distribution was accordingly postponed till the 14th and again to the 15th. On the 10th July, the Sub-Divisional Magistrate took the precautionary measure of prohibiting meetings or processions, except under a police licence, by an order under section 144 of the Code of Criminal Procedure. The District Superintendent of Police came to Karur on 13th July, 1946, and an attempt to distribute yarn on the 15th July, from the retail shop of one Rajagopala Aiyar in Kassim Sahib's Lane very near the Police Station was rendered abortive by a general hartal and a sympathetic strike by coolies and handcart pullers. On the 16th the weavers all went on strike with well-organised picketing. The District Magistrate came to Karur on the 17th of July, but all attempts at settlement were unsuccessful, and the decision was taken on 19th July, 1946, that yarn would be distributed the next day with the aid of police bondobust to the factory owners. The Association of factory owners on this assurance decided to meet the following morning at the police station and procure their supplies of yarn under cover of police assisance.

Accordingly between 10 and 11 A.M., on the 20th July, the day of these riots, about 30 factory owners gathered at the police station with motor lorries and handcarts. The District Magistrate and the District Superintendent of Police were also camping there; but they found a crowd of weavers led by agitators already gathered in Kassim Sahib's Lane and around Rajagopala Aiyar's shop. Satyagraha technique was first tried by men and women picketers who were found lying across the steps leading into Rajagopala Aiyar's shops to prevent any yarn being taken outside. The District Superintendent of Police himself and the Deputy Superintendent of Police using the graphic language of the learned Assistant Sessions Judge "lifted the women by their arms and removed them." The police succeeded in pushing the crowd back and in loading a lorry with bales of yarn. Finally in order to clear the crowd to make way for the lorry a lathi charge was made. It was after these happenings in the neighbourhood of the police station that matters took a very ugly turn and Satyagraha or passive resistance suddenly turned into violent destruction. This shortly is the background out of which the evidence against these appellants has to be appreciated. We are not concerned with the merits of the grievances of the weavers which appear to have generated some public sympathy. There are, however, ample indications from leaflets and pamphlets and the utterances of the leaders that strong political propaganda had sedulously capitalised a grievance the weavers undoubtedly had and sought to turn it to advantage in a war on capitalists in general. The

weavers were held out to be oppressed by the officials of the textile and other departments of Government who were working for the benefit of the factory owners and so on.

Before dealing with the evidence relating to the individual cases of rioting tried, it may be well to set out the general sequence of the riots that day. It would appear that suddenly and without any warning when there were no police at all in the locality, a mob at about midday bent on incendiarism burnt the car of Mariappa Mudaliar in its garage in the by-pass road and simultaneously attacked Manikka Mudaliar's house next to it. They then burnt the car of Arumugha Mudaliar and set fire to the thatched verandah of Mariappa Mudaliar's house and factory in the Coimbatore Road. All this took place between 12 and 1 P.M. The District Superintendent of Police arrived with a reserve party at this stage and with some difficulty the crowd was dispersed, after the District Superintendent of Police and a constable each fired one round, one Malayappan, an acquitted accused, was shot in the knee and there was also a lathi charge. The police then appear to have proceeded to another troubled area, when the mob returned with redoubled fury and, after looting and burning Arumugham's house in the by-pass road, finally sacked Mariappa Mudaliar's factory and set fire to its entire contents.

This is roughly the prosecution sequence, not seriously disputed by the learned advocates for the appellants, of the events that day in what was undoubtedly a scene of great confusion and disorder.

Reference No. 1 of 1948, Criminal Appeals 66, 67, and 131 of 1948 and Crown Appeal, Criminal Appeal No. 163 of 1948 : These appeals arise out of Sessions Cases No. 28 and 50 of 1947 in which 36 persons were charged in connection with rioting, arson and so on, in connection with the factory and house of Mariappa Mudaliar, who was P. W. 16, and the burning of his car. Each batch of appeals arises out of two Sessions Cases because some accused in each discharged by the committing magistrate were in revision directed to be retried by the District Magistrate. The learned Assistant Sessions Judge who tried all these cases in succession and simultaneously delivered judgment on the 3rd of January this year found accused 1 to 11, 13 to 15, 18, 19, 24, 25 and 30 guilty of rioting, arson and in fact on a variety of counts. He sentenced accused 1 to 4, 9 and 10 in all to five years rigorous imprisonment and the other accused to two years rigorous imprisonment in all. Accused 1 and 10 were in addition fined Rs. 500 and accused 5 and 19 each Rs. 250 as he found they were possessed of property. They have all appealed. The Crown has also filed an appeal, Criminal Appeal No. 163 of 1948, against the acquittal of accused 12, 16, 17 20, 28 and 31 to 36.

Reference No. 1 of 1948 made by the learned Assistant Sessions Judge had a very curious origin. He framed a variety of charges in all these cases, in all 14 counts. They included two separate counts 9 and 10, of house-breaking which he proceeded to try by a jury who found all the accused so charged not guilty. As assessors also the same Jury found all the accused not guilty on any count. In addition to these house-breaking counts there were charges under section 188 of the Indian Penal Code for disobedience of an order under section 144 of the Code of Criminal Procedure which was wholly unnecessary. Another charge framed was one of abetment against accused 1, 10, 16 and 17 under sections 436 and 114 of the Indian Penal Code. As all the accused were charged quite rightly under section 147, Indian Penal Code, with forming themselves into an unlawful assembly with the common object of committing arson, a separate charge of abetment was wholly unnecessary and does not in fact arise. The prosecution in these cases was conducted by the learned Assistant Public Prosecutor of Madras who explains that it was only in the first case that the trial Judge tried the house-breaking offences by the adoption of a mixed juror and assessor trial, and that this was abandoned in the subsequent cases. There was no justification whatsoever for the trial of the minor house-breaking charges by a Jury and unnecessarily adding complications to these already complicated cases. As it appears to us

only four simple charges were necessary in each of these cases, namely, rioting under section 147, Indian Penal Code, mischief by fire under section 435, Indian Penal Code and mischief by fire with intent to destroy a house under section 436, Indian Penal Code and finally an offence imposing on all the accused constructive liability for these offences read with section 149, Indian Penal Code. These simple charges should have been quite sufficient. There is no necessity for a sessions trial to be cumbered by a medley of minor charges, particularly in a rioting case in which the overt acts constitute evidence of participation in the riot. Section 147, Indian Penal Code is quite sufficient in its punitive scope adequately to punish these minor overt acts committed. The learned Public Prosecutor explained that his assistant at the commencement of the trial suggested simpler draft charges to the learned Assistant Sessions Judge, who however felt himself bound by the charges framed in the committing court. A trial Judge at Sessions is not bound by the charges framed in the committing court and he has ample power to revise and alter them not only at the commencement of the trial under section 226, Criminal Procedure Code but under section 227, Criminal Procedure Code at any stage of the trial before the verdict of the Jury is returned or the opinions of the assessors are recorded. When he came to record his findings as regards the offence committed by each accused, the learned Judge recorded his conviction of each appellant under several counts. For instance he convicted accused 1 and 10 under counts 1, 3, 5, 6, 8 and 12 of the charge and sentenced each of them to rigorous imprisonment respectively for 2 years, 5 years, 5 years, 5 years, 5 years and 5 years. To find out what offences they were guilty of, it has been necessary to have the counts before us; and in preparing the warrants, his office must have been put to wholly unnecessary scriptory labour and strain with the possibility of mistakes creeping in as regards sections of law. We would impress on trial Judges the necessity of clearly recording in their findings the offence of which they find a person guilty and also the section of the Indian Penal Code. The learned trial Judge really created for himself a great deal of unnecessary trouble by framing so many unnecessary charges.

The First Information Report in the case (Ex. P-23) purports to have been made by Mariappa Mudaliar (P.W. 16) himself at the Karur police station at 5-30 P.M. on the 20th July itself. According to the Inspector of Police, Sri K. Raman (P.W. 17) this long complaint was made to him and at his request a Sub-Inspector, Venkatachalam (P.W. 5) took down what P.W. 16 told him in his presence. Exhibit P-23 contains a brief description of the happenings that morning up to the lathi charge at about 11 A.M. In Exhibit P-23, P.W. 16 said that he was on his way to the police station to take delivery of the yarn when the lathi charge was made, and that some time later Kaliappan (P.W. 13) the servant in his factory came running with the news about the mob in front of Manikka Mudaliar's house. He gave this information to the Collector and on his way to his house saw Manikka Mudaliar's house on fire, and he then says he witnessed the crowd led by accused 1 to 11, all mentioned by name, who set fire to everything in his house while his women-folk took refuge on the terrace. The estimate of the damage done was Rs. 1,28,500. In an appendix to Exhibit P-23 the names of 26 other accused appear as persons who assisted in the arson. In Exhibit P-23 there appears the names of seven witnesses said to have been present, of whom only the servant Kaliappan (P.W. 13) and one Subbarayar (P.W. 15) have been examined. One witness mentioned in Exhibit P-23 is Vaiyapuri Mudaliar, whose brother, Nagarajan, has been examined instead as P.W. 14. It is clear from the non-examination of these five witnesses cited in Exhibit P-23 that the investigating police did not, as sometimes happens, confine their attention to the First Information Report but examined independent witnesses (P.Ws. 11, 12 and 14) instead.

Mr. N. Somasundaram for most of the appellants has sought to undermine Exhibit P-23 as a belated document, and therefore wholly unreliable on the ground that it does not bear the initials of the Sub-Magistrate or the date stamp of his office. There is indeed no indication on its face as to when it was received;

but we are unable to follow precisely what adverse inference is sought to be drawn from this obvious omission, in view of the clear evidence that these eye-witnesses excluding the five mentioned in Exhibit P-23 were examined in the investigation on the 21st July. There were a number of other First Information Reports received in the Sub-Magistrate's Court that day and the following day in connection with numerous cases of arson. No such omission admittedly appears in the First Information Reports in the other cases which are before us. We are unable to draw any other inference than that there was an accidental omission to initial and date seal this First Information Report in the magistrate's office.

It was next urged that Mariappa Mudaliar, P.W. 16 took sanctuary all that day at the police station and never came near his house at all after the mob proceeded to violence and incendiarism there. This line of defence is based on the evidence of three defence witnesses, D.W.s. 18, 19 and 20, all substantial residents of Karur to the effect that they were all in the police station from 11 A.M. to 6 or 7 P.M. that day and that P.W. 16 was there all the time. D.W. 18 would even go to the length of saying that P.W. 16's servant Kaliappan also stayed in the station till 6 P.M. It is sufficient to say that D.W. 18 admitted that his father and accused 16 were partners in the Pasupathi Textiles, an institution which strongly supported the cause of the weavers. The natural conduct of a man who hears that a mob is about to loot his house is to go and see for himself what was happening and to arrange for the safety of his women-folk. We may even presume that precautions were taken to put them in a place of safety in anticipation of trouble that day. There is, however, nothing to indicate that such a violent outburst of mob fury was anticipated in that locality that day, as when it started there did not appear to have been any constables in the neighbourhood on bundobust duty. We are unable to agree that P.W. 16 would have behaved more naturally had he remained in the station all that day without going near his house which was being looted and burnt. We have no doubt that P.W. 16 did see something of the attack on his house but we have good reason to doubt whether everything embodied in Exhibit P-23 is the result of his own personal observations. This certainly could not have been the case in view of a long list of 26 other accused named in an appendix to Exhibit P-23. The learned trial Judge was fully alive to the possibilities of Mariappa Mudaliar not being able to resist the temptation to include as accused some of his enemies in Karur and indeed he has quite rightly given more than one accused the benefit of the doubt on this ground and acquitted them.

The strongest attack on the prosecution evidence was levelled at Nagarajan (P.W. 14), a brother of Vayyapuri Mudaliar, mentioned as a witness in Exhibit P-23. This witness appears at the time he was examined by the police on the 21st to have been disinterested. He said that at about midday he was passing along the Coimbatore Road when he saw a crowd going into the by-pass road and accused 3, 4, 5, 9 and 19 setting fire to P.W. 16's Ford car. The crowd then went into the Coimbatore Road and there accused 1, 9, 10, 16 and 17 urged the crowd to set fire to Mariappa's factory. Accused 2, 3, 5, 7, 11, 14 and 15 broke open the locked door of the factory out of which they brought out bed-sheets and towels and made a bonfire. He also saw accused 2, 3, 9, 30 to 34 bring out various articles, an iron safe, typewriter and furniture and make a bonfire of them. He also saw the thatched verandah in front of the factory set fire to by accused 1, 3, 5, 9 and 12 and he also names the accused who set fire to the jutkas as accused 3, 4, 14 and 19. This witness admitted that he was about 6 or 7 years ago employed by Mariappa Mudaliar for about two years. During the war he was employed in some mechanical department of the Army for 2½ years and says he returned to Karur only eight days prior to the riot. Much is made of the fact that subsequent to his being examined as a witness he has been given employment by the family of P.W. 16. P.W. 14 admitted that he is now an apprentice in a knitting factory owned by P.W. 16's son, P.W. 2 and his cousin Arumugham. We are unable to accept the suggestion that P.W. 14 was a witness who was prevailed upon to give false evidence in this case with promise of employment. The more serious criticism about his

testimony is the large ambit of his personal observations which would make any conviction of an appellant on his uncorroborated testimony without substantial corroboration from more than one source in the circumstances of this case unsafe.

The servant Kaliappan, P. W. 13, and another eyewitness, P.W. 12, were disbelieved by the learned Judge. We are not quite satisfied that his total rejection of their evidence is justified. P.W. 13 was in the factory at the time the mob attacked it. His evidence is not easy to reject, because he does not implicate too many persons and the extent of his actual observations is, as would be natural in such cases, small. He saw accused 1, 6 and 17 instigating the crowd to arson whereupon accused 2 and 5 set fire to the thatch of the building. He saw accused 14 and 15 bring the jutkas from the by-pass road, throw them into the fire and A-2 and others bring out the yarn from the factory. He then says he got frightened and ran away. P.W. 12 is a cooly who saw accused 1, 10 and 16 exhorting the crowed to incendiarism and he then saw accused 2, 3 and 9 light a cloth ball and apply it to P.W. 16's thatched verandah. In fear he then ran home. These two witnesses were examined by the police the very next day and appear to us natural observers whose evidence there are no grounds for rejecting *in toto*. Even apart from the evidence of P.Ws. 12 and 13 there is as the learned Public Prosecutor urges quite sufficient evidence accepted by the trial Judge.

Of the eyewitnesses believed by the trial Judge, P.W. 11 was a shop-keeper who was passing along the Coimbatore Road when he saw accused 1, 2, 3, 5 and 9 setting fire to the thatched verandah of his factory. The other material fact he deposes to is that he saw P. W. 16 standing in the vicinity.

P.W. 16's son, P.W. 2 has also figured as an eyewitness. He says he was standing in the by-pass road with his brother when the mob appeared. The details he gave are that accused 3, 4, 9 and 19 set fire to the car and that on the instigation of accused, 1, 9, 10, 16 and 17, accused 2, 3, 5 and 9 and 12 set fire to the thatched shed in front of the factory. Then the District Superintendent of Police came and there was firing in which accused 12 was injured and the crowd dispersed, P.W. 2 makes out that he gallantly held his ground even after the police left the place and was there when the crowd came back with fresh fury. He saw accused 4, 5, 6, 7, 9, 11, 14, 15 and 31 bring the jutkas and horses from his father's stable break the former and burn them, and he named several other accused who then broke open the building and brought out yarn and bed-sheets, etc., and made a bonfire of them. He says that the women who were in the upper floor of the building escaped by the back staircase.

The other eyewitness mentioned in Ex. P-23 and examined is Subbarayan, P.W. 15, a servant under P.W. 16's brother Annamalai. He was standing near the factory in the Coimbatore Road at 12 noon when the mob went into the by-pass road and came back to the Coimbatore Road. He says accused 1, 10, 16 and 17 exhorted the mob to set fire to the factory. Accused 2, 3, 5, 9 and 12 then set fire to the thatched verandah at which stage the police came. The mob stoned them and shots were fired one of which hit accused 12. He also deposed to the next active phase after a temporary lull. Accused 6, 14, 18 19 and 31 broke the jutakas to pieces and set fire to them ; accused 5, 7, 11, 14 and 15 broke open the factory door, accused 18, 24, 25 and 31 brought out moveables and burnt them while accused 8 threw bulbs with inflammable matter on to the roof of the building.

There are no grounds for any suspicion that the eyewitnesses who appear to us to be natural were not present at the rioting at all. The main difficulty which the learned Judge has fully appreciated and in our opinion on the whole soundly and correctly surmounted was the danger of innocent persons being implicated as accused. He has not convicted any appellant on the uncorroborated testimony of P.W. 16 and P.W. 2 alone and used what we consider to be a reasonable and appropriate test of requiring ample corroboration from other witnesses of the presence and specific acts attributed to each of the accused before convicting him.

The learned Judge has sentenced accused 1 to 4, 9 and 10 each to rigorous imprisonment for five years. There can be no reasonable doubt that they were the ringleaders not only in the whole agitation but also in the direct incitement of the mob to senseless violence and destruction. Accused 1 was the Secretary of the United Weavers' Association and accused 3 the Secretary of the Karur Taluk Handloom Weavers' Association. A-9 was president of the committee of action elected on 23rd June, 1946, with A-4 as Secretary and accused 1, 3 and 10 as members. As regards A-2 there was material to show that he was one of the leaders in the ration card agitation. There is the evidence of the Deputy Superintendent of Police (P. W. 3) that accused 2 and 3, the only two he named specifically, actively obstructed the movement of the yarn from Rajagopala Aiyar's retail shop before the lathi charge that morning. P.Ws. 2, 11, 15 and 16 all give him a prominent part in the actual incendiarism. There is abundant cumulative testimony clearly proving the guilt of these six persons as ringleaders in rioting and arson.

It is urged by Mr. Somasundaram that violence and destruction was more probably the work of hooligans, who capitalised an opportunity for loot, but it is significant that no valuable property was taken away and that even currency notes were found half charred. This was all clearly not the work of hooligans out to loot but a carefully organized plan of direct violence held in reserve in the event of the first line of passive resistance or Satyagraha failing. The failure of the Satyagraha plan led the ringleaders to bring into operation a plan of organized arson and incendiarism for which they appear to have been fully prepared in the last resort. Indignities to passive resistance endured, with men and women being removed bodily from lying postures, doubtless exasperated them into more violent excesses than they had contemplated.

A separate appeal, Criminal Appeal No. 131 of 1948 has been filed on behalf of Sambasiva Aiyar (A-10) who is not a weaver but is described as a Mirasdar, the son of a lawyer and the brother of a lawyer now in practice. He endeavoured to establish an *alibi* which the learned Judge rightly rejected to the effect that he took two persons injured in the lathi charge to Dr. Menon, D.W. 8, and was with him all that morning. The doctor's evidence is merely to the effect that A-10 brought these persons to him some time between 10 and 12 and that he stayed chatting with him for half an hour. D.W. 8 is A-10's family doctor and he has gone as far as he could to assist him. The times he has given cannot be regarded as in the remotest degree conclusive. P.Ws. 2, 14, 15 and 16 have all given A-10 a most active part all through amongst those who led the crowd. The convictions of accused 1 to 4, 9 and 10 under sections 147, 435 and 436, Indian Penal Code, are confirmed. We find rather curiously no direct count of arson against the first accused and only constructive counts though in paragraph 132 of his judgment the learned trial Judge finds rightly that he was one of the persons who set fire to the thatched verandah. In view of the number of protracted trials in the lower Court which these appellants have undergone and the fact that they have been in remand also throughout we reduce the sentences on these ringleaders to one year's rigorous imprisonment under section 147, Indian Penal Code and to three years' rigorous imprisonment under each of the arson counts, the sentences to run concurrently.

As regards the other appellants, the learned trial Judge has carefully considered each case separately. We are in agreement with his finding that they are all guilty of rioting and arson with the exception of accused 13, 18, 24, 25 and 30. In their cases we think that the learned trial Judge deviated from the strict test of evidence he adopted in requiring corroborative testimony. As against the 13th accused whose age is given as 20 there is only the evidence of P.W. 2 that he helped to break open the lock of the factory. He was, it is true, a weaver and Secretary of the Dravida Kazhagam but there is nothing to show any direct connection between this association and the weavers' agitation. As regards A-18 he claimed to have his own loom and a separate ration card. He has been implicated only by P.Ws. 2 and 15. As regards the 24th accused there is only the evidence of P.W. 15 that he helped to roll an iron safe and put it on the bonfire. The age of the 25th

accused is given as only 17. He and the 24th accused were once employed in P.W. 16's handloom factory and they fall really into the same category. As against this youth there is only the evidence of P.W. 2 that he brought out some tables to the bonfire and that of P.W. 15 that he set fire to some cycles. As regards the 30th accused there is the evidence of P.W. 2 that he brought an iron safe and threw it in the fire. But the sub-Inspector, P.W. 17, admitted in his favour that P.W. 2 did not tell him this fact in the investigation. P.W. 14, it is true, corroborated P.W. 2 but we do not consider that this evidence is conclusive.

We think on the evidence that accused 13, 18, 24, 25 and 30 are border line cases entitled to the benefit of a reasonable doubt. We therefore acquit them on all counts and set them at liberty. The convictions of the other appellants are confirmed under sections 147, 435 and under 436 read with section 149, Indian Penal Code. The findings on other counts are unnecessary and set aside.

As regards the sentences we observe that accused 3, 6 and 11 whose convictions we are confirming are young men aged 21, 19 and 22 respectively. We have considered the possibility of applying to them the provisions of the Probation of Offenders Act and placing these misguided youths under section 6 under the care of the District Probation Officer. We are, however, unable to do so as the Act cannot be applied to grave offences such as arson under section 436, Indian Penal Code, which is punishable with transportation for life. It is regrettable that A-3 though only 21 should have been so conclusively proved to have been a prominent ringleader in violent crime of this description. The sentences on the other appellants (except A-6) namely A-5, 7, 8, 11, 14, 15, 19 are reduced to six months' rigorous imprisonment under section 147 and to one year's rigorous imprisonment under sections 435 and 436 read with section 149, Indian Penal Code, the sentences to run concurrently. In view of the age of Gopal (A-6) and his being a misguided youth we reduce his sentence to 6 months' rigorous imprisonment under section 147, Indian Penal Code and to the period already undergone (more than 8 months) on the other counts, the sentences to run concurrently.

The fines imposed on accused 1, 5, 10 and 19 are confirmed as it is just and appropriate that malefactors who are possessed of property and means should make a contribution to the costs of their prosecution which in these cases has been a heavy charge on the tax-payer.

I come now to the Crown Appeal, Criminal Appeal No. 163 of 1948 filed against the acquittal of accused 12, 16, 17, 20, 28 and 31 to 36. We have been taken through the evidence against them by the learned Public Prosecutor. A-12 was the person shot in the knee from Police fire and according to the trial Judge maimed for life. He was clearly amongst the crowd but was fortunate in that P.Ws. 2, 14 and 15 who depose that he set fire to the thatched verandah did not say that to the investigating Inspector. As regards the 16th accused, for instance, he was a partner in the Pasupathi Textiles situated opposite to the factory of P.W.16. There was clearly material to show differences between accused 16 and P.W. 16 arising out of municipal politics. The learned Judge rejected some *alibi* evidence adduced for the 16th accused as false, but at the same time he quite rightly gave the 16th accused the benefit of the doubt observing that Exhibit P-23 gave this accused a minor part although the witnesses made him out to be a ringleader. It is unnecessary to consider separately the cases of the other accused. In no case is there overwhelming and conclusive testimony which would justify the setting aside of the acquittal. As regards the 17th accused against whom alone the learned Public Prosecutor would press the appeal, he is a young Chettiar student aged 21 mentioned by P.Ws. 2, 14, 15 and 16 as a person who took an active part in the riot. He was acquitted on the ground that Exhibit P-23 placed him in the appendix of assistants and gave him no leading part. He is the only person who was released on bail early in this case. It is brought to our notice that he has been convicted in the next batch of arson appeals we are considering. We do not find sufficient and cogent material to justify a reversal of his acquittal by the learned Judge in the present case.

The Crown appeal accordingly in the result is dismissed *in toto.*

Before leaving this case we feel called upon to deal with two points of police procedure in investigations which Mr. Somasundaram for the appellants has canvassed at length presumbly in a belated attempt in this Court for the first time to question the *bona fides* of the entire police investigation. Both points he raised are based on replies given by the Inspector Sri Ram (P.W. 17) to questions put in cross-examination in the trial Court by the learned advocate who it is said was once a Deputy Superintendent of Police. He seems to have used his knowledge of police procedure to heckle, not very seriously to the police investigating officer. The Inspector said in cross examination:

" I cannot say whether it is my duty to record the names of the accused in the General Diary."

From this Mr. Somasundaram has argued that no names of the accused at all were noted in the General Diary entry about this case. The General Diary entry itself has not been exhibited for the defence. It is sufficient to say that under section 154 of the Code of Criminal Procedure, the substance of a first information has to be entered in a book in such form as the Provincial Government may prescribe and that under Madras Police Standing Order No. 538 the book prescribed by section 154, Criminal Procedure Code, is the first information book in form No. 78 in which the present F.I.R. (Exhibit P-23) was admittedly recorded. The General Dairy entry need not give, as the learned Public Prosecutor points out, all the names of the accused in cognizable offences and police Standing Order No. 696 specifically says that details of complaints already given in the F. I. book and the case diary need not be recorded in the General Diary.

The second point is based on the Inspector's frank and straight-forward admission that he made notes as he examined each witness with the aid of which he later typed his diary ; and that his notes which were " scribblings " were not preserved. There is no suggestion that the substance of the examination of each witness was not separately recorded in the case diary. Mr. Somasundaram contended, as we understood his argument, that there was an obligation on P.W. 17 to preserve, keep and produce when required all the rough notes he made of the examination of witnesses. He relied on a Nagpur case *Baliram* v. *King Emperor*[1], in which the scope of section 162 of the Code of Criminal Procedure was considered and some strictures passed on the police procedure in suppressing records of statements from the witnesses during investigation. In that case some witnesses said their statements were reduced to writing. The investigating officer said he had made notes of their statements but had destroyed them. The case diary did not contain the substance of the statement made by each witness examined and there was a clear breach of section 162, Criminal Procedure Code. It is not imperative for an investigating officer to make any written record at all of the statement every witness he examines under section 161, Criminal Procedure Code makes to him. This is made quite clear by section 161 (3) added by Act II of 1945 which reads as follows :—

" A police officer may reduce to writing any statement made to him in the course of an examination under this section. If he does so, he shall make a separate record of the statement of each such person whose statement he records."

If such a separate record appears in the case diary there is a sufficient compliance with the statutory requirements of section 162, Criminal Procedure Code, which only entitles an accused to a copy of the record of such statement " whether in a police diary or otherwise." We are unable to find any authority for the position that section 162 imposes a statutory obligation on an investigating officer to produce all his rough notes and jottings out of which he writes up his case diary for the day. We have been referred in this connection to a recent Bench decision of this Court in *Subba Reddi* v. *Emperor*[2]. In that case an investigating Inspector said in the box that he could not say from his case diary what each witness had stated, that he made rough notes and did not prepare individual statements, and that he had the

1. I.L.R. (1945) Nag. 141.

2. (1947) 1 M.L.J. 193: I.L.R. (1948) Mad. 57.

rough notes with him but he was not asked even to produce them. Our attention has been drawn to the following observation by Bell, J. :—

"It is no doubt desirable as was pointed out by *Baliram* v. *King Emperor*[1] that notes, however and whenever taken by the police officer, should be preserved."

We do not after a careful perusal of that decision consider that the scope of that observation extended to casting on a police officer any duty of preserving and producing all his rough notes made in an investigation. Horwill, J., in the same decision made the following observation :

"Although no irregularity was committed by the taking of notes for the preparation of the case diary instead of recording statements, it seems desirable that statements should be recorded where reasons of urgency do not preclude this course."

With respect we are in complete agreement with this observation, the law as it stands, not making it imperative on a police officer to make any record at all of a statement made to him in the course of an investigation. All that an accused is entitled to demand is that when a written record is kept of the statement of the witness to an investigating officer he shall be entitled to a copy of that record ; and if the case diary contains as it should the substances recorded separately of the statement by each witness to the police officer, the latter is under no obligation to preserve or produce any other record, rough or otherwise of such a statement. It has been urged before us that the production of the rough notes or rough statements recorded may disclose some accidental slip or clerical error which when compared with the case diary entry may be material to the defence. But section 162 of the Code of Criminal Procedure has made no provision for such a remote contingency. Rough notes unlike the case diary may easily be brought into existence and any such material slip or error can easily be corrected to accord with the case diary before the rough notes are produced for Court's inspection. To permit an accused person to enforce the production of all the rough notes made by a police officer in his investigation and to require a police officer to preserve them would be to bring into court an untidy mass of scribbled matter which will serve little purpose and we shall have police officers laboriously making fair copies of their scribbled investigation notes for judicial assimilation and consideration. It is only when a police investigating officer makes a written record of a statement of a witness, and is shown not to have incorporated it as a separate statement in his case diary that he can be said to be guilty of a breach of a statutory obligation.

[His Lordships then dealt with the merits of the other appeals arising out of the case].

GOVINDARAJACHARI, J. :—I am in substantial agreement with my learned brother, but I desire to add a few observations.

One is with regard to the evidence of P. Ws. 12 and 13 in S. C. No. 28 of 1947. The learned Public Prosecutor with his usual fairness intimated that he would hesitate to ask us to rely on that evidence in view of the fact that the Assistant Sessions Judge was not himself prepared to act on it. Though, as my learned brother has observed there may be room for doubting whether the rejection of their evidence by the Court below is altogether justified, it is, in my opinion, safer that the case is judged apart from and excluding the evidence of these witnesses. I would only emphasise that that is how we have judged.

There has been some discussion as to whether in S. C. No. 28 of 1947 the defence had to exhibit the General Diary and whether and to what extent they obtained an admission in regard to its contents from the Inspector of police, P. W. 17. It seems to me that P. W. 17 admitted that the names of all the accused were not recorded in the General diary and if this is all that the defence desired to rely on, there is no need to exhibit the General Diary. But this, however, does not exclude the possibility of the name of the first accused having been entered with the rest of the accused being indicated by an etc., of the total number of the accused having been

1. I.L.R. (1945) Nag. 141.

given. If the defence desired to exclude these possibilities also, they should either have had the General Diary included in the evidence or cross-examined P. W. 17 further. However, in view of Police Standing Order No. 696 there is no need to enter in the General Diary details of complaints already given in the F. I. R. book.

The following answers were elicited from the investigating officer, P. W. 17 :

> " The case diary is typed. As I examined the witnesses, I took notes. Later I had the matter typed in the diary. The notes were not preserved. They were scribblings."

Relying on this evidence Mr. Somasundaram, the learned advocate for the appellants argued that there was a serious irregularity by way of non-compliance with the requirements of the Code of Criminal Procedure.

Section 161 of the Code deals with examination of witnesses by the police. Under section 161 (3)

> " a Police Officer may reduce to writing any statement made to him in the course of an examination under this section. If he does so, he shall make a separate record of the statement of each such person whose statement he records."

When such statement is recorded whether in the Police Diary or otherwise section 162 requires the Court, on the request of the accused, to grant a copy of such statement, in order that any part of it, if duly proved may be used to contradict the witnesses making it in the manner provided by section 145 of the Evidence Act. It is no doubt not imperative on the investigating officer to record the statement of a person examined by him under section 161. But if he records the statement, it is clear that it must be preserved. This is implicit in the right accorded to the accused of obtaining a copy of it. The statement need not be taken down verbatim. The investigating officer need do no more than record a gist of the statements made to him (see *Guruva Vannan, In re*[1]). But on the clear language of section 161 (3) itself the statement of each person must be separately recorded. The reason is obvious. For the purpose of contradicting a witness by a previous statement of his, a condensation of what he and others said will be of little practical value. It is also extremely doubtful whether such an abstract can be described as a previous statement of the witness reduced to writing within the language of section 145 of the Evidence Act.

That section 162 confers on the accused protection and privileges of a substantial nature can hardly be doubted. Destruction of the record so as to make it unavailable or a refusal to supply the accused with a copy of it will have the effect of depriving him of a very valuable right and will, therefore, be regarded with gravity. In *Baliram* v. *King Emperor*[2], the investigating officer destroyed the notes he made of the statements of the persons whom he examined during the investigation after incorporating them in the Case Diary. From the facts set out at page 164 of the report it would, however, appear that what was entered in the case diary was a fusion of the several statements into a compact narrative which afforded no scope to the accused for confronting the witnesses with their statements originally noted down but destroyed. It was held that in the result the accused was denied the benefit of the statements recorded under section 162 for cross examination of the witnesses concerned and that this constituted a serious departure from the mode of trial prescribed by law and occasioned failure of justice rendering the conviction liable to be quashed. In *Kottaya* v. *King Emperor*[3], the irregularity lay in not making available to the accused till a late stage of the trial, the note book of the police Sub-Inspector containing statements of the witnesses he had examined at the inquest. It was held that such a failure was undoubtedly a breach of the proviso to section 162 of the Code which had, however, in the peculiar circumstances of the case, not occasioned any prejudice to the accused, that the case consequently fell under section 537 and the trial was valid notwithstanding the breach of section 162.

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1. (1944) 1 M.L.J. 253.
2. I.L.R. (1945) Nag. 151.
3. (1947) 1 M.L.J. 219 : L.R. 74 I.A. 65 : I.L.R. 1948 Mad. 1 (P.C.).

Neither of these cases, however, directly bears upon what happened in the present case. In the course of the discussion whether the rough notes or scribblings made by an investigating officer should be preserved, the learned Public Prosecutor drew our attention to a decision of Horwill, and Bell, JJ., in *Subba Reddi* v. *Emperor*[1]. In that case Bell, J., observed as follows :—

> " It is no doubt desirable as was pointed out in *Baliram Tikaram* v. *Emperor*[2], that notes however and whenever taken by the police officer should be preserved."

With great respect this observation, judging from its wide language, derives no support from *Baliram's case*[2], the exact scope of which I have already discussed. It seems to me, however, on a close examination of the rest of the judgment of Bell, J. that he did not intend to lay down any general rule such as the observation just quoted may seem to suggest. I note in particular that the learned Judge stated that

> " nothing is more natural than that he (the investigating officer) should make rough notes of information which later he would set out in proper form in the case diary for the scrutiny of his superior officers."

The rough notes were available in that case and on their being inspected it was found that the case diary was an amplification of those notes. Horwill, J., pointed out that although no irregularity can be said to have been committed by the taking of notes for the preparation of the case diary instead of recording statements, it is desirable that such statements should be recorded where reasons for urgency do not preclude that course. The learned Judge drew a distinction between notes which are in the form of summaries of statements made by individual witnesses and notes which give a very brief summary of the narrative found in the case diary and do not take the form of summaries of individual statements made by the various witnesses. In the former case according to the learned Judge the notes should be made available to the defence. In the latter the police officer would be justified in objecting to the production of his notes. In the case of *Subba Reddi* v. *Emperor*[1], however, the police officer did not so object.

In view of the judgment in the case of *Subba Reddi* v. *Emperor*[1], the observations in which I have set out at some length, it seems to me that it cannot be maintained that there was anything irregular in what P. W. 17 did in the present case. I may add that Mr. Somasundaram did not suggest anything against the *bona fides* of the officer who seems to have impressed the Assistant Sessions Judge by the straightforward manner in which he deposed. Having had the benefit of a full discussion by the Bar I have thought it desirable to indicate my opinion as to whether the existing practice which evidently P. W. 17 followed is irregular. In my opinion, for the reasons stated, it is not.

V.P.S.

Some accused acquitted. Crown appeal dismissed. Convictions of others confirmed, but sentences reduced.

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1. (1947) 1 M.L.J. 193.
2. I.L.R. (1945) Nag. 151.

[PRIVY COUNCIL.]

(On appeal from the Chief Court of Oudh at Lucknow[1]).

PRESENT :—LORD SIMONDS, LORD NORMAND, LORD OAKSEY, LORD MACDERMOTT AND SIR MADHAVAN NAIR.

Raja Mustafa Ali Khan, through Special Manager, Court of Wards, Utraula, District Gonda .. *Appellant**

v.

The Commissioner of Income-Tax United Provinces, Ajmer and Merwara .. *Respondent.*

Income-tax Act (XI of 1922), *sections* 2 (*i*) *and* 4 (3) (*viii*)—" *Agricultural income* "—*Forest trees growing naturally—Income from sale of—If agricultural income exempt from tax—Mortgagee in possession of agricultural land assessed to land revenue leasing out to mortgagor—Rent received by him is agricultural income exempt from income-tax—Malikana if agricultural income.*

Whether exemption is sought under section 2, sub-section 1 (*a*) or section 2 sub-section 1 (*b*) of the Indian Income-tax Act the primary condition must be satisfied that the land in question is used for agricultural purposes : the expression " such land " in sub-section (*b*) refers back to the land mentioned in sub-section (*a*) and must have the same quality. No assistance is to be got from the meaning ascribed to the word ' agriculture ' in other statutes and though it may always be difficult to draw the line, yet unless there is some measure of cultivation of the land, some expenditure of skill and labour on it, it cannot be said, to be used for agricultural purposes within the meaning of the Income-tax Act. Accordingly income derived by the sale of forest trees growing naturally will not be " agricultural " income exempt from income-tax.

Yuvarajah of Pittapuram v. *Commissioner of Income-tax,* (1946) 1 M.L.J. 120 ; I.L.R. 1946 Mad. 745 and *Benoy Ratan Banerji* v. *Commissioner of Income-tax,* (1946) 15 I.T.R. 98 approved.

" Malikana " or the small cash payment received by the Rajas of Utraula by virtue of their position as the old " pargana lord" (though their Zamindari and proprietary rights had been assigned to purchasers, grantees or transferees) is not " agricultural income." It cannot be said that such income was rent or revenue derived from the land ; on the contrary it is paid just because the original proprietors relinquished their claims to the land, and it represents the consideration for that relinquishment.

Maharaja Kumar Gopal Saran Narain Singh v. *Commissioner of Income-tax, Bihar and Orissa,* (1935) 69 M.L.J. 190 : L.R. 62 I.A. 207 : I.L.R. 14 Pat. 552 (P.C.) referred to.

The rent of agricultural land received by a usufrutuary mortgagee is agricutural income not because he is a usufructuary mortgagee but because, being a usufructuary mortgagee,he has gone into possession and received the rent. So also the assessee being a mortgagee, usufructuary or other, has gone into possession and the rent that he receives (from the mortgagor to whom he leases back the property) is " agricultural income " and as such exempt from income-tax.

Khoyee Sahib v. *The Commissioner of Income-tax,* (1934) 8 I.T.C. 138 at 145 the dictum of Ramesam, J. approved.

Commissioner of Income-tax v. *The Maharajah of Dharbhanga,* (1935) 69 M.L.J. 474 : L.R. 62 I.A. 215 : I.L.R. 14 Pat. 623 (P.C.) referred to.

The distinction sought to be made between rent received by a mortgagee " in lieu of interest " and rent received by him but applicable by him *inter alia* in satisfaction of interest cannot be maintained.

Rajah Mustafa Ali Khan v. *Commissioner of Income-tax, U. P. and C. P.,* (1944) 13 I.T.R. 98 affirmed.

Sir Roland Burrows and *L. M. Jopling for* Appellant.

J. M. Tucker and *J. M. R. Jayakar* for Respondent.

Their Lordships' judgment was delivered by

LORD SIMONDS.—The consolidated appeals result from the consolidation of four appeals from the Chief Court of Oudh, all of which relate to assessments of income-tax under the Indian Income-tax Act, 1922.

Two appeals relate to the income of Raja Mustafa Ali Khan of Utraula who will be referred to as " the assessee," for the year of assessment 1939-40 and two appeals to his income for the year of assessments 1940-41. In each case there is one appeal by the assessee and one by the Commissioner of Income-tax, United

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1. (1944) 13 I.T.R. 98.

*P.C. Appeal No. 33 of 1947. 12th July, 1948.

Provinces, who will be referred to as "The Commissioner". The same questions are raised in regard to each year and it will be necessary to state and consider the facts in regard to one year only.

By an assessment order dated the 18th September, 1939, the Income-tax Officer, Gonda, made an assessment for the year 1939-40 on the assessee which included as income from "other sources" (as defined in section 12 of the Act) three separate items as follows:

1. Forest Rs. 25,144.
2. Malikana Rs. 6,967.
3. Annuity and interest Rs. 1,07,000.

These items will be explained later, but it is convenient here to state that, the assessee having appealed against this assessment, the first item was reduced to Rs. 21,040 by the Assistant Commissioner of Income-tax and was at this figure upheld by the Income-tax Appellate Tribunal and the Chief Court of Oudh, that the second item has throughout been upheld at the figure of Rs. 6,967 less 10 per cent, for expenses, i. e. Rs. 6,271 and that the third item was in the first place reduced by the Assistant Commissioner to Rs. 61,797, that from his decision the assessee appealed, but the Commissioner did not, that the Appellate Tribunal allowed the assessee's appeal and that its decision was affirmed by the Chief Court. The appeals therefore to their Lordships' Board are by the assessee against assessments in respect of the first item at Rs. 21,040 and the second item at Rs. 6,271 and by the Commissioner against an order quashing an assessment in respect of third item in the figure at Rs. 61,797.

In the case of each item the question is whether the moneys received by the assessee were exempted from income-tax as being "agricultural income" under section 4 (3) (*viii*) of the Act. With regard to the first item the assessee sought also to raise the question whether the moneys received under that head were not income at all but capital, but it did not appear to their Lordships that this point was open to him upon the present appeal.

The relevant provisions of the Act are as follows:—

"Section 2—In this Act, unless, there is anything repugnant in the subject or context,—

(1) "Agricultural income" means—

(*a*) any rent or revenue derived from land which is used for agricultural purposes, and is either assessed to land revenue in British India or subject to a local rate assessed and collected by officers of the Crown as such;

(*b*) any income derived from such land by—

(*i*) agriculture, or

(*ii*) the performance by a cultivator or receiver of rent-in-kind of any process ordinarily employed by a cultivator or receiver of rent-in-kind to render the produce raised or received by him fit to be taken to market, or

(*iii*) the sale by a cultivator or receiver of rent-in-kind of the produce raised or received by him, in respect of which no process has been performed other than a process of the nature described in sub-clause (*ii*).

Section 4—(3) any income, profits or gains falling within the following classes shall not be included in the total income of the person receiving them:

(*i*) to (*vii*).

* * *

(*viii*) Agricultural income."

In regard to the first item the question referred to the Chief Court of Oudh under section 66 (1) of the Act was as follows:

"Whether income from the sale of forest trees growing on land naturally and without the intervention of human agency, even if the land is assessed to land revenue, is agricultural income within the meaning of section 2 (1) (*a*) of the Income Tax Act and as such exempt from income-tax under section 4 (3) (*viii*) of the Act."

Their Lordships would observe that, inasmuch as (as is stated in the Order passed by the Appellate Tribunal under section 33 of the Act) the Income-tax Officer and the Assistant Commissioner

> "have devoted considerable parts of their orders to a consideration of the question whether the land is assessed to land revenue or not and have both found it is not so assessed".

and from this finding there has been no dissent, there appears to be little justification for raising the hypothesis in the question referred to the Court. The Chief Court has, however, been content to entertain a question thus referred and their Lordships, since they concur in the conclusion reached by the Court, will take the same course.

As appears from the form of the question, the income under the first head was derived from the sale of trees described as "forest trees growing on land naturally" and the case has throughout proceeded upon the footing that there was nothing to show that the assessee was carrying on any regular operations in forestry and that the jungle from which trees had been cut and sold was a spontaneous growth. Upon these facts the question is whether such income is (within section 2 (1) (*a*) of the Act) rent or revenue derived from land which satisfies two conditions (*a*) that it is used for agricultural purposes, and (*b*) that it is "either assessed to land revenue or etc.," or alternatively (as, notwithstanding the form of the question, counsel for the assessee was allowed to argue), whether such income was, within section 2 (1) (*b*), income derived from such land by agriculture.

It appears to their Lordships that, whether exemption is sought under section 2 (1) (*a*) or section 2 (1) (*b*), the primary condition must be satisfied that the land in question is used for agricultural purposes : the expression "such land" in (*b*) refers back to the land mentioned in (*a*) and must have the same quality. It is not then necessary to consider any other difficulty which may stand in the way of the assessee. His case fails if he does not prove that the land is "used for agricultural purposes." Upon this point their Lordships concur in the views which have been expressed not only in the Chief Court of Oudh but in the High Court of Madras (see *Yuvarajah of Pithapuram* v. *Commissioner of Income-tax*[1]), and the High Court of Allahabad (see *Benoy Ratan Banerji* v. *Commissioner of Income-tax*[2]), and elsewhere in India. The question seems not yet to have been decided whether land can be said to be used for agricultural purposes within the section, if it has been planted with trees and cultivated in the regular course of arboriculture, and upon this question their Lordships express no opinion. It is sufficient for the purpose of the present appeal to say (1) that in their opinion no assistance is to be got from the meaning ascribed to the word "agriculture" in other statutes and (2) that, though it must always be difficult to draw the line, yet, unless there is some measure of cultivation of the land, some expenditure of skill and labour upon it, it cannot be said to be used for agricultural purposes within the meaning of the Income-tax Act. In the present case their Lordships agree with the High Court in thinking that there is no evidence which would justify the conclusion that this condition is satisfied.

The second item "malikana" is the subject of the second question referred to the Chief Court which is as follows :

> "Whether having regard to the nature and incidents of the tenure in the case, the income of Rs. 6,271 realised by the assessee as Malikana in the year of account is agricultural income etc."

It is necessary then to examine the facts of the case, which can conveniently be taken from the order passed by the Appellate Tribunal which repeated almost in terms and adopted the finding of fact by the Appellate Assistant Commissioner as to the source and true nature of this sum. In its Order the Tribunal said :

> "7. This due is stated by the Appellate Assistant Commissioner to be peculiar to the Utraula (the assessee's) Estate, and distinguishable from the (haq) malikhana due which is payable by the underproprietors to the superior proprietors. The nature of this due is thus described in the revenue papers (meaning the Appellate Order of the Appellate Assistant Commissioner made on the Assessee's appeal) :

1. (1946) 1 M.L.J. 120 : I.L.R. (1946) Mad. 745. 2. (1946) 15 I.T.R. 98.

During the days of the Nawabs of Oudh the Raja of Utraula was recognised as the Pargana Lord and as such retained the right to a small feudal tribute and to manorial dues. From the beginning of the 19th century till the annexation, the Rajas of Utraula could not manage their estate properly on account of the continued warfare between the neighbouring estates. During this period they transferred, made grants of or sold a large number of villages to certain persons for monetary consideration. In doing so they surrendered all their Zamindari and proprietary rights and lost all their title to real property in respect of those villages. They, however, retained the right of a small annual cash payment by virtue of their position as the old "Pargana lord." This cash allowance came to be called the "Malikana." The village otherwise became quite independent and the exclusive property of the purchasers, grantees or transferees.

'The amount of the malikana was fixed by the settlement decree and is not variable. It is payable whether the land on which it is supposed to be a charge is used for agricultural purposes or not or whether it yields any profits or not. It is admitted that suits for the recovery of this due are cognizable by Civil Courts and not by Revenue Courts. This being so it is impossible to describe this due as rent or as agricultural income. There is no relation of landlord and tenant between the appellant and the proprietors who are liable to pay this amount. . . . .' ."

Upon these facts their Lordships agree with the Chief Court in holding that this malikana is not agricultural income. It may be conceded that it would never have become payable to the ancestors of the assessee had they not been feudal proprietors of the land. But that does not mean that it is now rent or revenue derived from the land ; on the contrary, it is paid just because the original proprietors relinquished their claims to the land and it represents the consideration for that relinquishment. The land is in no real sense its source ; and even if it is to be regarded as secured by a charge on the land, this is no more decisive of the question in the present case than it was in *Maharaja Kumar Gopal Saran Narain Singh* v. *Commissioner of Income-tax, Bihar and Orissa*[1].

In conclusion, their Lordships would emphasise that in affirming the decision of the Chief Court upon this point they deal solely with malikana which, to use the words of the formal question, has "the nature and incidents of the tenure in this case."

The third item of "annuity and interest thereon" amounting to Rs. 1,07,000 reduced to Rs. 61,797 was the subject of the two following questions :

(*a*) "Whether in the circumstances of the case the sum of Rs. 1,07,000 received by the Utraula Estate from the Nanpara Estate during the previous year represents agricultural income, etc. and

(*b*) Whether the interest portion of the above receipt represents damages or compensation for wrongful withholding of the annuity money and is as such not assessable to income tax".

But, as was pointed out by the Chief Court and is admitted by the Commissioner, the first of these questions ignores the fact that the assessment under this head was reduced by the Appellate Assistant Commissioner to Rs. 61,797 and no appeal was preferred against this reduction. As has been already stated, the Chief Court has held that this sum is agricultural income and exempt from tax accordingly, and against its decision the Commissioner has preferred this appeal.

The facts in regard to the "annuity and interest" now to be considered which are somewhat complex are set out at length in the statement of case referred to the Chief Court. Their Lordships think it unnecessary to repeat what is there stated. For the question now to be determined depends not on the historical origin of the payment but upon its present quality and incidents. It is sufficient then to say that the present payment, which is made under and by virtue of two documents to be presently stated, represents a compromise of a longstanding dispute between the Nanpara Estate and the Utraula Estate. It had been agreed between the parties that as at the 30th June, 1937, there was due from the former Estate to the latter no less a sum than Rs. 12,13,079 and a scheme for the liquidation of this sum was made. Shortly stated, it provided that this total sum should be funded and liquidated over a period of 10 years, bearing interest at 3½ per cent per annum on the unpaid part of the principal amount in the meantime, and should be liquidated by equal annual instalments of Rs. 1,45,862 to cover both principal and interest.

1. (1935) 69 M.L.J. 190 : L.R. 62 I.A. 207 : I.L.R. 14 Pat. 552 (P.C.).

At the same time, and as part of the liquidation scheme, a deed of mortgage of certain Nanpara Estate property, dated the 4th September, 1937, and described as a " usufructuary mortgage deed " was executed by the Raja of Nanpara as mortgagor in favour of Court of Wards, acting on behalf of the assessee the Raja of Utraula, as mortgagee. Simultaneously, and also as part of the scheme, the Court of Wards acting on behalf of the assessee leased back to the Raja of Nanpara by a lease of the same date the whole of the mortgaged property at an annual rent equivalent to the annual instalment payable under the mortgage, namely Rs. 1, 45,862.

The relevant provisions of this mortgage and lease can now be stated, but it must first be observed that they are genuine documents which are to be taken at their face value, creating in law the relations which they purport to create.

By the mortgage the mortgagor covenanted to pay the mortgagee the sum of Rs. 12,13,079 with interest thereon at 3½ per cent. per annum from the 31st July, 1937, to 30th June, 1947, and thereby granted and transferred the property comprised in the mortgage to the mortgagee by way of usufructuary mortgage from the 1st July, 1937

> " to the intent that the said premises shall remain in possession of the mortgagee and be charged by way of usufructuary mortgage as security for the payment to the mortgagee of the said principal sum interest thereon and costs till the entire satisfaction of such amount . . . . ."

and he thereby covenanted that he would cause the name of the mortgagee to be entered in the revenue records as mortgagee in possession. And the mortgagee covenanted that if he be entered into possession he would (*i*) collect the rent and other moneys accruing due and payable upon the premises, (*ii*) out of such rents and moneys pay the Government revenue and cesses and defray the cost of collection and management and the costs incurred in any suit relating to the premises, and (*iii*) apply the balance, first to the liquidation of all sums payable as interest under the mortgage and the remainder in satisfaction of the principal money secured by the mortgage. By the lease the lessor as mortgagee in possession demised by way of " Theka " the mortgaged property for a term of 10 years from the 1st July, 1937, at a yearly rent of Rs. 1,45,862 payable annually on the 31st May, the first payment to be made on 31st May, 1938 and it was thereby provided that the lessee should pay all Government revenue and cesses assessed or imposed on the demised premises and he undertook not to assign or sublet without the lessor's consent. Thus the assessee went into possession of the property and as mortgagee in possession leased it to the mortgagor. He did not thereby cease to be a mortgagee in possession.

In respect of the annual rent of Rs. 1,45, 862 payable on the 1st May, 1938 (which date fell within the " previous year " for the purposes of the 1939-40 income-tax assessment), the mortgagor paid various sums amounting in all to Rs. 1,07,000. It is the sum of Rs. 61,797, part of this sum, which is the subject of the appeal by the Commissioner, and the question simply stated is whether this sum, which was paid as rent in respect of lands admitted to be used for agricultural purposes and to be assessed to land revenue, was in the hands of the assessee " agricultural income " and as such exempt from tax. Despite the elaborate arguments which have been urged on behalf of the Commissioner, their Lordships entertain no doubt that the Chief Court has correctly answered this question in the affirmative and they think it is immaterial whether any part of this sum in any account as between mortgagor and mortgagee is or ought to be appropriated to the payment of principal or of interest or to any other purpose. They therefore do not propose to analyse the payment nor to consider whether, in so far as any part of it was in respect of a principal sum, that principal sum was itself an aggregate of a principal sum and interest. The salient and decisive fact is that the assessee being in possession of the mortgaged property was entitled to receive and received the rents thereof. It was conceded that if the assessee was truly a usufructuary mortgagee within the meaning of section 58 (*d*) of the Transfer of Property Act, 1882, and in that capacity received the rent in question, it would be in his hands agricultural income and exempt

from tax. But it was contended that, if the assessee was not such a usufructuary mortgagee, then, notwithstanding that he went into possession and received the rent it was not agricultural income. For this reason learned counsel for the Commissioner was at pains to show that the mortgage in question was not a usufructuary mortgage within section 58 (*d*) of the Act. But in their Lordships' opinion it is unnecessary to pursue this question. For the rent of agricultural land received by a usufructuary mortgagee is agricultural income not because he is a usufructuary mortgagee but because, being a usufructuary mortgagee, he has gone into possession and received the rent. So also the assessee, being a mortgagee, usufructuary or other, has gone into possession and the rent that he receives is agricultural income. The law is correctly and succinctly stated by Sir Vepa Ramasam, J., in *Khoyee Sahib* v. *The Commissioner of Income-tax*[1], in these words:

> "If the mortgagor receives it (the rent) from tenants it is agricultural income in his hands and, when it passes from his hands, it is not. Similarly if the mortgagee collects it from the tenant it is agricultural income in his hands."

The view of the law thus expressed receives confirmation from the decision of the Board in the *Commissioner of Income-tax* v. *The Maharajah of Darbhanga*[2]. That was a case of usufructuary mortgage: but the language used by Lord Macmillan in delivering the judgment of the Board is equally applicable to the present case.

> "The exemption", he said "is conferred and conferred indelibly, on a particular kind of income and does not depend on the character of the recipient."

And again

> "the result in their Lordships' opinion is to exclude 'agricultural income' altogether from the scope of the Act however or by whomsoever it may be received."

Enough has been said to show that the distinction sought to be made between rent received by a mortgagee "in lieu of interest" and rent received by him but applicable by him, *inter alia*, in satisfaction of interest cannot be maintained. It is, however, proper to refer to a case much relied on by the Commissioner. In *Commissioners of Inland Revenue* v. *Paterson*[3], a case arising under the English Income-tax Act, it was decided that, where a tax-payer borrowed money from an insurance company and gave certain shares and a policy of assurance to the company as security for the loan, the dividends on the shares being receivable by the company and applicable, *inter alia*, in payment of the interest on the loan, such dividends were income of the tax-payer for the purposes of super-tax. Assuming that this case was correctly decided, and that it has any relevance to the case of a mortgagee in possession of agricultural land in India, matters on which it is unnecessary to express any opinion, it appears to their Lordships to give no assistance to the Commissioner. For the only result of its application to the present case must be that the rent received by the mortgagee is to be regarded as the income of the mortgagor and this affords no possible ground for saying that it loses its quality of agricultural income.

Their Lordships are therefore of opinion that the whole of the sums mentioned in the third and fourth questions are without distinction to be regarded as agricultural income within the meaning of the Act.

As has been already stated the same considerations apply to the assessment for the years 1940 to 1941 and the same results follow.

Their Lordships are of opinion that the two appeals of the assessee and the two appeals of the Commissioner must be dismissed and they will humbly advise His Majesty accordingly. The assessee and the Commissioner will pay their own costs of the several appeals.

Solicitors for the Appellant: *Hy. S. L. Polak & Co.*

Solicitor for the Respondent: *Solicitor, High Commissioner for India.*

K.S. ——— *Appeal dismissed.*

1. (1934) 8 I.T.C. 138 at 145. I.L.R. 14 Pat. 623 (P.C.).
2. (1935) 69 M.L.J. 474: 62 I.A. 215
3. (1924) 9 Tax. Cas. 163.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Katikara Simhagiri Dora *alias* Latchanna Dora and others .. *Petitioners.*

v.

Sri Vyricherla Chandramani Pattamahadevi, Zamindarini of Chemudu .. *Respondent.*

Civil Procedure Code (V of 1908), *section* 115—*Competency of revision—Amendment of decree consequent on amendment of decretal portion of judgment—Order not revisable—Amended decree appealable.*

An order amending a decree to bring it into conformity with the judgment whose decretal portion has been amended to bring it into conformity with its earlier parts is not revisable under section 115 of the Code as an alternative remedy in the form of an appeal against the amended decree is available.

Case law discussed.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Chicacole in I.A. No. 369 of 1946 in O. S. No. 76 of 1937 dated 5th day of August, 1946.

B. V. Subrahmanyam for Petitioners.

K. Umamaheswaram for Respondent.

The Court delivered the following

JUDGMENT.—On an application by the sixth defendant the lower Court amended what is often described as the decretal part of the judgment to bring it into conformity with the earlier parts of the judgment. He thereupon amended the decree to bring it into conformity with the amended judgment. Against that order, this revision petition has been filed under section 115, Civil Procedure Code ; and a preliminary point has been taken that no Civil Revision Petition lies.

One of the earliest cases in which the question whether a revision petition lay against such an amendment, or an appeal, was considered was *Raghunath Das* v. *Raj Kumar*[1], which was followed by the same two Judges in *Surta* v. *Ganga*[2]. Oldfield, J., held that since the decree was amended, an appeal would lie against the amended decree. Mahmood, J., in a long discussion of the various aspects of the case, did not directly say that no appeal would lie against the amended decree, but discussed whether the amending order would amount to a decree ; and he held that it would not. He then went on to express his opinion that a revision did lie. The matter was again considered in Letters Patent Appeal by a Full Bench in *Raghunath Das* v. *Raj Kumar*[3] in which, in a single sentence judgment, the view of Mahmood, J., was accepted. A similar question arose in *Narayanaswami* v. *Natesan*[4], where Best, J., referred to the Allahabad cases and said, with regard to the objection that no revision petition lay :

" . . . . it is contended that, though an order passed under section 206 (section 152 of the present Code) is not appealable as an order under section 588 (section 104), the decree as amended, is appealable. This was the opinion of Oldfield, J., in *Surta* v. *Ganga*[2], but Mahmood, J., was of different opinion in the same case, and on appeal the Full Bench agreed with the latter, *Surta* v. *Ganga*[5], and this view appears to have been adopted by this Court also. This first objection must, therefore, be disallowed."

Muttuswami Aiyar, J., the other Judge in that Bench, did not duscuss this question at all, and gave a reluctant assent to the order proposed by his learned brother, Best, J. It may however be taken, from the fact that he agreed to the order passed, that he was of opinion that a revision petition lay. Since Mahmood, J., did not expressly say that an appeal against the amended decree would not lie, nor did the Full Bench, and Best J.'s opinion was apparently not concurred in by Muttuswami Aiyar, J., the argument was put forward in *Viswanathan Chettiar* v. *Ramanathan*

*C.R.P. No. 260 of 1947. 13th September, 1948.

1. (1884) I.L.R. 7 All. 276.
2. (1885) I.L.R. 7 All. 411.
3. (1884) 7 All. 876 (F.B.).
4. (1892) I.L.R. 16 Mad. 424.
5. (1884) I.L.R. 7 All. 875 (F.B.)

Chetty[1] that an appeal against the amended decree did lie. That view was accepted by the Bench in these words:

> "Mr. Justice Mahmood in discussing the question in *Nanda Rai* v. *Raghunandan Singh*[2], overlooks the possibility of an appeal against the decree as amended, and for that reason comes to the conclusion that section 622 of the Code of Civil Procedure must be applied. It must be admitted that Mr. Justice Mahmood's view has been followed in one or two cases in this Court, but no reported case is cited in which a Bench of Judges has held that an appeal against the amended decree will not lie."

Earlier in the judgment, the learned Judges said that a petition under section 622 (section 115) was not admissible. The learned Judges in *Viswanathan Chetty* v. *Ramanathan Chetty*[1] did not consider that there was anything in *Narayanaswami* v. *Natesan*[3], or in any other case that it was necessary for them to express dissent from. Wadsworth and Patanjali Sastri, JJ., in *Arunachalam Chettiar* v. *Govindaswami Goundar*[4] and *Sitaramamurthi* v. *Lakshminarayanamurthi*[5], clearly followed *Viswanathan Chetty* v. *Ramanathan Chetty*[1]. It has been argued that in *Parameshraya* v. *Seshagiriappa*[6], a Full Bench, in similar circumstances, held that a revision petition would lie, or at any rate that the Court could interfere in revision. That was a case in which there was an appeal against the amended decree; and in dismissing the appeal, the Court deleted that part of the decree which had been amended. There is no reason, however, to think that in doing so, the Court invoked section 115, Civil Procedure Code for that purpose; for in exercising their jurisdiction in appeal, they certainly had the power to amend the decree in any way they chose.

The preliminary objection is upheld. It has been suggested that this civil revision petition should be converted into a regular appeal. That can hardly be done, since the decree appealed against has not been filed.

Since section 115 refers to a 'case' that word may include the order to amend together with the amended decree, in which case interference in revision would be prohibited under that section; but even if we distinguish the order to amend and the amended decree, the entertainment of a Civil Revision Petition would be objectionable, when an alternative remedy is available.

The preliminary objection being upheld, the Civil Revision Petition is dismissed with costs.

V.P.S. —————— *Petition dismissed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Bombay†).

PRESENT:—LORD UTHWATT, LORD MACDERMOTT AND SIR JOHN BEAUMONT.

Kadappa Bapurao Desai .. *Appellant**

v.

Lingappa Ramachandra Desai .. *Respondent.*

Impartible estate—Relinquishment by holder in favour of younger brother—Elder brother dying without leaving any male issue—Subsequent death of younger brother also without leaving any male issue—Property vesting in lineal heir of younger brother—Subsequent adoption by elder brother's widow—Rights of the adopted son—Bombay Land Revenue Code (1879), *sections* 73 *and* 74*—Requirements—Sufficient compliance with—Costs—Pauper minor plaintiff—Direction to pay costs of suit—If a proper exercise of discretion.*

R was the holder of an impartible estate governed by the rule of lineal primogeniture which was Deshgat, Patilki and Nadgavdki Watan property and consisted of land governed by the Bombay Land Revenue Code and the Bombay Hereditary Offices Act. *R* and his younger brother *M* were members of a joint Hindu family subject to the Bombay School of the Mitakshara Law. *R* applied to the collector to remove his name from the Khatta and to enter the name of *M* therein. After the usual inquiries and after *M* had also agreed to such arrangement and also to a further condition that in case *R* had thereafter any male issue, he would have no objection to get the entry made in his name, M's name was entered in the Khatta "by reason of consent." *R* died without any male issue,

1. (1901) I.L.R. 24 Mad. 646.
2. (1884) 7 All. 282.
3. (1892) I.L.R. 16 Mad. 424.
4. (1942) 2 M.L.J. 38.
5. (1942) 2 M.L.J. 568.
6. (1899) I.L.R. 22 Mad. 364.

† (1940) 42 Bom.L.R. 832.

* P. C. Appeal No. 94 of 1945. 17th June, 1948.

leaving surviving him two widows and subequently *M* also died without any male issue. The estate which in the meanwhile was in the custody of the Court of Wards was handed over to the heir of *M* under the rule of lineal primogeniture. Some years thereafter, the senior widow of *R*, made an adoption to her husband. In a suit by the adopted boy claiming a right to inherit the estate which had vested in the heir of *M*,

Held, in the circumstances, that (1) *R* in fact and in law did relinquish his interest in the property in favour of *M* and the statement of *M* at the enquiry constituted a written agreement within the meaning of section 74 of the Bombay Land Revenue Code to accept the relinquishment and the transaction was complete so far as the parties were concerned. (2) The adopted son of *R* could have no rights to the property which had vested in the heirs of *M*.

Though a trial Judge undoubtedly has a discretion as to the manner in which he would deal with costs, it is not a sound exercise of his discretion to order costs to be paid by a minor suing as a pauper. Obviously such an order is not likely to be effective.

Sir Herbert Cunliffe and *K. R. Bengari* for Appellant.

C. S. Rewcastle, *P. V. Subba Rao* and *K. G. Datar* for Respondent.

Their Lordships' Judgment was delivered by

SIR JOHN BEAUMONT.—This is an appeal from a judgment and decree of the High Court of Judicature at Bombay[1], dated 8th March, 1940, which reversed a judgment and decree of the Joint First Class Subordinate Judge of Belgaum, dated 28th October, 1937, dismissing the plaintiff's suit with costs.

The property in suit is an impartible estate governed by the rule of lineal primogeniture and is Deshgat, Patilki, and Nadgavdki Watan property. It consists of land subject to Government assessment and is governed by the Bombay Land Revenue Code, 1879, and the Bombay Hereditary Offices Act, III of 1874 (known as the Watan Act) as amended by Act V of 1886. The parties are Hindus, subject to the Bombay school of the Mitakshara Law.

The question for decision in this appeal is as to the nature of a transaction which took place in the year 1887. On that date Rayappa and his younger brother Mallappa were members of a joint family. Whether the family included the members of a younger branch to which the appellant belongs, it is not necessary to consider. Rayappa as the eldest male member of the family was the watandar in possession of the suit property. He seems to have been an improvident person, and had incurred debts to the amount of Rs. 30,000 to Rs. 35,000, some of which were charged on parts of the suit property and in respect of which creditors were pressing.

On 8th February, 1887, Rayappa made an application to the Collector of Belgaum (Ex. 114) in which, after explaining his financial difficulties, he informed the Collector that Mallappa had suggested that his name should be entered in the khatta in respect of the entire lands as well as in the register of the Patilki turn to enable him to make arrangements for the entire debts ; that Rayappa had accepted this suggestion and accordingly he prayed that the Collector would be pleased to remove his name from the khatta and the register for turns and to enter the name of Mallappa therein.

On 19th February, 1887, both Rayappa and Mallappa were examined before the Mamlatdar of Athni. Rayappa made a further statement (Ex. 118) confirming his previous request and asking that his statement should be treated as in the nature of their rajinama (conveyance) and arrangements should be made accordingly. Mallappa made a statement (Ex. 115) in which he referred to Rayappa's debts, and stated that he had taken on himself the responsibility regarding the management of all the debts. The statement continued :

"In accordance with the consent of our elder brother, his name, which is at present in the Pali register, may be removed therefrom and my name may be entered. We alone are entitled to the 16 annas Goudki (right of Patilki service). Thus is the statement got written. We two brothers are joint."

On some date in February, 1887, which is not specified, the wife of Rayappa made an application to the Governor of Bombay (Ex. 120) in which she objected to

1. (1940) 42 Bom.L.R. 832.

the proposed transfer to Mallappa on the ground that she might bear a son to Rayappa, who ought to succeed to the estate. On the 23rd February, 1887, the Mamlatdar of Athni was directed (Ex. 167) to ascertain whether there would be any objection to the name of a possible son of Rayappa being entered in the khatta. On 1st March, 1887, Mallappa made a further statement in which he stated :

> " If hereafter any male issue is born to him (Rayappa) and when that boy comes of age, I will have no objection whatever to get the entry made in his name, considering him to be the direct heir. Knowing that day by day, my brother is involving himself in greater difficulties on account of debts, this method has been adopted for managing everything, But there is no intention to defeat in future the right which would go to Rayappa's direct issue."

Rayappa agreed to this in a statement (Ex. 117) made on the same date. As Rayappa never had any male issue it is not necessary to determine the legal effect of this arrangement. It is clear that under Hindu law it was not competent to confer any interest in the property on an unborn son of Rayappa, and the highest the case could be put against Mallappa (apart from contract) would be that his interest was made defeasible in an event which did not happen.

On getting these statements the Mamlatdar made a report to the District Deputy Collector, who thereupon reported to the Collector of Belgaum, that Rayappa's request might be accepted and the name of Mallappa entered in the register. On 3rd June, 1887, the District Deputy Collector was directed by the Collector to issue an order to give effect to his opinion, and such order was issued accordingly to the Mamlatdar (Ex. 167). On 6th June, information was directed to be sent to all the villages debited in the name of the Desai. In the Land Register of the village of Kokatnur where the property was situated (Ex. 127) the name of Mallappa was entered in the place of Rayappa " by reason of consent under order of Mamlatdar dated 19th June, 1887." Whether that date was a mistake, or whether there was a further order after that of 6th June, 1887, is not clear. No mutation was entered in the *Pali* register (Ex. P-102). On 18th June, 1887, the two brothers entered into a maintenance agreement (Ex. 126) whereby the sum of Rs. 500 was fixed as Rayappa's maintenance, as security for which Rayappa was to be given certain of the family lands during his life.

Mallappa seems to have been unsuccessful in discharging the debts upon the estate, and in the year 1906, he and Rayappa made a joint application to the Governor of Bombay, asking that the Court of Wards take over the management of the estate. The application stated :

> " That the Desgati consists of an undivisible property held according to the law of primogeniture that it is held for the present by the youngest brother Mallappa Petitioner No. 1, only on condition that he should resign his claims to khata in the name of a male issue of petitioner No. 2 (Rayappa) that in case Petitioner No. 2 dies without male issue the property should continue in the name of its present holder, and that thus they both have an equal interest in the property and hence the petition in the name of the two."

The application was supported by a statement (Ex. 126) made by Rayappa. The resolution of Government dated 15th June, 1906, assuming control by the Court of Wards (Ex. 131) referred to the property as that of Mallappa and Rayappa.

Rayappa died on 23rd November, 1914, without any male issue, leaving surviving him two widows. Mallappa died on 16th April, 1917, without male issue, the estate still being under the superintendence of the Court of Wards. The estate was handed over by the Court of Wards to the appellant in the year 1919.

In the year 1927 the senior widow of Rayappa took in adoption the present respondent as a son to her deceased husband Rayappa, and on 7th December, 1933, the respondent, then a minor 10 years of age, instituted the present suit as a pauper.

In the Courts in India the case was dealt with upon the footing that if Rayappa was the owner of the estate at the date of his death the respondent on his adoption would inherit ; but that if Mallappa was the owner, the appellant as his heir under the rule of lineal primogeniture, would be entitled to the property in suit. Mr. Datar, Junior Counsel for the respondent, desired to argue before the Board

that a son of Rayappa would be a nearer heir to Mallappa than the appellant, and that on the adoption of the respondent any estate which the appellant had inherited from Mallappa would be divested in favour of the respondent as heir of Mallappa. This point was not debated in the Courts in India, nor was it taken in the case of the respondent, and their Lordships declined to allow it to be raised at so late a stage. Their Lordships will deal with the case on the footing upon which it was dealt with in India, and on this basis the question at issue turns upon whether in 1887, Rayappa relinquished all his interest in favour of Mallappa, or whether Mallappa became merely the manager of the property for the purpose of the payment of the debts. The learned trial Judge held that Rayappa had relinquished all his interest, and dismissed the suit. In appeal the learned Judges of the High Court (N. J. Wadia and Divatia, JJ.[1]) took a different view and decreed the plaintiff's suit except as to certain mesne profits claimed. The learned Judges of the High Court expressed the view that there was no doubt that Rayappa in law had the power to relinquish or alienate the estate, but that the facts proved showed clearly that he did not exercise that power in 1887, and that all that he did was to make an arrangement by which during his lifetime the management of the estate was transferred to Mallappa so as to save the estate from being seized by creditors and to prevent it from being further encumbered by Rayappa himself.

In considering the evidence as to the arrangement arrived at in 1887, two questions must be determined. First, what was the intention of the parties? And secondly, was such intention carried into effect? On the first question the facts and documents to which reference has been made seem to their Lordships to establish that Rayappa intended to relinquish his interest in the property in favour of Mallappa, rather than to constitute Mallappa a mere agent for the management of the estate and payment of the debts. This view finds strong support from the absence of any arrangement for the return of the estate to Rayappa when the debts were paid, or when the authority of Mallappa came to an end, which at the latest would be at his death. Nor is it easy to see why if Rayappa remained the owner, it was necessary to provide for Mallappa to ensure the succession of Rayappa's son. In that event the son would inherit under Hindu law, without reference to Mallappa. It was contended for the respondent that, on the hypothesis that Mallappa was only an agent, his agreement to restore the estate to Rayappa's son on his attaining majority would take effect if that event occurred during the period of Mallappa's managership; but Ex. 116 certainly does not suggest that that was all that the parties had in view.

The second question, whether Rayappa in fact and in law did relinquish his interest in the property in favour of Mallappa, is the vital one, and depends upon the effect of sections 73 and 74, Bombay Land Revenue Code, as they stood in 1887. Section 73 provided that the right of occupancy should be deemed an heritable and transferable property and should immediately pass to the person whose agreement to become occupant should have been accepted by the Collector. Section 74 provided, so far as material, that an occupant by giving notice to the Mamlatdar or Mahalkari might relinquish his occupancy either absolutely or in favour of a specified person, provided that such relinquishment applied to the entire occupancy or to whole survey numbers, or recognised shares of survey numbers, and that when there were more occupants than one, notice of relinquishment must be given by the registered occupant, and the person, if any, in whose favour an occupancy was relinquished, must enter into a written agreement to become the registered occupant and his name should thereupon be substituted in the records for that of the previous registered occupant. Under rule 74 of the Rules framed under the Code the notice of relinquishment required by section 74 had to be in a certain specified form.

In their Lordships' opinion the statement of Rayappa (Ex. 118) made to the Mamlatdar read with the earlier statement (Ex. 114) was a good notice of relinquishment within section 74. It is true that it was not in the form prescribed

1. (1940) 42 Bom.L.R. 832.

by rule 74, but it contained all the essentials required by such form, and Government were entitled to accept the notice (as they did) without insisting on the prescribed form. The important matter for determination is whether the statement (Ex. 115) made by Mallappa to the Mamlatdar operated as a written agreement within section 74. The learned Judges of the High Court thought that it did not, that no agreement by Mallappa could be inferred, and that even if such an agreement existed it would not necessarily have the effect of extinguishing completely the rights of Rayappa in the property, a view for which they relied upon the case of *Rachappa* v. *Ningappa*[1]. Their Lordships are unable to agree with this view. Section 74 does not say with whom the written agreement is to be made, but clearly it must be with Government, since the Collector has to accept it. Mallappa made a written statement to the Mamlatdar in which he asked that in accordance with the consent of his brother, his brother's name might be removed from the *Pali* register, and his own name might be entered. In their Lordships' view this constituted a written agreement to accept the relinquishment of which Rayappa had given notice, and it was accepted by the Collector. The right of occupancy, therefore, passed under section 73 and nothing remained to be done except for the name of Rayappa to be entered in the register as required by section 74. Upon their Lordships' view as to the effect of sections 73 and 74, the transaction as far as the parties were concerned was complete and their Lordships are unable to accept the view taken by the High Court of Bombay in the case of *Rachappa* v. *Ningappa*[1] (*supra*) that whether or not the property passed under the notice of relinquishment and agreement depended on all the circumstances of the case. The rights of the parties could not be affected by the failure of Government to carry out its statutory duty to substitute the name of Mallappa in the *Pali* register, or by the action after the death of Rayappa in entering the name of Mallappa in the mutation register as taking by inheritance, a point upon which the appellant relied.

If their Lordships are right in thinking that in 1887 Rayappa duly gave notice of the relinquishment of his interest, and that Mallappa duly entered into a written agreement to accept such relinquishment and that the title accordingly passed to Mallappa, no importance attaches to subsequent equivocal acts on the part of the brothers after that date, which did not alter the legal position, but on which the learned Judges of the High Court relied. The learned Judges attached particular importance to the fact that the application in 1906 for the Court of Wards to assume control of the property was made by the two brothers and not by Mallappa alone, and that Government took a statement from Rayappa in preference to one by Mallappa. Their Lordships would in any case attach no great importance to this. The application to the Court of Wards was made nearly 20 years after the arrangement of 1887, and Government finding the younger brother in possession of the watan property and proposing to hand it over, would naturally desire to make sure that the elder brother approved of the proposal and would not make trouble in the future.

It was further contended by the respondent that the transfer from Rayappa to Mallappa was illegal under section 5, Watan Act, which provides that without the sanction of the Government it shall not be competent to a watandar to alienate for a period beyond the term of his natural life, any watan or any part thereof, or any interest therein to or for the benefit of any person who is not a watandar of the same watan. It is said that since the property in this case was subject to the rule of lineal primogeniture Rayappa was the only watandar and Mallappa had no more than a *spes successionis* and for that proposition reliance was placed on *Chinava* v. *Bhimangauda*[2], and *Tara Bai* v. *Murlacharya*[3]. The answer to this argument is that the Collector did sanction the alienation, and at this distance of time their Lordships must presume that the Collector had authority on behalf of Government so to do, a presumption made the more readily because this point

1. (1925) 27 Bom.L.R. 1253.
2. (1896) I.L.R. 21 Bom. 787.
3. (1939) 41 Bom.L.R. 924.

was not pleaded, nor debated in the Courts in India, and, if it had been, evidence on the subject might have been adduced.

With regard to costs, the respondent obtained leave to sue as a pauper, but notwithstanding this fact, and the further fact that he succeeded on the issues as to his adoption, he was ordered to pay the costs of the suit. He obtained leave to appeal to the High Court as a pauper, and as his appeal succeeded he was given his costs. He did not obtain leave to defend this appeal as a pauper. Whilst the trial Judge no doubt had a discretion as to the manner in which he would deal with the costs, their Lordships think that it was not a sound exercise of his discretion to order costs to be paid by a minor suing as a pauper. Obviously such an order was not likely to be effective. Their Lordships think that the proper course is to make no order as to the costs of the suit and of the appeal to the High Court, but to direct the respondent to pay the costs of the appellant of this appeal.

For these reasons their Lordships will humbly advise His Majesty that this appeal be allowed, that the decree of the High Court of Bombay dated 8th March, 1940 be set aside and that the decree of the Joint First Class Subordinate Judge of Belguam dated 28th October, 1937 be restored except so far as it ordered costs of the defendant to be paid by the plaintiff. The respondent must pay the costs of this appeal.

Solicitors for Appellant : *Cassvetti Coastas & Co.*

Solicitors for Respondent : *Hy. S. L. Polak & Co.*

V.S. *Appeal allowed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Fort William in Bengal.)

PRESENT :—LORD SIMONDS, LORD MORTON OF HENRYTON AND LORD REID.

Phanindra Chandra Neogy .. *Appellant**

v.

The King .. *Respondent.*

Criminal Procedure Code (V of 1898), section 197—Construction and scope—Privy Council—Practice—Tendering advice inconsistent with a previous decision—Competency.

According to its plain words, section 197, criminal Procedure Code deals with offences alleged to have been committed by a public servant " while acting or purporting to act in the discharge of his official duty." These words have the same meaning as that ascribed to them in *Gill's case*[1].

Even where their Lordships have before them a decision upon facts which in no material respect differ from those of a case before them, it is competent for them humbly to tender advice to His Majesty inconsistent with the previous decisions, though it can only be in the most exceptional circumstances that such a course should be taken.

A. G. P. Pullan for Appellant.

J. Megaw for Respondent.

Their Lordships' judgment was delivered by

LORD SIMONDS.—This appeal is brought by the special leave from a Judgment of the High Court of Judicature at Fort William in Bengal dismissing the appeal of the appellant, Phanindra Chandra Neogy, from the conviction and sentence passed on him by the Chief Magistrate, Calcutta, on April 10, 1946.

The conviction was for an offence under section 161 of the Indian Penal Code and the sentence was one of twelve months' rigorous imprisonment. It is convenient to set out the charge which was in these terms :

" That you, Phanindra Chandra Neogy, on or about the 19th day of September, 1945, in the Town of Calcutta being a public servant to wit, a Railway servant and an inspector in the Office of the Regional Controller of Priorities accepted from one Sohanlal a gratification other than your legal remuneration to wit, the sum of Rs. 500 only as a motive or reward for showing favour to the

* P. C. Appeal No. 27 of 1948. 21st October, 1948.

1. (1948) 2 M.L.J. 6 : 1948 F.L.J. 13 : L.R. 75 I.A. 41 (P.C.).

said Sohanlal in the exercise of your official functions relating to an application by the said Sohanlal for being allowed two wagons, one from Allahabad and another from Benares and thereby you the said Phanindra Chandra Neogy committed an offence punishable under section 161 of the Indian Penal Code and within my cognizance."

The single ground upon which the petition for special leave to appeal was based was that, no sanction for the prosecution of the appellant having been obtained either under section 270 of the Government of India Act, 1935, or under section 197 of the Criminal Procedure Code, the Chief Magistrate had no jurisdiction to try or convict him, and it was upon this ground that special leave to appeal was granted, for similar leave had been given in *Gill* v. *The King*, a case then pending, in which the same question (together with other questions) was raised. In January, 1948 this Board heard, and in February, 1948, delivered judgment in *Gill* v. *The King*[1] now reported. In the course of that judgment their Lordships thought it proper to express their view upon the scope of section 197 of the Criminal Procedure Code. Having observed that they found it impossible for any relevant purpose to differentiate between section 270 of the Government of India Act and section 197 of the Criminal Procedure Code they proceeded as follows :

"A public servant can only be said to act or purport to act in the discharge of his official duty, if the act is such as to lie within the scope of his official duty. Thus a judge neither acts nor purports to act as a judge in receiving a bribe, though the judgment which he delivers may be such an act; nor does a Government medical officer act or purport to act as a public servant in picking the pocket of a patient whom he is examining, though the examination itself may be such an act. The test may well be, whether the public servant, if challenged, can reasonably claim that what he does he does in virtue of his office."

Applying this reasoning to the case of Gill, a public servant, who had been charged together with one, Lahiri, with being a party to a criminal conspiracy to cheat the Government, whereby offences under section 120-B read with section 420 of the Indian Penal Code were alleged to have been committed, and had also been charged with offences under section 161 of the Code, their Lordships held that no sanction under sectiin 197 of the Criminal Procedure Code was necessary.

In face of this judgment the present appeal appeared to have little chance of success. It was nevertheless argued fully by counsel and their Lordships have had the opportunity of reconsidering the whole question. They cannot accede to the suggestion of counsel that that part of the judgment which has been cited is to be regarded as *obiter dictum*. The scope of section 197 and its applicability to Gill's case were put in a forefront of the written case he presented to the Board and it was the first of his formal reasons that the sanction, for which that section provides, ought to have been, but was not given. The question was argued at length by the respondent's if not by the appellant's counsel and their Lordships treated it as a matter which required their deliberation and decision. In such circumstances it is irrelevant that a judgment upon other points raised in the case might have rendered such a decision unnecessary.

Their Lordships then have before them a decision upon facts which in no material respect differ from those of the present case. Even so, it is, as they recognise, competent for them humbly to tender advice to His Majesty inconsistent with the previous decision, though it can only be in the most exceptional circumstances that such a course should be taken ; see *Re* Payment of Compensation to Civil Servants under Article 10 of Agreement for a Treaty between Great Britain and Ireland, reported in *Transferred Civil Servants* (*Ireland*) *Compensation*, *In re*[2], and the cases there cited. Recognising the possibility, they have heard full argument and, having done so, see no reason to doubt the validity of the reasoning or the correctness of the conclusion in *Gill's case*[1], and they do not think it necessary to repeat what was said there. Learned counsel for the appellant in the present case laid stress upon what he described as a long line of authority in favour of the view that, where the offence charged is an act

1. (1948) 2 M.L.J. 6 : 1948 F.L.J. 13 : L.R. 75 I.A. 41 (P.C.).
2. (1929) A.C. at p. 242.

which would not be an offence unless committed by a public servant, sanction under section 197 is necessary. Their Lordships without scrutinising the authorities, which do not appear entirely to support this view, would observe that it is the words of section 197 as amended in 1923 and nothing else that must be considered, and that they can see no justification for reading the section as if the words "which under the Criminal Procedure Code is an offence only if committed by a public servant" were inserted in the appropriate place. It is neither with all such offences nor only with such offences that section 197 deals. On the contrary according to its plain words it deals with offences alleged to have been committed by a public servant "while acting or purporting to act in the discharge of his official duty." To these words a meaning was ascribed in *Gill's case*, to which their Lordships after reconsideration adhere. It has not been disputed that if section 197 is so construed, no sanction was necessary for the prosecution of the appellant. Their Lordships have therefore humbly advised His Majesty that this appeal must be dismissed.

Solicitors for Appellant : *T. L. Wilson & Co.*

Solicitor for Respondent : *Solicitor, High Commissioner for India.*

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

The Province of Madras represented by the Collector of Nellore. . *Petitioner**

v.

Kalavakuru Audemma and others .. *Respondents.*

Civil Procedure Code (V of 1908), *section* 151—*Court auction sale and affixing of necessary stamp on the sale certificate—Sale subsequently set aside—Application for refund of value of stamp after six months of the setting aside of the sale—Court has no inherent powers to grant refund.*

Standing Order 92 was passed by the Government amending the Madras Stamp Manual allowing a refund of stamp duty to the purchaser (when a Court auction sale is set aside) only if an application was made within six months of the setting aside of the sale. No Court has an inherent power to direct a refund of stamp duty when the application is made beyond the period fixed for the granting of a refund.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the Order of the Court of the District Munsiff of Kavali, dated 26th day of April, 1946, and made in E. A. No. 72 of 1946 in O.S. No. 296 of 1938.

The Government Pleader (*K. Kuttikrishna Menon*) for Petitioner.

B. V. Viswanatha Aiyar (*amicus curiæ*) for Respondents.

The Court delivered the following

JUDGMENT.—The petitioner in Court below purchased certain items of property in a Court auction on 26th September, 1941, and affixed the proper stamp on the sale certificate. That sale was subsequently set aside on 3rd February, 1945, because of some material irregularity in the conduct of the sale. The petitioner (auction-purchaser) then filed an application on 20th December, 1945, for a refund of the value of the stamp. The Government Pleader apparently opposed the application ; but the Court passed the following Order :—

"In the circumstances the Court has inherent power to order refund of the sale certificate stamp which has to be deposited along with the purchase money under the rules. Refund."

The Government has filed this Civil Revision Petition against the order, though the amount ordered to be refunded is small ; because the order involves a question of principle. The party has not appeared either in person or by advocate to

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*C.R.P. No. 1430 of 1946. 12th November, 1948.

oppose the Revision Petition; but she was fortunate enough to have her case argued by Mr. B. V. Viswanatha Aiyar, the learned author of a work on the Court-Fees Act, as an *amicus curiæ*. He has done so very thoroughly and I am grateful for the assistance that he has given the Court.

Mr. Viswanatha Ayyar has argued that the Court has jurisdiction under section 151 of the Code of Civil Procedure to pass such orders as it thinks necessary to render justice to all the parties before it and that where the facts of a case show that a Court-fee paid ought to be refunded, it can issue a certificate, although, unlike an order of refund under sections 13 to 15 of the Court-Fees Act and section 49 of the Stamp Act, it should merely certify that a Court-fee or other stamp duty has been paid which ought not to have been paid, leaving it to the revenue authorities to pay or not to pay as they think proper. He cited three cases from Madras where the inherent power of the Court to do this has been emphasised. In *Thammayya Naidu* v. *Venkataramanamma*[1], an *ad valorem* Court-fee had been paid ; and the Court held that it would have sufficed if Court-fee had been paid for a mere declaration. Dealing with the question whether the Court had power to issue a certificate, the learned Judges said :—

"It would be unreasonable and unjust for the High Court not to assist a party to recover excess Court-fee erroneously paid under its own order or under the orders of Courts subordinate to it. Of course what the High Court really does judicially in such a case is to decide judicially what is the proper Court-fee and then issue a certificate to the party that excess Court-fee has been levied. It still lies with the revenue authorities to decide whether or not they will refund the excess in the circumstances."

The other cases cited were *Narayana Reddiar*, In re[2] and *Vedaranyaswami Devasthanam*, In re[3], decisions of a single Judge. In the former case a person by mistake paid the full Court-fee on a review application before the petition itself was admitted, whereas the rules made the payment necessary only after the petition was admitted. The application for review was dismissed ; and the petitioner thereupon asked for a refund of the Court-fee. The learned Judge discussed the authorities on the point and held that the Court had an inherent power to do justice to the party and where Court-fee had been paid at a time when it was not necessary that it should have been paid, it was the duty of the Court to assist the applicant to recover what had been paid by mistake. The question however came up before a Bench of this Court in *Chidambaram Chettiar*, In re[4] and the learned Judges found it necessary to consider under what circumstances the Court could order a refund of the stamp duty. They came to the conclusion that the Court could order a refund only, (1) where the Court-Fees Act applies; (2) where there is an excess payment by mistake ; or (3) where, on account of the mistake of a Court, a party has been compelled to pay Court-fees either wholly or in part. The learned Judges then went on to add :—

"Outside these cases we are not satisfied that we have authority to direct a refund."

The cases above quoted by Mr. B. V. Viswanatha Aiyar, would come within the grounds set out by the learned Judges as being those in which a refund of Court-fee could be granted. No authority has been cited to indicate that a refund can be granted in cases lying beyond the three categories referred to in *Chidambaram Chettiar*, In re[4]. In C.M.P. Nos. 4439-42 of 1941 the petitioner paid Rs. 909-13-0 as Court-fee. When they were directed to pay a further Rs. 2,772-7-0, they withdrew their appeals and asked for a refund of the Rs. 909-13-0. The learned Chief Justice and Happell, J., quoted *Chidambaram Chettiar*, In re[4], with approval and held that refund of Court-fee could be granted in no other cases.

In 1935, this High Court addressed a letter to the Secretary of the Board of Revenue, pointing out that there was no provision for granting a refund of stamp duty on sale certificates if the sale had been set aside long after the sale certificate had been issued and registered. The matter was thereupon considered by the

1. (1932) 62 M.L.J. 541 : I.L.R. 55 Mad. 641.
2. (1942) 1 M.L.J. 226.
3. (1942) 1 M.L.J. 451.
4. (1934) 67 M.L.J. 321 : I.L.R. 57 Mad. 1028.

Government and Standing Order No. 92 was passed amending the Madras Stamp Manual. The Order was as follows :—

"In the case of certificates of sale issued by Courts which are subsequently set aside, the auction-purchaser may be allowed refund of the value of the stamps on the certificates even though the sale might have been set aside long after the sale certificate had been issued and registered, provided that the application for the refund is made to the Collector within six months of the date on which the sale has been set aside."

It is thus seen that a definite rule was laid down by the Government allowing a refund of stamp duty only if an application was made within six months of the setting aside of the sale. That being so, no Court can have an inherent power to direct a refund of stamp duty when the application is made beyond the period fixed for the granting of a refund.

The petition is allowed, the order of the lower Court set aside, and the application for refund dismissed. As this matter was brought to this Court only to have it made clear that in such circumstances an applicant was not entitled to a refund of stamp duty, no order as to costs is necessary.

K. S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN.

Ramachandra Chettiar .. *Petitioner**

v.

Kandasami Pillai .. *Respondent.*

Preliminary decree—Time for payment fixed in—Power of Court to extend.

Where a preliminary decree in a suit for partition provides for the plaintiff being entitled to a half share in a plaint item on payment into Court within six months from that date of a particular sum with interest thereon at six per cent. from date of plaint till payment, that Court has jurisdiction to extend the time for payment of the sum mentioned in the decree.

Idumba Parayan v. *Pethi Reddi,* (1919) 37 M.L.J. 695 : I.L.R. 43 Mad. 357 and *Abdul Shaker Sahib* v. *Abdul Rahiman Sahib,* (1922) 44 M.L.J. 107 : I.L.R. 46 Mad. 148, followed.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Tanjore, dated 8th January, 1947 in I. A. No. 386 of 1946 in O.S. No. 26 of 1944.

K. S. Desikan for Petitioner.

P. S. Sarangapani Aiyangar for Respondent.

The Court delivered the following

JUDGMENT.—In a preliminary decree in a suit for partition the decree of the trial Court provided,

"that the plaintiff be entitled to a half share in the plaint A schedule items 1 to 5 described hereunder on payment into Court within six months from this date Rs. 1,102-5-0 with interest thereon at six per cent. per annum from the date of plaint, that is, 15th September, 1943, till payment."

The amount was not paid within the period of six months from the date of the decree of the trial Court. There was an appeal against that decree and that appeal was finally disposed of on 28th June, 1946. Within six months of the date of the appellate decree the plaintiff deposited the amount into Court, and applied in I.A. No. 386 of 1946 for permission to deposit the amount due under the preliminary decree which was confirmed on appeal into Court and the learned Subordinate Judge granted a week's time from the date of the Order, 8th January, 1947. That Order, the first defendant, petitioner, seeks to set aside in revision.

The main contention of the petitioner wat that the Court had no jurisdiction to extend the time fixed in the decree, that is, six months from the date of the preliminary decree of the trial Court. The learned advocate for the petitioner relied on the decisions in *Mohideen Kuppai* v. *Ponnusami Pillai*[1] and *Gopala Iyer* v. *Sannasi*[2].

* C.R.P. No. 1026 of 1947. 12th November, 1948.

1. (1914) 1 L.W. 882. 2. (1915) 3 L.W. 29.

Both these decisions were considered in *Abdul Shaker Sahib* v. *Abdul Rahiman Sahib*[1], by a Division Bench consisting of Schwabe, C.J. and Wallace, J. All these decisions again were considered in *Mahomadalli Sahib* v. *Abdul Khadir Saheb*[2]. It should be unnecessary to go at great length into the same question. The basis of the decision in *Abdul Shaker Sahib* v. *Abdul Rahiman Sahib*[1], appears to me to be the observation of Schwabe, C.J., at page 155:

"As long as this form of decree is understood to be of a preliminary nature and the Court still retains full power over the action, I do not see any particular harm in the continuance of its use."

In *Mahommadalli Sahib* v. *Abdul Khadir Saheb*[2], Jackson, J., said with reference to the observations of Schwabe, C.J.:

"This with all respect lays down an eminently sensible rule of procedure . . . . and there is no ruling really to the contrary."

Thiruvenkatachariar, J., referred to the scope of section 35 of the Specific Relief Act. Even with reference to that, the conclusion finally reached by the learned Judge was that so long as the Court retained its power under section 35 (*c*) of the Specific Relief Act to rescind the contract the Court had power to extend the time originally granted by it, obviously because the suit was still pending before the Court. That brings it exactly within the scope of the principle laid down by Schwabe, C.J. *Idumba Parayan* v. *Pethi Reddi*[3] is directly in point. There the learned Judges held that where a decree in a suit for partition provided *inter alia* that the plaintiffs could recover certain properties from the alienees on payment of a sum of money into Court by a certain date without any provision as to the effect of non-payment and the plaintiff paid the money on a subsequent date the Court had jurisdiction to extend time for payment. The learned Judges observed that the decree was in terms and in effect one for redemption and the Court had jurisdiction to extend the time under Order 34, rule 8, Civil Procedure Code. Should an alternative basis be needed for the jurisdiction of the Court to extend time for payment that should be found in Order 34, rule 8. But even without that, on the basis of the principles laid down in *Abdul Shaker Sahib* v. *Abdul Rahiman Saheb*[1], the Court obviously had jurisdiction to extend time.

No question really arises whether the learned Subordinate Judge did exercise this discretion aright in granting time prayed for by the plaintiffs. Obviously such a question could not really arise in revision. The petition is dismissed with costs.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SUBBA RAO AND MR. JUSTICE PANCHAPAKESA AYYAR.

Andi Thevan .. *Accused.**

Criminal Procedure Code (V of 1898), section 307—Reference under—Scope of powers of interference with the verdict of the Jury.

The High Court in a reference under section 307 of the Criminal Procedure Code can interfere with the verdict of the Jury only if the verdict is such that no reasonable man would come to that conclusion, or, to put it in other words, the verdict is perverse.

Reference under section 307, Criminal Procedure Code, 1898, by the First Assistant Sessions Judge of Madura division in C.C. No. 81 of 1948, dated 20th August, 1948.

Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the Crown.

Accused not represented.

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1. (1922) 44 M.L.J. 107: I.L.R. 46 Mad. 148.
2. (1927) 59 M.L.J. 351.
3. (1919) 37 M.L.J. 695: I.L.R. 43 Mad. 357.

*Reference No. 3 of 1948. 7th December, 1948.

The Judgment of the Court was delivered by

Subba Rao, J.—This is a reference under section 307 of the Code of Criminal Procedure by the Assistant Sessions Judge, Madura. The four accused in the case were charged with an offence under section 395 of the Indian Penal Code. The Jury by a majority of four to one found that the accused 1 to 3 were not guilty and unanimously found that the fourth accused was not guilty. The learned Assistant Sessions Judge agreed with the verdict of the jury so far as accused 2 to 4 were concerned, but in regard to accused No. 1 he differed from the verdict of the Jury and referred this case to the High Court. The evidence against the first accused mainly consists of the oral evidence of P.Ws. 3 to 5. The same evidence also was relied upon by the prosecution in regard to accused 2 to 4. The charge to the Jury was very fair and in accordance with the directions given by the Judge, the Jury appreciated the evidence and refused to believe the witnesses called by the prosecution. The law on the point is well settled. The High Court, in a reference made under section 307 of the Code of Criminal Procedure can interfere with the verdict of the Jury only if the verdict is such that no reasonable man would come to that conclusion, or, to put it in other words, the verdict is perverse. We cannot say on the evidence on record that the verdict in this case is such that no reasonable man would come to a conclusion which the Jury has come to in this case. We, therefore, reject the reference and acquit accused No. 1 also.

V.S. —— *Reference rejected.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

K.S. Ramachar .. *Petitioner**

v.

K.S. Krishnachar .. *Respondent.*

Civil Procedure Code (V of 1908), Order 26, rule 10 (3)—Appointment of a second Commissioner—No reasons given for ignoring the previous Commissioner's report—Legality.

Where a Commissioner has been appointed and he has submitted a report to which both the parties had filed objections, it would be contrary to the provisions of Order 26, rule 10 (3), Civil Procedure Code, for the Court to appoint a fresh Commissioner without considering the merits of the application for such appointment and without giving any reasons why the previous Commissioner's report should be ignored as being unsatisfactory.

Kunhi Kutti Ali v. *Muhammad Haji*, (1930) 60 M.L.J. 450 : I.L.R. 54 Mad. 239, followed.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsiff, Dharmapuri, dated 16th April, 1947, in I.A. No. 289 of 1947, in O.S. No. 124 of 1945.

A. Bhujanga Rao and *D. R. Krishna Rao* for Petitioner.

C. S. Swaminathan for Respondent.

The Court delivered the following

JUDGMENT.—This is a revision against the order of the lower Court appointing a Commissioner in O.S. No. 124 of 1945. The petitioner is the defendant in the suit. The petitioner and the respondent are brothers. The respondent filed the above suit for a declaration that paimash Nos. 68/2 and 69 fell to his share in a partition that was effected between the brothers and for mesne profits. The petitioner filed an application for the appointment of a Commissioner. The District Munsiff appointed a Commissioner who submitted the report and both the parties filed their objections to the report. The suit was dismissed and the plaintiff-respondent preferred an appeal. In appeal the suit was remanded to the trial Court mainly on the ground that the District Munsiff erred in not admitting certain revenue accounts. After remand the respondent filed another petition, I.A. No. 289 of 1947 for the appointment of a Commissioner. The main ground alleged in the affidavit

*C.R.P. No. 817-A of 1947. 24th November, 1948.

was that the Commissioner appointed in the suit did not measure the suit land and that he measured only the land to the west of it belonging to the share of the plaintiff. The petitioner filed a counter-affidavit denying that fact and stated that the previous Commissioner did measure the entire land Haggupunja. The learned District Munsiff without considering the merits of the application and without giving any reasons why the previous Commissioner's report should be ignored, appointed a fresh Commissioner as he thought it was necessary in the interests of justice. This procedure is not only contrary to the express provisions of Order 26, rule 10 (3), Civil Procedure Code, but has been condemned more than once by the High Court.

In *Kunhi Kutti Ali* v. *Muhammad Haji*[1], the learned Judges have observed as follows :

> "The exact circumstances in which he came to issue the second commission do not appear from the record that has been placed before us, but the second commission should not have been issued, unless it was thought that the report of the first Commissioner was not satisfactory, in which case the earlier commission should have been wiped out altogether. . . . ."

Later on they state,

> "In taking this course he has acted with great impropriety and contrary to what is contemplated by Order 26, rule 10 (3), Civil Procedure Code. Though the practice which he has adopted may be one that is prevalent in Malabar, it is one that should no longer be continued as has been pointed out in clear terms by this Court in *Ambi* v. *Kunhikavamma*".[2]

I respectfully agree with the observations of the learned Judges. The order of the lower Court is set aside and the lower Court is directed to dispose of the application afresh in accordance with the law. The costs will abide the result.

V.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN.

Kaliammal, minor by guardian Patta Goundan .. *Petitioner**

v.

Ramaswami Goundan and others .. *Respondents.*

Civil Procedure Code (V of 1908), *Order* 32, *rule* 3 *and Order* 33—*Person as next friend of minor applying for leave to file a suit as pauper—Competence of such next friend—If can be agitated and decided.*

Where a relation of a minor purporting to act as his or her guardian seeks permission to institute a suit *in forma pauperis*, the competence of such a next friend instituting a suit could not be the subject-matter of investigation either at the stage of granting leave to sue *in forma pauperis* or for the matter of that at any other stage of the suit. The next friend as such does not need to ask for sanction of the Court to recognize him as next friend of the minor, if he is not incapacitated in any of the ways indicated in Order 32, rule 3 (1) of the Civil Procedure Code. The next friend has a right to institute a suit and maintain that suit on behalf of the minor.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Munsiff, Gobichettipalayam, dated 17th September, 1946, in O.S. No. 3 of 1946.

R. Ramamurthi Aiyar for Petitioner.

K. Vittal Rao for Respondents.

The Court delivered the following

JUDGMENT.—The maternal uncle of the minor purporting to act as her next friend sought permission to institute a suit *in forma pauperis* against the father of the minor among others for the minor's maintenance. The application for permission to sue *in forma pauperis* was refused virtually on the sole ground, that as the minor's father and mother were alive the maternal uncle was not the minor's guardian at law. That order the petitioner seeks to set aside in revision.

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1. (1930) 60 M.L.J. 450 : I.L.R. 54 Mad. 239. 2. (1929) 118 I.C. 296.

*C.R.P. No. 623 of 1947. 8th December, 1948.

A perusal of the provisions of Order 32, rule 3, clauses 1 and 2, should have convinced the learned District Munsiff that the competence of a next friend of a minor instituting a suit could not be the subject-matter of investigation either at the stage of granting leave to sue *in forma pauperis* or for the matter of that at any other stage of the suit. The next friend as such does not need to ask for sanction of the Court to recognise him as the next friend of the minor if he is not incapacitated in any of the ways indicated in Order 32, rule 3, clause 1, Civil Procedure Code. The next friend has a right to institute a suit and maintain that suit on behalf of the minor.

The order of the lower Court is set aside and the petition remanded for disposal afresh after considering the questions that properly arise for determination on the application for permission to sue *in forma pauperis.*

The respondents will pay the costs of this petition in this Court to the petitioner.

V.S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

Subba Naicker .. *Appellant**

v.

Minor Subbaraman Naicker by mother and guardian Ramammal .. *Respondent.*

Hindu Law—Pre-partition debt of father—Property in the hands of son after partition—When liable—Running account—Balance due on—Signature of father in acknowledgment after partition—Suit on accounts and decree thereon—Execution—Property obtained by son on partition—Liability.

If the pre-partition debt loses its identity and merges in a new cause of action that arose after the partition (*e.g.*, a promissory note by the father) there would be no pre-partition debt at all and therefore family property in the hands of the son obtained on partition could not be made liable for such debt.

Subramania Aiyar v. *Sabapathi Aiyar*, (1927) 54 M.L.J. 726 : I.L.R. 51 Mad. 361, followed.

Where however there was a running account and at a particular point of time when the amounts were ascertained the signature of the debtor (a Hindu father) was taken after a partition (whether it is treated as an acknowledgment or even as a collateral security it does not matter) the pre-existing pre-partition liability based on the running account did not lose its identity or merge in any new cause of action arising after the partition and a decree in a suit based on such accounts can be recovered out of the family properties obtained by the son in partition.

Appeal against the order of the Subordinate Judge's Court of Tuticorin, dated 9th November, 1945, in A.S. No. 62 of 1945 (E.A. No. 1433 of 1942, District Munsiff Court, Koilpatti, in S.C. No. 272 of 1941, Sub-Court, Tuticorin).

C. S. Rajappa for Appellant.

T. P. Gopalakrishna Ayyar for Respondent.

The Court delivered the following

JUDGMENT.—This is a Civil Miscellaneous Second Appeal against the order and judgment of the Subordinate Judge of Tuticorin dismissing the appeal against the order and judgment of the District Munsiff of Koilpatti allowing an application under section 47, Civil Procedure Code.

The plaintiff has been carrying on for a long time a grocery shop and a piecegoods shop in Masarapatti village. The first defendant was having dealings with him in both the shops. In 1936, there was a partition between the father, *i.e.*, the first defendant and his son, the third defendant, in and by which all the properties of the family were allotted to the third defendant and the first defendant was given a sum of Rs. 10,000. Even after the partition the first defendant continued to have dealings with the plaintiff and the accounts filed in this case show that they were running accounts. In regard to the piecegoods shop the accounts filed show

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*A.A.A.O. No. 305 of 1946. 16th November, 1948.

that a sum of Rs. 200 was due to the plaintiff being the balance and under that item the first defendant had signed on a stamped endorsement to the effect " I shall pay the sum of Rs. 200 with interest at Rs. 0-8-0 per cent. per mensem to you or your order on demand." The account continued even thereafter. In regard to the grocery shop the first defendant continued to have dealings with the plaintiff even after the alleged partition and on 6th November, 1938, a sum of Rs. 300 was shown as the balance of the amount due to the plaintiff and the first defendant again signed on a stamped endorsement to the effect " I shall pay this sum of Rs. 300 with interest at Rs. 0-8-0 per cent. per mensem to you or to your order on demand." The account continued thereafter in the same manner. The plaintiff appellant instituted S.C.S. No. 272 of 1941 on the file of the Court of the Subordinate Judge of Tuticorin, against the father, the first defendant, the son, the third defendant and the wife, the second defendant. During the pendency of the suit the first defendant died and the second and third defendants were recorded as his legal representatives. The suit was filed on the basis of the accounts and for the amount due to the plaintiff. In paragraph 12 of the plaint it was stated that the cause of action for the suit arose on 16th November, 1938. Though the fact that the first defendant signed in the two accounts was mentioned in the plaint, the suit was not on the basis of the promissory note. Indeed nowhere in the plaint the fact of the execution of the promissory note was mentioned. After the written statements were filed there was a compromise decree and the decree reads as follows :

" Plaintiff will have a decree for this suit amount and costs and future interest at six per cent. per annum against the properties and assets if any of the first defendant in the hands of defendants 2 and 3 and the question whether the partition arrangement of 12th August, 1936, referred to by defendants 2 and 3 in their written statement is true and valid and the family became divided and the question whether the said arrangement was given effect to and the family continued joint are left open."

The plaintiff sought to execute the decree aginst the assets in the hands of the third defendant and he filed the present application under section 47, Civil Procedure Code.

Two points were raised by the appellant in the lower Court : (1) that the alleged partition between the first defendant and the third defendant was not a real transaction and (2) that he would be entitled to execute the decree against the family assets in the hands of the third defendant as the decree debt was a pre-partition debt. On the first point both the Courts concurrently found that the partition was a *bona fide* transaction and that by virtue of the terms of the release deed the father and the son became divided from each other. This is essentially a question of fact and there are concurrent findings on that question. No permissible grounds were advanced to disturb the said findings. I accept the finding of the lower Courts and hold that the arrangement was a real and *bona fide* transaction. As regards the second question the learned counsel for the appellant argued that to the extent of a sum of Rs. 163-14-11 and a sum of Rs. 265-15-2, they are pre-partition debts and therefore he would be entitled to execute the decree to that extent against the joint family assets in the hands of the third defendant. The law on the subject is well settled. In *Subramania Iyer* v. *Sabapathi Iyer*[1], it was held by the Full Bench that a simple creditor of a father in a joint Hindu family is entitled to recover the debt from the shares of the sons after a *bona fide* partition between the father and the sons. A passage from the judgment of Ananthakrishna Aiyar, J., may usefully be quoted,

" And finally if the cause of action for the suit be not the original debt incurred before the partition but a promissory note executed by the father alone after partition though in renewal of a promissory note executed by him before partition, the sons are not liable to any extent if the suit be based on the renewed promissory note only."

Property got by a son in partition is liable for a pre-partition debt of the father. If the pre-partition debt loses its identity and merges in a new cause of action that arose after the partition there would be no pre-partition debt at all and therefore the family property in the hands of the son could not be made liable for the debt.

1. (1927) 54 M.L.J. 726 ; I.L.R. 51 Mad. 361 (F.B.).

In this case there was a running account and at a particular point of time when the amounts due were ascertained the debtor's signature was taken. Whether it is treated as an acknowledgment or even as a collateral security it does not matter. The pre-existing pre-partition liability based on the running account did not lose its identity or merge in any new cause of action arising after the partition. The suit was based on the accounts though the fact that the debtor signed on the ascertainment of the amount due on a particular date was mentioned. I therefore hold that to the extent of a sum of Rs. 163-14-11 and a sum of Rs. 265-15-2 under the different kathas together with interest on the said amounts at the rate mentioned in the decree the plaintiff would be entitled to recover the same from and out of the family property that fell to the share of the third defendant at the partition that was effected between the third defendant and the first defendant. The orders of the lower Court are accordingly modified.

The appeal is allowed in part. Both the parties will bear their own costs here and in the Courts below. Leave refused.

K.S. *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, AND MR. JUSTICE VISWANATHA SASTRI.

A. Karuppa Chetty Goundan .. *Petitioner**

v.

The Board of Commissioners for Hindu Religious Endowments, Madras, and another .. *Respondents.*

Certiorari—*Writ of—If can be issued by the High Court to quash the order of Madras Hindu Religious Endowments Board removing trustee of a temple in the mofussil purporting to exercise the powers of an Assistant Commissioner under section* 26 *of the Madras Hindu Religious Endowments Act (II of* 1927)—*Jurisdiction.*

The High Court has no jurisdiction to issue a writ of *certiorari* to quash the order of the Madras Hindu Religious Endowments Board purporting to exercise the powers of an Assistant Commissioner under section 26 of the Madras Hindu Religious Endowments Act by which a person was removed from the office of the trustee of a temple in the Salem District. By the mere location of its office in the Presidency Town the Madras Hindu Religious Endowments Board cannot be deemed to be an inhabitant thereof within the meaning of section 8 of the Letters Patent. Nor can it be said that the subject-matter of dispute was one which can be said to have arisen in the Presidency Town. The subject-matter in dispute in the case is the right to the Office of trustee in a mofussil town.

Ryots of Garabando v. *Zamindar of Parlakimedi*, (1943) 2 M.L.J. 254 : I.L.R. 1944 Mad. 457 (P.C.), applied. *Vedachala Mudaliar* v. *The Central Road Traffic Board, Madras*, (1948) 1 M.L.J. 322, distinguished.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order directing the issue of a writ of *certiorari* calling upon the Board of Commissioners for Hindu Religious Endowments, Madras, to send up the records in its proceedings in C. No. 13802 of 1948 before it and quash the order No. 2809, dated 30th July, 1948, removing the petitioner from the office of trustee of Sri Bhadrakaliamman temple, Mecheri, Omalur Taluk, Salem District.

R. Ramamurthi Iyer and *T. R. Venkataraman*, for Petitioner.

M. Seshachalapathi, *M. Chockalingam* and *V. Sankaran*, for Respondents.

The order of the Court was pronounced by

The Chief Justice.—In this application the petitioner prays for the issue of a writ of *certiorari* to quash the order of the Madras Hindu Religious Endowments Board, dated the 30th July, 1948, by which the petitioner was removed from the office of the trustee of Sri Bhadrakaliamman temple, Mecheri, Salem District. The order was passed under section 53 and section 26 of Madras Act II of 1927

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* C.M.P. No. 6334 of 1948. 6th December, 1948.

as amended by Madras Act VIII of 1944. Under section 53 (1) of the Act, the Board in the case of a temple specified in the list referred to in sub-section (1) of section 51 and the Assistant Commissioner in the case of any other temple, may by order suspend, remove or dismiss any non-hereditary trustee on grounds specified therein. Admittedly the temple in question does not fall within the list referred to in sub-section (1) of section 51. Therefore it is the Assistant Commissioner that can remove or dismiss a non-hereditary trustee of this temple. Under section 26 of the Act, if the Board is satisfied, that an Assistant Commissioner has failed to exercise any power or discharge any duty, which he ought to have exercised or discharged, the Board may by itself exercise such power or discharge such duty. It was in the purported exercise of such power conferred by this section that the Board passed the order above referred to.

A preliminary objection was taken that this Court has no jurisdiction to issue a writ of *certiorari* because of the ruling of the Judicial Committee in *Ryots of Garabando* v. *Zamindar of Parlakimedi*[1]. The temple is admittedly situated outside the presidency town and the subject matter is the right of the petitioner to the office of trustee in the temple. Mr. Ramamurthi the learned counsel for the petitioner, contended that the decision of the Judicial Committee in the *Parlakimedi case* would not apply to the facts of this case on account of two facts : (1) the Board of Commissioners for Hindu Religious Endowments must be treated as an inhabitant of the presidency town ; and (2) the subject matter in dispute between the Board on the one hand and the petitioner on the other must be deemed to have arisen here. We are unable to accept his contentions. The Judicial Committee refused to accept the position that by the mere location of its office in the presidency town the Board of Revenue could be deemed to be an inhabitant thereof within the meaning of section 8 of the Letters Patent. Their Lordships treated the Board of Revenue not as an ordinary subject but as an official body entrusted with particular duties including duties of a judicial character. The same reasoning would apply to the case of the Madras Hindu Religious Endowments Board which has been entrusted by statute with duties of a judicial character. In fact, it is because it is treated as an inferior tribunal that the petitioner has sought from this Court a writ of *certiorari.*

The second ground urged by the learned counsel is based on a fallacy. It is not right to consider the Madras Hindu Religious Endowments Board as a private party between whom and the petitioner there was a dipute. In cases relating to a public trust where proceedings are taken for the framing of a scheme or for the removal of undesirable trustees, in one sense it may be true that there is no private right of parties which is the subject matter of adjudication. But even there it can be said that there is a *lis* between the trustees on the one side and the deity represented by other trustees or by worshippers or by the Advocate-General on the other side. What is really of importance is that in such cases the Court, if it is a Court which is entrusted with powers to frame a scheme or to dismiss a trustee or, the Board, when invested with such powers, is not in the position of a private party interested in one side or the other. Taking the present case we find that there was an application by the managing trustee for the removal of the petitioner. If it was not by the managing trustee, it might have been by the worshippers or an officer of the Board. What the Board was called upon was to make an impartial inquiry and to arrive at findings in the same manner as a Court would, if called upon to exercise such functions. In a case like this, the question of jurisdiction must be regarded as one of substance as their Lordships pointed out in the *Parlakimedi case* and jurisdiction must depend upon the subject matter in dispute ; and that in this case, is the right to the office of trustee in a mofussil temple.

The learned counsel for the petitioner conceded that, if in the first instance, the Assistant Commissioner had passed an order dismissing him and on appeal, the Madras Hindu Religious Endowments Board had confirmed that order, he

1. (1943) 2 M.L.J. 254: L.R. 70 I.A. 129: I.L.R. 1944 Mad. 457 (P.C.).

could not have come up to us for the issue of writ of *certiorari*. In our opinion, what has happened in the present case is, on principle, not very different. Just as in an appeal the Board could pass that order which the Assistant Commissioner to ought have passed in the first instance, even here the Board purported to pass an order which, if considered, the Assistant Commissioner ought to have passed himself. If this Court has no jurisdiction to quash the order of the Assistant Commissioner dismissing the petitioner, it would follow likewise that it has no jurisdiction to quash the order of the Board purporting to exercise the powers of an Assistant Commissioner under section 26 of the Act.

Reliance was placed upon certain observations in the decision in *Vedachala Mudaliar* v. *The Central Road Traffic Board, Madras*[1], but those observations are not applicable to the facts of the present case, because here the petitioner is litigating his individual right before a judicial body like the Madras Hindu Religious Endowments Board entrusted with power to adjudicate upon such right.

We therefore hold that this Court has no jurisdiction to issue a writ of *certiorari* in this case. The application is dismissed with costs (one set).

K.S. ——— *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VISWANATHA SASTRI.

Nallamilli Veerayamma .. *Petitioner**

v.

Karri Ammireddi .. *Respondent.*

Hindu Law—Joint family—Promissory note in favour of son in respect of debt due to family—Death of the holder—The father as manager if can give a valid discharge—Wife as legal representative if can sue after father has given discharge.

The person to whom payment should be made in order to discharge the maker of the note from liability under a promissory note is the " holder " of the note as defined in section 8 of the Negotiable Instruments Act. It is only the payees named in the instrument or their endorsees that can be said to be " holders " and undisclosed principals and beneficial owners of the debt are not entitled to sue the maker of the note. Notwithstanding the fact that the money lent under a note was advanced from family funds, if the promissory note is taken in the name of the son, he alone would be the holder and when he was alive he alone could have sued on the note and not the father. But where the son died the father as manager of the family to whom the debt survived can receive payment from the debtor and give a discharge without reference to the son's widow who would be his legal representative and the widow cannot then sue on the promissory note.

Petition under section 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the District Munsiff, Ramachandrapuram, dated 31st April, 1947, in S.C.S. No. 212 of 1946.

B. Srinivasamurthi for Petitioner.

M. S. Ramachandra Rao for Respondent.

The Court delivered the following

JUDGMENT.—This civil revision petition arises out of a suit by a Hindu widow to recover a debt due under a promissory note, dated 24th May, 1945, executed by the defendant in favour of her husband, Ammireddi, since deceased. The suit was dismissed by the trial Court on the findings that Ammireddi and his father were members of a joint Hindu family, that it was the father who advanced the loan to the defendant though the pronote was taken in the name of the son and that subsequent to the death of the payee Ammireddi, the debtor repaid the moneys due under the promissory note to the father and obtained a discharge evidenced by a receipt Ex. D. 1, dated 18th January, 1946.

The plaintiff has preferred this civil revision petition on the ground that the payment to the father after the death of the son does not operate as a valid discharge of the defendant's liability and the plaintiff alone as the widow of the payee is the

1. (1948) 1 M.L.J. 322 at 325.

* C. R. P. No. 745 of 1947. 2nd December, 1948.

" holder " entitled to give a discharge. The contention of the respondent is that the debt was a family debt and the defendant obtained a valid discharge of his liability by payment to the father and manager. As a result of the combined operation of sections 8, 32 and 78 of the Negotiable Instruments Act, the person to whom payment should be made in order to discharge the maker of the note from liability under the instrument is the " holder " as defined in section 8. This Court has repeatedly held that it is only the payees named in the instrument or their endorsees that can be said to be " holders " and undisclosed principals and beneficial owners of the debt are not entitled to sue the maker of the note. Notwithstanding the respondent's criticism of this view as being arbitrary and highly technical and notwithstanding the views of some other High Courts, I consider it futile to embark upon a further discussion of that question. Giving full effect, as I must, to the decision in *Subba Narayana Vadhyar* v. *Ramaswami Iyer*[1], the plaintiff's husband must be held to have been the holder of the note during his lifetime notwithstanding the fact that the money lent under the note was advanced from family funds. If the plaintiff's husband had lived, he alone could have sued on the *note* and not the father. So much is established by the decision cited on behalf of the petitioner. See *Nelli Amma* v. *Krishna Panicker*[2] and *Arunachala Reddi* v. *Subba Reddi*[3]. It does not however follow that the other members of the family have no enforceable rights in respect of the debt apart from the note. See the decisions in *Gopal Pillai* v. *Kothandarama Iyer*[4] and *Venkatarama Reddiar* v. *Valli Akkal.*[5]

The finding in the present case, which I must accept, is, that the debt is one due to the joint family. The question that falls to be considered is whether it was open to the father and manager of the family to receive payment from the debtor and give a discharge, after the death of Ammireddi, without reference to the plaintiff. Though the right of action on the note vested during his lifetime in the plaintiff's husband, Ammireddi, the debt itself belonged to the family and on the death of Ammireddi, the entire debt vested in his undivided father by operation of the law of survivorship, subject to the rights of the plaintiff under the Hindu Women's Rights to Property Act, XVIII of 1937. It has been held by our High Court that where the right to a debt evidenced by a promissory note vests by operation of law in a person different from the payee named in the note, as for instance, in a receiver in insolvency or a succeeding trustee, it is open to the persons in whom the right to the debt so vests to sue for the recovery even though they may not come strictly within the literal language of section 8 of the Negotiable Instruments Act, as " holders." See the decisions in *Sowcar Lodd Govinda Das* v. *Muneppa Naidu*[6] and *Ramanathan Chetti* v. *Kathirvelan*[7]. In the present case the debt being a family debt, the father of the deceased payee and the manager of the family, to whom the debt survived in its entirety, could realise it and give a valid discharge of the debtor. Whatever be the exact nature of the right conferred on the plaintiff under the Hindu Women's Rights to Property Act, the Act does not *per se* put an end to the undivided status of the family or deprive the manager of the family of his rights and duties as manager of the entire family estate. See the decisions in C. R. P. No. 1080 of 1945 (unreported) and *Munikapudi Satyanarayanacharlu* v. *Madnubabedu Narasamma*[8]. The plaintiff may work out the rights conferred on her by the Hindu Women's Rights to Property Act in respect of the suit debt as well as other joint family properties in an appropriate proceeding; but in this suit, to which the manager of the family is not a party, it is not possible to give her any relief.

The civil revision petition is accordingly dismissed with costs which I fix at Rs. 25.

K.S. —— *Petition dismissed.*

1. (1906) 16 M.L.J. 508: I.L.R. 30 Mad. 88 (F.B.).
2. 1910 M.W.N. 211.
3. (1907) 17 M.L.J. 393.
4. (1934) 67 M.L.J. 843: I.L.R. 57 Mad. 1082.
5. (1934) 68 M.L.J. 81: I.L.R. 58 Mad. 693 (F.B.).
6. (1908) I.L.R. 31 Mad. 534.
7. (1917) 33 M.L.J. 627: I.L.R. 41 Mad. 353.
8. (1943) 2 M.L.J. 282.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—P. V. RAJAMANNAR, *Chief Justice.*

Krishna Bhatta .. *Petitioner (Plaintiff)**.

v.

Narayana Achary and another .. *Respondents (Defendants).*

Lease—Transferee from lessee—Recognition by lessor—Creation of privity of interest—Liability of heirs of a lessee—Joint liability—Partition inter se*—Lessor not a party—Lessor if bound.*

If after a transfer of a lease the lessor recognises the transfer, and collects rents from the transferee not only is the lessee's liability to the lessor under the original contract at an end, but there is further privity of contract established between the lessor and the transferee and the latter becomes the tenant.

Where there is a lease in favour of a single person as a tenant, and when that tenant dies, the liability of the heirs would be a joint liability. It is true that the joint lessees can effect a partition as between themselves, but if the lessor is not a party to the division, he is not bound by it and he cannot be compelled on that account to demand and recover only a proportionate share from each of the joint tenants.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the District Munsiff of Karikal, in S. C. S. No. 87 of 1946.

T. Krishna Rao for Petitioner.

K. Y. Adiga and *K. P. Adiga* for Respondents.

The Court delivered the following

JUDGMENT.—The petitioner sued to recover arrears of rent due under a mulgeni chit, enhanced assessment and half cess with interest thereon due for two years 1943-44 and 1944-45 from the two respondents. The District Munsiff of Karikal who tried the suit passed a decree in his favour though not for the entire amount claimed. The decree was against the two defendants severally and against each in respect of a moiety of the total amount found due.

Three points were taken by Mr. Krishna Rao, the learned Advocate for the petitioner, in revision. The first is that the two defendants should have been made jointly and severally liable for the decree amount. To appreciate this point it is necessary to state a few facts. On 1st June, 1900, one Sankarayachari executed the mulgeni chit on which the suit is based in favour of the plaintiff's father. The tenant sold his leasehold interest to one Appu Bhandari in 1917, Ex. D-1. On 28th May, 1926, Appu Bhandari in his turn transferred the interest which he obtained from Sankarayachari in favour of Rangu Hengsu the mother of the two respondents. After Rangu Hengsu's death, the two respondents in this petition were in enjoyment of the demised property jointly. On 11th May, 1943, the two respondents effected a division between them by a registered partition deed, Ex. D-6, in accordance with which they have been enjoying the plaint mulgeni in two moieties. The learned District Munsiff held that because of this partition each of the defendants was only severally liable for a moiety of the rent to the plaintiff.

We are not here concerned with the case of a transfer or assignment of a share of the demised premises by the lessee. Whether it be by a transfer of the entire interest of the lessee in a part of the demised property or a share of the lessee's interest in the entire property, if the transferee or assignee holds that share in physical severalty, the law is fairly well settled that the lessor would be entitled to recover from such transferee or assignee only proportionate rent based on the extent in the separate possession of such transferee or assignee—*vide* observations of Ramesam, J., in *Mosafkanni Ravuthar* v. *Doraiswami*[1] and *Kunhi Sou* v. *Mulloli Chathu*[2]. As a corollary to this rule it would follow that if the assignee or transferee

* C. R. P. No. 57 of 1947. 12th November, 1948.

1. (1926) 54 M.L.J. 30.
2. (1912) 23 M.L.J. 695: I.L.R. 38 Mad. 86 at 90.

is only in joint possession of the whole along with the original lessee or lessees, they will all be jointly liable. In the present case there is no such partial transfer. Admittedly the transfer by the original tenant in favour of Appu Bhandari and the transfer by Appu Bhandari in favour of the mother of the respondents was a transfer of the entire mulgeni interest. Mr. Adiga on behalf of the respondents contended that once there is a transfer of the leasehold interest by the lessee, the liability of the transferee and the right of the lessor in respect of the rent of the leased property rests on a privity of estate. The liability of the original lessee will continue as it rests on a privity of contract though such liability would cease to exist when the lessor collects the rent from the transferee. That will be so. The generally accepted view in England and India appears to be that if after a transfer the lessor recognises the transfer and collects rent from the transferee, not only is the lessee's liability to the lessor under the original contract at an end but there is further privity of contract established between the lessor and the transferee. In *Mayor of Swansea* v. *Thomas*[1], Baro Pollock, dealt with this point thus :

> "On the part of the defendant it was contended, first, that the plaintiffs, upon the facts stated, must be taken to have recognised Watson and Overend as their tenants, and therefore that they could not now maintain an action against the defendant (Original lessee) for the rent sued for. If the plaintiffs had received rent from the defendant's assignees this might have been so, because by so doing they would be taken to have accepted the assignees as their tenants, and so privity of contract between the plaintiffs and the defendant would have been extinguished, in accordance with the well known doctrine laid down in *Walker's case*[2]."

In *Theethalan* v. *Eralpad Rajah, Calicut*[3], Sir John Wallis, C.J., after referring to section 108 (*j*) of the Transfer of Property Act says thus :

> "One effect of this provision is that the lessee does not cease to be liable on the lease by reason only of an out and out assignment, but he will, as in England, cease to be liable if the lessor accepts rent from the assignees and thereby creates privity of contract between them."

It follows from this rule of law that when after the transfer in favour of the mother of the respondents the plaintiff continued to demand and collect the rent from her, privity of contract was established between them. The mother of the defendants became herself a mulgeni tenant.

When there is a lease in favour of a single person as a tenant and when that tenant dies, the liability of the heirs would be a joint liability—See *Krishna Das Roy* v. *Kali Tara Chowdhurani*[4]. The principle being that heirs of the original tenant constitute one body and there is only a joint liability. Chatterjee, J., says at page 294.

> "The contract is with a single person as tenant, and when he dies the liability of his heirs is a joint liability."

When Rangu Hengsu died and the defendants succeeded her, they became jointly liable. It is true that joint lessees can effect a partition as between themselves, but if the lessor is not a party to the division, he is not bound by it and he cannot be compelled on that account to demand and recover only a proportionate share from each of the joint tenants. In *Bholanath Sircar* v. *Baharam Khan*[5], it was held in a suit for rent in which defendants, admitting their joint tenancy, set up that they had as among themselves made an allotment of the land in certain shares, that as such partition was not recognised by the landlord, the plea could not avail. In *Raghunath Kalwar* v. *Bala Din Kalwar*[6], Stanley, C.J., observed thus :

> "There is no objection to joint tenants agreeing among themselves to occupy and cultivate distinct parts of the joint holding, provided that their so doing in no respect prejudices the rights of the landholder. Under such an agreement the tenants continue to be liable to the landlord for the entire rent, and the arrangement between them is not a partition which is enforceable as between them and the landlord. A partition to bind the landlord must be a partition with his consent."

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1. (1882) 10 Q.B.D. 48 at 50.
2. (1587) Co. Rep. Part III. 22 A, B. : 76 E.R. 676.
3. (1917) 32 M.L.J. 442 : I.L.R. 40 Mad. 1111.
4. (1917) 22 C.W.N. 289.
5. (1868) 10 W.R. 392.
6. (1910) I.L.R. 33 All. 143.

Admittedly in this case the plaintiff was not a party to the partition between the two defendants. It may be that by common consent of the lessor and the two lessees or by appropriate proceedings to which the lessor is a party the liability *inter se* between the two joint lessees can be apportioned; but till such apportionment is made, a plea of several liability cannot be sustained in a suit like the present. The learned District Munsiff erred in passing a decree against each of the defendants severally for a moiety of the rent found due.

The second point taken is in respect of a provision in the mulgeni chit under which the lessor is entitled to a higher rent on default made by the tenant. The normal rent under the chit was Rs. 44 in cash after 1901, but if a default was made, the enhanced rent was Rs. 55 in cash. It was held in a prior suit between the parties (S. C. S. No. 265 of 1944) that this clause as to payment of enhanced cash rent was not unconscionable, but the provision was certainly in the nature of a penalty and the Court was entitled to award reasonable compensation instead of the enhanced rent provided in the deed. An amount of Rs. 4 was fixed as payable in addition to the normal rent. The learned District Munsiff adopted the same figure in the present case. Whether the decision in the prior suit operates as *res judicata* or not, I am not inclined to disagree with the learned District Munsiff on this point. The clause was certainly a penal provision though it may have been otherwise if the proper rent was the enhanced amount and if the tenant had been given a concession if he paid the rent within a prescribed time.

The last point relates to the question whether the lessor is entitled to claim the price prevailing at the material time of two Kalsiges of cashewnuts or whether he is precluded from claiming more than five annas as their value. The relevant clause in the mulgeni chit runs as follows:

> "Thereafter, the *geni* per annum is Rs. 44 in cash, 50 coconuts, two Kalsiges of cashewnuts of the value of five annas."

I read this clause to mean that there is provision for a cash rent of Rs. 44 and a rent in kind consisting of 50 coconuts and two Kalsiges of cashewnuts. No doubt the price of the cashewnuts prevailing at the date of the execution of the mulgeni chit is also mentioned. But it could not have been in the contemplation of the parties that the lessor was precluded from claiming more than five annas as representing the value of two Kalsiges of cashewnuts. The lessee is not given the option of either delivering two Kalsiges of cashewnuts or of paying five annas in lieu thereof. A case dealing with the language very similar to this is reported in *Soodamani Pattar* v. *Somasundara Mudaliar*[1]. In that case the material words of the lease were as follows:

> "We agree to pay you 847 salagais of paddy worth Rs. 2,400 per annum."

The learned Judges Muthuswami Aiyar and Best, JJ., held that these words denote the average value of the paddy per annum or its equivalent in money, but not to create an alternative right to payment in money at that rate every year, however much it may differ from the market rate on the day when the paddy becomes due. The learned Judges point out that if it had been intended to create such right the word "or" or other apt words would have been used. With great respect I follow that decision and hold that the plaintiff is entitled to the value of two Kalsiges of cashewnuts in accordance with the prevailing market rate. As the learned District Munsiff held that the plaintiff was not entitled to anything more than five annas, he did not deal with the question whether the price claimed by the plaintiff was proper. The District Munsiff will now determine that issue and grant a decree in accordance with his finding.

The civil revision petition is allowed in part to the extent indicated above and dismissed otherwise. There will be no order as to costs.

V.P.S. —— *Petition allowed in part.*

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1. (1894) 4 M.L.J. 201.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

V. Shanmughavelayudham Pillai .. *Appellant**

v.

K. M. R. M. Ramanathan Chettiar and another .. *Respondents.*

Madras Debt Conciliation Act (XI of 1936), *section* 10 (2) (b)—*Discharge of debt under—Conditions necessary.*

A debt can be deemed to have been discharged within the meaning of section 10 (2) (*b*) of the Madras Debt Conciliation Act only when the service of notice contemplated by sub-section (1) of section 10 is proved and there has been a failure to file a statement as required by that notice. It is not enough to prove that the creditor had knowledge of the proceedings under the Act. It must be further proved that there was a failure to comply with the requirements of the statute as laid down in section 10 (1). It is only then that the penal consequence of discharging the debt under section 10 (2) (*b*) would follow.

Appeal against the order of the District Court, Coimbatore, dated 24th November, 1945, in A. S. No. 117 of 1943, preferred against the order of the Court of the Principal District Munsiff, Coimbatore, dated 8th December, 1942, in E.A. No. 208 of 1942, in O. S. No. 71 of 1929.

T. K. Subramania Pillai for Appellant.

K. V. Ramachandra Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The only question that arises for consideration in this civi miscellaneous second appeal is whether the decree debt in O. S. No. 71 of 1929 on the file of the District Munsiff's Court, Coimbatore, was discharged under section 10, sub-section (2), clause (*b*) of the Madras Debt Conciliation Act. Under the Act the debt would be discharged for failure on the part of the creditor to submit the statement of the debts owed to him in compliance with the provisions of sub-section (1). Sub-section (1) of section 10 contemplates the issue of a notice and service thereof calling upon every creditor to submit a statement of debts owed to him by the debtor with a view to effect a settlement. If after the receipt of such notice the creditor fails to file the statement as required by sub-section (1), under clause (*b*) of sub-section (2) the debt shall be deemed for all purposes and all occasions to have been duly discharged. The foundation, therefore, for the argument that the debt must be deemed to have been discharged within the meaning of the section is the service of notice contemplated by section 10 (1) of the Act. In the present case the concurrent finding of both the Courts below is that there is no evidence that a notice of the kind contemplated by section 10 (1) of the Act was served or even issued to the decree-holder K. M. R. M. Ramanathan Chettiar. An attempt was made to connect a notice issued to one Ramanathan Chettiar with different initials but that attempt signally failed. It was then urged that the decree-holder had notice of the filing of the petition under the Debt Conciliation Act as there was an application to stay execution of the decree under section 25 of the Act but that notice was merely a notice of proceedings and not a notice calling upon the creditor to file a statement of the debts due to him from the debtor within the meaning of section 10 (1) of the Act. It is not enough to prove that the creditor had knowledge of the proceedings under the Debt Conciliation Act. The debtor must go further and prove the failure to comply with the requirements of the statute as laid down in section 10 (1). It is only then that the penal consequence of discharging the debt under section 10 (2) (*b*) would follow. As the judgment-debtor had failed to establish the very first requirement of the section the debt is not discharged.

The decision of the Court below is correct. The civil miscellaneous second appeal is dismissed with costs.

No leave.

V.S. ——— *Appeal dismissed.*

* A. A. A. O. No. 248 of 1946. 9th December, 1948.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE SOMASUNDARAM.

Singarachariar, legal representative of deceased Trustee Srinivasachariar .. *Appellant**

v.

Lakshmanan Chettiar and others .. *Respondents.*

Court-Fees Act (VII of 1870), section 7 (v) and Schedule II, Article 17-B and Madras Civil Courts Act (III of 1873), section 14—Suit for setting aside order relating to immoveable property—Court valuation—Jurisdiction purposes.

A suit was filed by plaintiff on behalf of himself and other creditors of defendant 1 to set aside the order passed on a claim petition filed by 2nd defendant, who claimed the properties attached by the plaintiff as belonging to his judgment-debtor. The 2nd defendant claimed the property on the strength of a trust deed which was impeached as sham and nominal by the decree-holder. The plaint was subsequently amended to include a prayer for declaration that the trust deed executed by the first defendant, the judgment-debtor, was a sham transaction executed with the intention to defraud creditors. A court-fee of Rs. 15 was paid under Schedule II, Article 17-B. On the contention that as the market value of the property was more than Rs. 9,000 the District Munsiff had no jurisdiction to entertain the suit,

Held, that since the present suit related to a summary order concerning immoveable property, section 14 of the Madras Civil Courts Act applied and therefore the suit had to be valued as in manner provided by section 7 (v) of the Court-Fees Act.

Arumugha Mudaliar v. *Venkatachala Pillai*, (1932) 64 M.L.J. 568 : I.L.R. 56 Mad. 716, followed.

Judgment in C. M. A. No. 52 of 1931 of Pandrang Row, J., applied.

Appeal against the decree of the District Court, South Arcot, dated 23rd November, 1944, in A. S. No. 338 of 1943, preferred against the decree of the Court of the District Munsiff, Vridhachalam, passed in O. S. No. 218 of 1936.

T. E. Ramabhadrachariar for Appellant.

A. V. Viswanatha Sastri and *K. R. Krishnaswami Aiyar* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The only point which calls for consideration in this second appeal is the question of jurisdiction. The second appeal arose out of a suit filed by one Lakshmanan Chettiar for himself and on behalf of the creditors of defendant 1 to set aside the order passed on a claim petition filed by the second defendant, claiming properties attached by the said Lakshmanan Chettiar as properties belonging to his judgment-debtor. The property was claimed by the second defendant on the strength of a trust deed, which was challenged by the decree-holder as a sham and nominal deed. Though the suit originally was merely to set aside the summary order, it was subsequently amended so as to include a prayer for a declaration that the trust deed executed by the first defendant, the judgment-debtor, was a sham, nominal and fraudulent transaction, which had been brought into existence with the evil intention of defrauding the creditors. The suit was filed in the Court of the District Munsiff of Vridhachalam. A court-fee of Rs. 15 was paid under Schedule II, Article 17-B. The valuation for purposes of jurisdiction was given as follows : 10 times the assessment of Rs. 65-15-0, *i.e.*, Rs. 659-6-0, or the decretal amount of Rs. 2,621-7-0 as per the last E. P. Mr. Muthukrishna Aiyar, the learned advocate for the appellant, contended that as it had been found that the market value of the properties exceeded Rs. 9,000, the District Munsiff had no jurisdiction to entertain the suit. Reliance was placed by him on the decision of a Division Bench in *Vasireddi Veeramma* v. *Butchayya*[1]. We do not think that this decision has a direct bearing on the question to be decided in this appeal. That decision related to a suit brought for a declaration as to the invalidity of an adoption, and it was held that under section 12 of the Madras Civil Courts Act, the value must be deemed to be the market value of the properties which would

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*S.A. No. 1629 of 1945. 17th November, 1948.

1. (1926) 52 M.L.J. 381 : I.L.R. 50 Mad. 646.

be affected by a decision as to the validity of the adoption. The learned Judges were of the opinion that the suit before them did not fall within section 14 of the Act. In a subsequent decision, *Arumugha Mudaliar* v. *Venkatachala Pillai*[1], Krishnan Pandalai, J., held, in respect of a suit practically identical with the present suit, that is, a suit to set aside a summary order relating to immoveable property, that section 14 of the Madras Civil Courts Act would apply, and therefore for the purpose of jurisdiction, the subject-matter had to be valued in the manner provided by section 7 (*v*) of the Court-Fees Act. With respect to the learned Judge, we are in entire agreement with his decision and his construction of section 14. This decision was followed by Pandrang Row, J., in C. M. A. No. 52 of 1931. That case related to a suit by a defeated claimant under Order 21, rule 63, Civil Procedure Code. The learned Judge held that the subject-matter of such a suit would be " land, house or garden," and that being the case, the value had to be fixed in accordance with the provisions of section 14 of the Madras Civil Courts Act, that is, in the manner provided by section 7, clause (*v*) of the Court-Fees Act. Admittedly, the valuation in accordance with this provision does not exceed the pecuniary limit of the District Munsiff's jurisdiction. The learned Advocate for the appellant desired to raise other points which, however, do not appear to have been raised before the learned District Judge. He cannot be permitted to raise them in second appeal.

This second appeal is dismissed with costs of the sixth respondent.

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VISWANATHA SASTRI.

A. Krishna Raya Kodgi and another .. *Appellants**

v.

Sankayya Shetty .. *Respondent.*

Transfer of Property Act (IV of 1882), sections 83 and 100—Procedure prescribed by section 83—If can be extended to cases of charges.

It cannot be said that the procedure prescribed in section 83, Transfer of Property Act, is limited to mortgages properly so called and that it could not be extended to charges securing a recurring liability. The language of section 100 of the Act permits the procedure prescribed in section 83 to be availed of by the person who is liable to pay money charged on land.

Appeal against the decree of the Court of the Subordinate Judge, South Kanara, in A.S. No. 241 of 1945 preferred against the decree of the Court of the District Munsiff, Kundapur, in O.S. No. 39 of 1943.

T. Krishna Rao for Appellants.

K. Y. Adiga and *K. P. Adiga* for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiffs are the appellants in this second appeal. They brought the suit for the recovery of a sum of Rs. 756-13-10 being the arrears of mulgeni rent together with enhanced assessment payable to the Government, due from the defendant on the basis of a mulgeni chit, dated 14th May, 1900, Ex. P. 1, being the counter part of the mulgeni chit. The Courts below have dismissed the plaintiffs' suit on the ground that the amount really due and payable by the defendant has been deposited by him in the Court in O. P. Nos. 21 of 1938, 33 of 1939 and 37 of 1942 in full discharge of the liability and that it is open to the plaintiffs to draw the money from Court and satisfy their claim. The plaintiffs have preferred this second appeal.

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1. (1932) 64 M.L.J. 568 : I.L.R. 56 Mad. 716.

* S.A. No. 564 of 1946. 17th December, 1948.

Mr. T. Krishna Rao, the learned counsel for the appellants, has raised four contentions on this appeal. His first contention is that Ex. P. 1 merely creates a charge for the unpaid arrear of rent on the mulgeni holding and the improvements effected by the tenant and it is not open to the defendant, the representative of the mulgeni tenant, to deposit the amount in Court under section 83 of the Transfer of Property Act. The contention is that the procedure prescribed in section 83 of the Transfer of Property Act is limited to mortgages properly so called and cannot be extended to charges securing a recurring liability. It may well be argued that Ex. P. 1, containing as it does a personal covenant to pay and also creating a charge on the mulgeni interest and the improvements effected by the tenant for the rents payable by him is, in substance, a simple mortgage. Assuming, however, as Mr. Krishna Rao contends and the Courts below have held, that Ex. P. 1 creates only a charge upon the mulgeni interest, I do not see any reason why section 83 of the Transfer of Property Act should not be availed of by the person liable to pay the amount charged, by depositing the amount due in respect of the charge and thus redeeming the property. Section 100 of the Transfer of Property Act provides that the provisions relating to simple mortgages may be availed of, as far as may be by persons entitled to a charge or bound by it. Section 83 is one of the provisions which might be properly resorted to in the case of a charge like the present involving payment of a definite sum of money. No authority has been cited by the learned counsel on both sides on this point and I hold that the language of section 100 of the Transfer of Property Act permits the procedure prescribed in section 83 of the Transfer of Property Act to be availed of by the person who is liable to pay money charged on land.

The second contention of Mr. Krishna Rao is that there has been no proper compliance with the provisions of section 83 of the Transfer of Property Act because the defendant has not taken the steps prescribed by Order 32, rule 3, sub-clause (4) of the Civil Procedure Code. I find from one of the petitions filed under section 83 of the Transfer of Property Act marked as Ex. D-3 in the case, that the second plaintiff's father has been treated as a guardian of the minor second plaintiff and served with notice of the application. The objection now taken has not been raised in the Courts below and since it involves an investigation of facts, I consider that it should not be permitted to be raised for the first time on second appeal.

The third contention of Mr. Krishna Rao is that under the terms of Ex. P-1, the tenant is bound to pay not only the rent fixed by the mulgeni chit but also any enhanced assessment that might be due and payable to the Government in respect of the land demised and that in the present case the tenant did not pay into Court the amount of such enhanced assessment. I consider that, in the circumstances of this case, there has been no effective or real enhancement of the assessment by the Government. It is not pretended that the Government has collected any such enhanced assessment or that the plaintiffs have paid any enhanced assessment. All that appears is that there was a notification for the levy of an enhanced assessment in future. As the Shanbogus, who is examined on the side of the plaintiffs, himself admits, there has been no actual levy or demand for any enhanced assessment by the Government. I therefore hold that the deposit under section 83 of the Transfer of Property Act is not bad for the reason that it omitted to include the proposed enhanced assessment.

Mr. Krishna Rao lastly raised a question as regards the rate of interest to which the plaintiffs were entitled but ultimately gave up this point.

In the result, I hold that the decision of the Courts below is right and I dismiss this second appeal with costs.

(Leave to appeal is refused.)

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN.

Vanka Bhimaraju .. *Petitioner*.*

Madras Prevention of Adulteration Act (III of 1918), *section* 20 (2) (f) *and Rules framed under—Rules* 27-*A and* 29—*Mixture of gingelly oil and groundnut oil kept for sale—Plea that composition was kept for sale as lamp oil and not for sale as food—If a good plea in defence—Rule* 27-A, *if* ultra vires *the Provincial Government.*

Where a mixture of gingelly oil and groundnut oil is kept for sale, that would be a contravention of rule 27-A of the Rules framed under section 20 (2) (*f*) of the Madras Prevention of Adulteration Act. It would not matter that it was kept for sale as lamp oil and not for sale as food. It is not necessary that the rule should be applied only to food offered for sale for consumption as food.

The Public Prosecutor v. *Kachi Mohideen Marakayar*, (1947) 2 M.L.J. 456 followed.

There is nothing in rule 27-A which is inconsistent with the provisions of section 20 (2) (*f*) of the Act for there is nothing in section 20 (2) (*f*) requiring the Government to restrict its rule-making power to food offered for sale for consumption as food. The scope of the rule is well within the rule-making power under section 20 (2) (*f*).

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Sub-Divisional Magistrate, Guntur, in C. A. No. 128 of 1947, preferred against the judgment of the Court of the Stationary Sub-Magistrate, Guntur, in C. C. No. 3231 of 1947.

N. Subramaniam for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The petitioner was convicted under rule 29 for contravention of rule 27-A of the Rules framed under section 20 (2) (*f*) of the Madras Prevention of Adulteration Act He was sentenced to a fine of Rs. 100.

The accused did not deny that the oil which was found in his possession contained 50 per cent. of gingelly oil and 50 per cent. of groundnut oil. The accused pleaded from the commencement that he kept that oil not for sale as food but for sale as lamp oil. The learned trial Magistrate apparently did not accept that defence. The learned Sub-Divisional Magistrate on appeal held that even if that composition was kept by the accused for sale as lamp oil that was in contravention of rule 27 (*a*).

Assuming for the purposes of this case that the defence was true and the composition was kept by the accused for sale as lamp oil, *The Public Prosecutor* v. *Kachi Mohideen Marakayar*[1] should really conclude the question at issue of the liability of the accused for punishment under rule 29. Yahya Ali, J., observed :

"The prohibition is absolute for whatever purpose the consumer may take it or the seller may sell it."

What rule 27-A states is :

"No person shall sell or have in his possession for the purpose of sale a mixture of gingelly oil with groundnut oil."

To reiterate, that the accused kept the composition for sale was common ground. Only his contention was that he did not keep it for sale as food.

No doubt Yahya Ali, J., did not specifically consider the question whether rule 27 (*a*) was *ultra vires* the Provincial Government. Section 20 (2) (*f*) runs :

"In particular and without prejudice to the generality of the foregoing power the Local Government may make rules prohibiting or regulating in the interests of public health (*i*) the addition of water or other diluent or adulterant to any food. . . . . ."

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*Cr.R.C. No. 226 of 1948.
(Cr.R.P. No. 209 of 1948). 26th November, 1948.

1. (1947) 2 M.L.J. 456.

I am unable to see anything in rule 27-A inconsistent with the provisions of section 20 (2) (f) (i) of the Act. There was nothing in section 20 (2) (f) requiring the Government to restrict its rule-making power to food offered for sale for consumption as food. The learned advocate for the petitioner pointed out that the preamble recited that the Act was designed in the interests of public health to prevent adulteration of food. Had the preamble run that it was designed to prevent adulteration of food offered for sale for consumption as food there might have been some substance in the contention, that rule 27-A, which has much larger scope, was beyond the scope of the rule-making powers conferred on Government by statute. Though Yahya Ali, J., did not go specifically into the question whether rule 27-A was *ultra vires* or *intra vires* the reasoning there made it quite clear that the rule was perfectly *intra vires*. It was not necessary that that rule should be applied only to food offered for sale for consumption as food. As the learned Judge pointed out the rule was absolute in its scope and that scope was well within the rule-making power by section 20 (2) (j).

The sentence of fine of Rs. 100 for a second offence was by no means excessive. The petition is dismissed.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

Karuppasamy Goundar .. *Appellant**

v.

K. T. Krishnaswamy Goundar .. *Respondent.*

Madras Co-operative Societies Act (VI of 1932), *section* 57-*A—Mortgage decree obtained by Co-operative Society—Execution—Transfer of decree from Court which passed the decree—Necessity.*

Where a decree has been obtained by a Co-operative Society the Registrar is entitled under section 57-A of the Co-operative Societies Act, to execute the decree without an order of transfer of the decree from the Civil Court which passed the decree.

Appeal against the order of the District Court, Coimbatore, dated 8th October, 1946, in A. S. No. 312 of 1946, preferred against the order of the Court of the District Munsiff, Tiruppur, in E. A. Nos. 439 and 465 of 1945 in O. S. No. 381 of 1940.

N. Sivaramakrishna Aiyar and *A. Balasubramania Aiyar* for Appellant.

S. Krishnamachariar for *A. C. Sampath Aiyangar* for Respondent.

The Court delivered the following

JUDGMENT.—The only point that was argued in the Courts below was that the Registrar of Co-operative Societies had no power to sell the properties in pursuance of the mortgage decree without an order of transfer of the decree from the Civil Court which passed the decree. The language of section 57-A of the Co-operative Societies Act is clear and so far as I am able to see, there does not seem to be any necessity for a transfer of the decree. The section says :

> " The Registrar or any person subordinate to him empowered by the Registrar in this behalf may, subject to such rules as may be prescribed by the Provincial Government and without prejudice to any other mode of recovery provided by or under this Act, recover—(a) any amount due under a decree or order of a Civil Court, a decision or an award of the Registrar. . . . "

A decree was obtained by the Co-operative Society and under this section, the Registrar is entitled to execute the decree by bringing the property to sale. Mr. Sivaramakrishna Aiyar, the learned advocate for the appellant, wanted to raise also a further question that under the Co-operative Societies Act and the rules framed thereunder it is obligatory on the part of the Registrar, before the property is sold, to give notice of the sale not only to persons who are parties to the suit but also to

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*A.A.A.O. No. 1 of 1947. 15th November, 1948.

others interested in the property, such as his clients. The point, though raised in the counter, has not been pursued either in the trial Court or in the appellate Court and I do not think it will be proper to allow the learned advocate to raise this question, even if there be such a requirement under the Co-operative Societies Act.

The result is the appeal fails and is dismissed with costs.

Time for vacating the property and delivering possession one month from this date. (Leave to appeal is refused.)

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE PANCHAPAGESA SASTRI.

Parankusam Rangacharyulu and others .. *Petitioners**

v.

Pernamitta Venkatanarasimhayya, Trustee of Sri Chenna Kesavaswami Temple including the minor shrine Sri Ranganadhaswami situated at Pernamitta village, Ongole Taluk and others .. *Respondents.*

Madras Hindu Religious Endowments Act (II of 1927, as amended by Act X of 1946), section 78—Scope—Certificate granted by the Board before any rules for the issue of such certificates were prescribed by the Local Government—Not sufficient to support an application under section 78—Enquiry under section 78—Scope.

Applications were filed in the District Court of Guntur and Kistna under section 78 of the Madras Hindu Religious Endowments Act as amended by Act X of 1946 for recovery of possession of lands in the possession of archakas on the ground that they were temple properties and in support of their applications the applicants filed certificates as required by section 78 of the Act, granted by the Board and it was contended by the archakas who were the contesting respondents that the certificates were invalid as on the date of the applications the Local Government had not prescribed any rules for the issue of such certificates under its rule making power under section 71. The objections were overruled by the lower Courts. On revision,

Held, that (*i*) the applications to the lower Court were not maintainable. (*ii*) The production of a certificate as may be prescribed by the Local Government was mandatory and a condition precedent to the institution of the applications and therefore the production of a certificate granted by the Board was not sufficient. The Board has no power of issuing a certificate by itself. The power is to issue a certificate in the manner as may be prescribed. The non-exercise of the power of prescribing the form by the Provincial Government would not confer the power to issue certificates, on the Board. (*iii*) Under the amended section 78 of the Hindu Religious Endowments Act the scope of inquiry is narrowed down and it can apply only against dismissed trustees or officers or servants of the temple or those claiming under them and only in respect of admitted endowments but not to cases where archakas in possession for more than a century were sought to be dispossessed.

However, the amended section 78 has no application to an application filed before the date of the amendment as the amendment has no retrospective operation and will not affect existing rights to recover property.

Petitions under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the orders of the District Court, Guntur, in O. P. Nos. 17, etc., of 1946, respectively and the order of the District Court, Kistna, in O. P. No. 34 of 1947, respectively (C. R. P. No. 1676 of 1947).

P. Somasundaram and *P. Suryanarayana* for Petitioners.

P. Chandra Reddy, K. Venkataratnam, O. Chinnappareddi, V. Subramanyam, A. Bhujanga Rao, D. R. Krishna Rao, C. A. Vaidyalingam, T. Venkatadri, D. Munikannayya, and *D. Bhimayya* for Respondents.

The Judgment of the Court was delivered by

Satyanarayana Rao, J.—These Civil Revision Petitions were preferred against the orders of the learned District Judge of Guntur (except C. R. P. No. 1676 of 1947, in which the order was passed by the District Judge of Kistna) passed under

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* C. R. P. Nos. 1341 of 1946, 780, 812, 1167, 1170 to 1173 and 1676 of 1947. 11th November, 1948.

section 78 of the Madras Hindu Religious Endowments Act of 1926 (Act II of 1927) as amended by the Madras Hindu Religious Endowments (Amendment) Act of 1946 (Act X of 1946). As these revision petitions raised important questions of law regarding the interpretation of section 78 of the Act as amended in 1946, my learned brother, Panchapagesa Sastri, J., referred them to a Bench, and they are now before us.

Nine applications were filed in the lower Court under section 78 by the trustees appointed either by the Board or by the Assistant Commissioner having jurisdiction for delivery of possession of immoveable properties in the possession of the archakas who were the respondents in the petitions in the Court below and are the petitioners before us. The properties in question have been in continuous possession of the archakas for a considerably long period, and the claim by them was that the lands in dispute were granted to their predecessors in title burdened with service to the temples concerned while the trustees contended that they belonged to the temples. Besides this question of title to the property, there were other objections raised regarding maintainability of the petitions. The Court below overruled the contentions of the archakas and directed delivery of possession of the properties.

In these revision petitions we are not concerned with the merits of the claim put forward by the archakas but are mainly concerned with the objections regarding the maintainability of the petitions. The finding of the learned District Judge on the question of title was not canvassed before us, and therefore it is not necessary to deal with it. If the petitions are otherwise maintainable, the trustees would be entitled to recover possession of the property, as the finding of the learned District Judge on the question of title to the property stands unchallenged.

The amended section 78 requires, in case where the application is for possession of property, a certificate by the Board in such manner as may be prescribed. By the time these applications were disposed of, the Provincial Government under their rule-making power conferred upon them under section 71 did not prescribe the rules governing the issue of such certificates ; nor did they prescribe the form of the certificate. The trustees therefore obtained a certificate from the Board stating that the property in question belonged to the temple. One of the questions raised in the Court below and repeated before us was that this certificate does not fulfil the requirement of section 78 as amended and that therefore the order for delivery made by the learned District Judge was incompetent. On behalf of the archakas it was also contended that the claim put forward by the trustees regarding the title to the property could not be tried in a summary proceeding under section 78 of the Act and that such a dispute was entirely outside the purview of the section, particularly in view of the alterations made in that section by the amending Act X of 1946. In C. R. P. No. 1341 of 1946, a further point was also raised by the trustee that the application in that case was filed in the lower Court on 6th February, 1946, before the amendment came into force on 2nd April, 1946. It was therefore urged on behalf of the trustees that so far as this petition was concerned it was still governed by the procedure laid down by the unamended section and was not governed by the new section introduced by Act X of 1946. This contention will be dealt with separately.

Before dealing with the arguments urged before us on the three questions stated above, in order to better appreciate the contentions, it is necessary to set out the history of section 78. In the Act that was originally passed in 1926 (Act II of 1927) the section ran as follows :

> " Where a committee has appointed a person as non-hereditary trustee of a temple or where a Board or committee has appointed a person to discharge the functions of a hereditary trustee and such person is resisted in, or prevented from, obtaining possession of the math or temple or of the endowments connected therewith, the Court may, on application by the person so appointed and on production of the order of the Board or committee appointing him, order the delivery to any person the possession of such property as may be specified therein."

By the amending Act of 1930 (Madras Act IV of 1930) the first part of the section was amended so as to confer the benefit of the provisions of the section also upon non-hereditary trustees appointed by the Board by substituting the following :

"Where a person has been appointed as trustee of a math or temple or a religious endowment connected therewith or has been appointed to discharge the functions of a trustee by the committee or the Board, in accordance with the provisions of this Act and such person is resisted in. . . . ."

The rest of the section was not altered. This section, it may be seen, did not specify the persons against whom the application could be maintained except stating generally that it was available against persons resisting or preventing delivery of possession of the math, temple or religious endowment or the properties belonging to them, etc. The section also gave a discretion to the Court to direct or not direct delivery of possession. The applicant was required under this section to produce only the order of appointment.

The scope of the section was the subject-matter of conflicting decisions by single Judges of this Court on the question whether the Court had jurisdiction in an application under the section to enquire into and adjudicate upon the claims of third persons. In *Ramireddi* v. *Sreeramulu*[1], Pandalai, J., was of opinion that the Court possessed such jurisdiction. In that case an application under section 78 was made by the non-hereditary trustees of the temple against certain lessees from the archakas of lands belonging to the temple. There was an arrangement between the archakas and the trustees regarding the remuneration for the service of the archakas, and the archakas under that arrangement which was reduced to writing consented to the temple taking possession of the properties from the lessees. The lessees resisted the application on the ground that the Court had no jurisdiction to decide the question whether the property belonged to the temple or to the archakas. The District Judge while referring to the notes on the clauses of the Bill which ultimately became the Act thought that the intention of the Legislature in enacting the section was to direct delivery of possession only in cases where the property was admitted to be the property of the temple, and that the Court had no jurisdiction to adjudicate upon the claims of third parties holding adversely to the temple or the trust. This was pointed out by the learned Judge in revision as erroneous, as it was not permissible in interpreting the section to refer to the objects and reasons, and that the language of the section alone should be considered. As the section did not confine the application against ex-trustees, or temple servants or other refractory persons connected with the administration of the temple who resisted delivery of possession, the learned Judge was of opinion that there was no room to restrict its operation to any particular class of persons or claims. If the Legislature intended to so confine it, the learned Judge pointed out, that the words in the section should have been

"from any person who is not holding the same under any title or claim adversely to the institution."

There was no such language, and as the Act did not limit its operation as did the English Charitable Trusts Act of 1853 by section 41 there was no room to accept the contention that a dispute between a temple and a third party *bona fide* claiming to be in possession of the property was not within the purview of that section. He however dismissed the petition ultimately on the ground that as the learned District Judge refused to exercise the discretion vested in him even if he had power to go into the question of title, there was no ground for interfering with such an order of the learned District Judge under section 115, Civil Procedure Code.

Shortly thereafter Ramesam, J., had to consider the same question in *Subramaniam* v. *Subbayi*[2]. The learned Judge differed from the view of Pandalai, J., and according to him, section 78 was intended to apply only to admitted endowments and it was intended by that section that the District Court should enquire into questions of title. He however did not rest his decision on this sole ground but also on the ground that the Court was within its jurisdiction in refusing to go into the question of title in the exercise of its discretion and that therefore the order of the District Judge could not be interfered with in revision. Patanjali Sastri, J., followed the view of Ramesam, J., in C. R. P. No. 1004 of 1937 (52 L.W. 7, short notes). In *Yedukondalu* v. *Suryanarayana Rao*[3], Horwill, J., preferred to follow the opinion

1. A.I.R. 1933 Mad. 120.
2. (1933) M.W.N. 934.
3. (1943) 1 M.L.J. 403.

of Pandalai, J., as against the opinion of Ramesam and Patanjali Sastri, JJ., in the cases above referred to. According to the learned Judge, if a Court is empowered to hand over temple property to the trustees it must be deemed to have also the power to decide whether the property is temple property. His view therefore is, if once the jurisdiction to deliver was conferred upon the Court, as an incident to that jurisdiction and as ancillary to it, it should possess also the power to go into the question whether the property of which delivery was sought for was or was not the property of the temple. Happell, J., in *Kinnayakka* v. *Naranappayya*[1] stated as his opinion that an application for delivery under section 78 was in the nature of an application for execution, and therefore it was not open to a person who was a party to it to question the order of appointment of the trustee who made the application. With respect to the learned Judge, it is difficult to see in what sense an application under section 78 is in the nature of an application for execution. Which is the decree that is sought to be executed in such a proceeding? If there was a prior order of the Board between the parties holding that the property belonged to the temple or the trust and that order was sought to be enforced under section 78 it may with considerable force be contended that the application under section 78 really purports to execute or enforce an order passed by the Board. See for example the decision in *Baijnath Sahai* v. *Ramgut Singh*[2], where a certificate issued by the Collector specifying the sum of arrears of revenue due and the person from whom it was due was treated by reason of the language of section 7 of the Bengal Act VII of 1880 (Public Demands Recovery Act) as having the effect of a decree and that proceedings in pursuance thereof were in the nature of execution proceedings.

In this state of the law the Legislature amended section 78 in important respects. The application is now confined to relief against a trustee, office-holder, or a servant of a math, temple or specific endowment who has been dismissed or suspended or is otherwise not entitled to be in possession, meaning thereby disqualified to hold or continue to be in possession. Section 54 of the Act sets out the grounds of disqualification which disentitle a non-hereditary trustee to hold the office. Possession can also be claimed against persons claiming or deriving title from such a trustee, office-holder or servant. This restriction, it may be noted, meets the argument of Pandalai, J., in *Ramireddi* v. *Sreeramulu*[3] and narrows down the scope of the section. The claim of a person in possession in good faith, on his own account or on account of a third person who was not such a trustee, office-holder, or servant is excluded from the ambit of the section. The claims therefore of third persons claiming *bona fide* to be in possession of the property claimed as belonging to the trust cannot be now enquired into in an application under section 78. The discretion vested in the Court under the old section to make or not to make an order for delivery is taken away, and the Court is bound to make an order for delivery if the conditions of the section are satisfied. The word "shall" was substituted for "may." This is a very important change. In addition to the production of the order of appointment, the trustee if he claims possession of the property is also bound to produce a certificate by the Board in such manner as may be prescribed setting forth that the property in question belongs to the math, temple or specific endowment concerned and of which delivery is sought for in the application.

These important alterations lead to the inference that the intention of the Legislature in enacting the section is to confine it only to admitted trust properties as held by Ramesam, J., in the case referred to. The dismissed or suspended trustee or trustee disqualified under section 54 would generally be the person who either prepared the register contemplated by section 38 of the Act in which the property of the temple or math was specified or must at least be a person who was a party to the annual verification of the register under section 39. The Board in issuing the certificate can only act on the information available with it, namely, the

1. (1946) 2 M.L.J. 111.
2. (1896) L.R. 23 I.A. 45 : I.L.R. 23 Cal. 775 (P.C.).
3. A.I.R. 1933 Mad. 120.

register maintained and brought up to date from time to time under sections 38 and 39. Under the amended section 57, the Board now is also given power to determine the properties of the temple in case where a scheme is framed. The rights of third parties are however saved under the proviso to section 57, clause 3 (*a*). A similar provision was also enacted in the case of Maths in section 63. A trustee or officer or servant obtains possession of the property when he assumes office from the previous trustee, and he would therefore be precluded from disputing the title of the trust to the property. There may be cases where though the trustees, etc., are not persons who entered into possession for the first time were at least persons who admitted or acquiesced in treating the property in their possession as property which they were holding on behalf of and for the benefit of the trust. The requirement regarding the certificate of property is intended to furnish to the Court proof that such properties are admitted trust properties. From this the inference is irresistible that the section as amended is confined only to properties in respect of which there could possibly be no dispute regarding title and is intended to provide a summary procedure to recover back possession of the property from a person who obtained possession on behalf of the trust and was holding it as such and who was refractory enough in not delivering possession to the lawful trustee entitled to obtain and hold it. The claims of third persons are expressly excluded, which is also an indication in support of this conclusion. The section therefore is restricted both as regards the persons and as regards the properties. The fact that no appeal is provided for against orders under this section is also a further indication that disputed questions of title should not be tried in an application under the section.

The archakas in this case have been in possession of these properties for over a century, and they have always been contending that the property belonged to them and not to the deity, though they were bound to render certain services to the temple. The determination of this question mostly depends upon documentary evidence and the interpretation of grants or the inam proceedings relating to the property. The archakas cannot be said to be persons who either admitted the property to be trust property or at any rate admitted to be in possession of those properties holding on behalf of and for the benefit of the trust. For these reasons the claim put forward by the archakas, in our opinion, cannot be disposed of in these applications and the order of the learned District Judge in these petitions deciding that question is without jurisdiction and has to be set aside.

The applications under section 78 also did not satisfy the requirement of that section regarding the production of the certificate by the Board in the manner as may be prescribed setting forth that the property in question belonged to the math or the temple as the case may be. The word "prescribed" is defined in section 9 (10) as meaning "prescribed by the Provincial Government by rules made under this Act." The rule-making power of the Provincial Government is contained in section 71. By the date of the presentation of this application in the lower Court the Government did not frame rules and did not prescribe the form of the certificate to be issued by the Board. It was only on the 28th June, 1948, that they prescribed the form of the certificate under section 78 by G. O. M. S. No. 393, Firka Development, 28th June, 1948, published in the *Fort St. George Gazette*, dated 13th July, 1948. On the dates therefore of filing the applications and of passing the orders for delivery the form of the certificate was not prescribed by the Provincial Government. The Board therefore issued a certificate in a form prescribed by themselves, and it was contended on behalf of the trustees that this was a sufficient compliance with the procedure laid down by the section. The Board has no power of issuing a certificate by itself either under this section or any other provision of the Act. The power is to issue a certificate in the manner as may be prescribed and not the power to issue a certificate, the form of which may or may not be prescribed by the Government. The non-exercise of the power of prescribing the form by the Provincial Government would not confer such power upon the Board as was contended on behalf of the respondents. The Board has

no rule-making power and cannot prescribe the form. No hardship is caused by the delay on the part of the Provincial Government in framing the rules, as it is open to the trustees to recover possession by suit instead of an application under section 78.

For the position that if the Government delayed in prescribing the form, the Board acquired that power, reliance was placed upon the decision of this Court in *M. & S. M. Railway Co., Ltd.* v. *Municipal Council, Bezwada*[1] affirmed by the Privy Council in *M. & S. M. Railway Co., Ltd.* v. *Municipal Council, Bezwada*[2]. From the facts of that decision it would be noticed that the municipality had power to levy the property tax under sections 81 (3) and 82 (2) of the Madras District Municipalities Act. The proviso to section 81 (3) laid down :

> "Provided that such percentages or rates shall not exceed the maxima, if any, fixed by the local Government and that the capital value of such lands shall be fixed in such manner as may be prescribed."

The local Government in that case did not frame rules for determining the capital value of lands. The municipality therefore arrived at the capital value in a manner which suited them and levied the assessment. It was held that the fact that the Government did not frame rules prescribing the manner of arriving at the capital value did not preclude or prevent the municipality from assessing property tax on the capital value basis arrived at by it. Dealing with this point at page 921 in *M. & S. M. Railway Co., Ltd.* v. *Municipal Council, Bezwada*[1], Somayya, J., observes:

> "Even otherwise, the omission of the rule-making authority to frame rules cannot take away the right of the municipal council to levy tax at the rate mentioned in the notification issued under clause 3 (of section 81). If, for instance, the local Government refrained from prescribing the manner in which the value of such lands should be determined, it cannot, we think, be said that the municipal council has no power at all to levy the tax at a percentage of the capital value merely because the method of determining the capital value has not been prescribed by the local Government. If the local Governmen does not prescribe it, then the municipal authority is free in our opinion to fix it in any manner itchooses. We have not been referred to any decision on this point except that of the Judicial Committee in *Wigg* v. *Attorney-General for the Irish Free State*[3] but it is doubtful how far that decision applies to the circumstances of this case. We therefore do not propose to rely upon that decision. . . . We think it is not correct to say that the omission by the local Government to prescribe the manner in which the capital value is to be determined deprives the municipal council of the power of levying the tax on the capital value basis."

That view was approved by the Privy Council. Of course, in the present case if the Board had otherwise the power to issue a certificate like the power of the municipality in that case to levy the tax, the fact that the Government delayed in prescribing the form or failed to prescribe the form at all would not have affected the power of the Board to issue a certificate. As the power does not exist apart from the power given under section 78 which is confined to the power to issue a certificate in the manner as may be prescribed, we think the certificate issued by the Board is not sufficient compliance with the requirement of the section.

It is urged that the provision with reference to the production of the certificate is only directory and not mandatory. We do not agree with this contention either, as the section requires that the order for delivery shall be made only on an application by the person and on the production of the order of appointment and of a certificate and not otherwise. If the language of the section is clear and the production of the certificate is essential, it is not open to us to condone it, however formal the requirement may be. We do not however intend to say that the certificate was merely a formal requirement as, in our opinion, it is intended to furnish proof of the properties which admittedly belonged to the trust, and Courts have always insisted upon the fulfilment of the conditions laid down by a section, however formal those conditions may be. In Maxwell's Interpretation of Statutes, 9th edition, at page 9, instances which are extreme in nature are cited. The learned author states :

1. (1941) 2 M.L.J. 189 : I.L.R. (1941) Mad. 897.
2. (1944) 2 M.L.J. 25 : L.R. 71 I.A. 113 : I.L.R. (1945) Mad. 1 (P.C.).
3. (1927) A.C. 674.

"If an Act provides that orders for committal must be made in 'open court', an order made, not in the Court, but in another part of the building which is also open to the public, will be invalid. The Bills of Sale Act, 1878 (c. 31), requiring an affidavit of the due attestation as well as of the execution of the deed, the omission in the former to mention the attestation was held fatal, although the attestation clause of the deed asserted it. It would not be open to the interpreter, in such cases, to shut his eyes to the formalities required, or because he deemed them unimportant, or because a hardship or failure of justice might result, in the particular case before him, from a neglect of any of them."

In these circumstances we think the learned District Judge was not justified in ordering delivery merely on the production of a certificate issued in a form prescribed by the Board.

In C. R. P. No. 1341 of 1946, a contention was raised that as the application was filed before the amendment of the section, and as the amendment came into force during the pendency of the application it was governed only by section 78 as it stood before the amendment and not by the amended section. The accepted canon of interpretation of statutes is that the operation of a provision in an Act is *prospective* and not *retrospective*, unless it is expressly so stated or is necessarily intended. An exception to this rule are the provisions relating to the procedure which are always treated as retrospective and were applied to actions pending as well as future. A right of appeal however is not a matter of procedure and is a substantive right. Though a person has no vested right in a procedure his right of appeal is always treated as a vested right. See *Colonial Sugar Refining Co.* v. *Irving*[1], Maxwell's latest edition at page 232 and Craies on Statute Law, pages 337 and 338. The learned counsel for the respondents contended that a vested right in the nature of a right of appeal was affected by the alterations in section 78, and that he should not be deprived of the benefit of the old section 78. Reliance was placed by him in support of his contention on two decisions in *Vasudeva Samiar*, In re[2] and *Nagendranath* v. *Monimohan Singh*[3]. In both these cases the right in dispute was a right of appeal, and it was held that after the suit was instituted any subsequent enactment could not alter or affect the right of appeal acquired under the existing law. That, however, is not the question before us. As part of the procedure, besides the order of appointment the section now requires that a certificate from the Board also should be produced showing the property of which possession is claimed and the requirement of the section is more in the nature of procedure rather than of a right. In *Kimbray* v. *Draper*[4], the Court had to consider the question whether the provision under section 10 of the County Courts Act, 1867, requiring the plaintiff to give security for costs in an action for tort was retrospective or not. The provision, it may be noted, did not take away any existing right but only added a further requirement regarding the procedure in insisting upon security for costs. It was held that it was merely a matter of procedure and that it applied also to an action which was then pending and also to future actions. There are also other instances which have been cited in Maxwell's Interpretation of Statutes at pages 233 and 234. The decision in *Girdharilal Son & Co.* v. *Kappini Gowder*[5], contains a full discussion of the relevant authorities dealing with this matter. There is a distinction however between a remedy in the sense of action or right of action and rules of procedure incidental to the working of that remedy. An exception is recognised even to the rule that rules of procedure are retrospective when the effect of applying the rule would be to destroy any vested right and retrospective operation is not given in such case unless the Statute expressly stated so. (See *Ramakrishna Chetti* v. *Subbaraya Iyer*[6].) In the present case the form of certificate was not prescribed by the Provincial Government during all the period when the petition was pending in the lower Court. It was, therefore, impossible for the petitioners to comply with the requirement of producing the certificate as required by the amended section 78. If the amended section should apply the result would be that the existing right to

1. (1905) A.C. 369.
2. (1928) 56 M.L.J. 369 : I.L.R. 52 Mad. 361.
3. A.I.R. 1931 Cal. 100.
4. (1868) 3 Q.B. 160.
5. (1938) 2 M.L.J. 44.
6. (1912) 24 M.L.J. 54 : I.L.R. 38 Mad. 101.

recover possession of the properties under section 78 as it stood before the amendment would be completely taken away and destroyed. In these circumstances the rule in *Ramakrishna Chetti's case*[1], should in our opinion apply. We hold accordingly that the unamended section 78 only would be applicable and in that view, C. R. P. No. 1341 of 1946 should be dismissed with costs. The other revision petitions are allowed. The orders of the learned Judge in these cases are set aside and the petitions under section 78 are dismissed with costs here and in the Court below.

K.S. *C. R. P. No.* 1341 *of* 1946 *dismissed, the other petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

Cherukur China Venkatasubba Naidu and others .. *Petitioners**

v.

Kandadi Sundara Varadacharlu and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 1, *rule* 1 *and section* 115—*Issues common to all plaintiffs—Joining in one suit—Permissibility—Order holding suit bad for misjoinder—Revision—Competency.*

Where in a suit by 30 plaintiffs to have their occupancy rights declared to several items of property detailed in one of the plaint schedules, it is contended for the defence that all the plaintiffs could not be said to be interested in all the property in that schedule and that some of the plaintiffs were not in actual possession of the lands claimed and there is also a dispute as to the actual extent in the case of some plaintiffs and that as such the suit was bad for multifariousness and misjoinder of parties,

Held, in the circumstances, as the main issues which the plaint and written statements raised were common to all the plaintiffs, the plaintiffs should not be referred to separate suits, except in the case of those between whom and the defendants different issues arise.

Held further, that the High Court could in the exercise of its revisional jurisdiction interfere when the lower Court has wrongly held a suit as bad for misjoinder of causes of action.

Arunachalam Chettiar v. *Arunachalam Chettiar*, (1922) 43 M.L.J. 218, followed.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff, Nellore, dated 31st January, 1947, in O. S. No. 31 of 1946.

Kuppuswami for *K. Umamaheswaram* for Petitioners.

V. Vedantachari and *T. Rangaswami Aiyangar* for Respondents.

The Court made the following

ORDER.—The petitioners are 30 plaintiffs who sued to have their occupancy rights declared to several items of property detailed in plaint schedule A. After issues were framed, the District Munsiff in a considered order found that the plaint was bad for multifariousness and misjoinder of parties so far as plaint A schedule lands were concerned. The petitioners all sought the same relief as regards B schedule lands holding that they were lands enjoyed in common. The learned District Munsiff found that the suit was not bad as regards B schedule either for multifariousness or for misjoinder.

The plaint is interesting and has been keenly argued before me. Mr. Kuppuswami for the petitioners contends that the pleadings raise in question a common issue, namely, whether this shrotriam estate comes within the definition of section 3 (2) of the Madras Estates Land Act, and urges that if that is so, section 6 of the Estates Land Act will automatically confer occupancy rights on the plaintiffs. He also urges that in the plaint there is an allegation of conspiracy amongst the inamdars who have been impleaded as defendants 1 to 7 to defeat the occupancy rights of the petitioners by collusive action in the shape of leases to defendants 9 to 13 to the prejudice of the petitioners' rights.

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1. (1912) 24 M.L.J. 54 : I.L.R. 38 Mad. 101.

* C. R. P. No. 344 of 1947. 7th October, 1948.

The main consideration which weighed with the District Munsif was that all the plaintiffs could not be said to be interested in all the plaint A schedule lands. It is urged that there will be embarrassment in the trial of the suit, particularly as in the written statements there are contentions that some of the plaintiffs are not in actual possession of the lands that they claimed. The main issues framed however in the suit appear to me to be common to all the plaintiffs, and none of them really bring out any particular differences between an individual plaintiff and the shrotriamdars in general. The issues framed were:

(1) Whether the plaint A schedule lands are ryoti lands within the meaning of the Madras Estates Land Act?

(2) Whether the plaintiffs have got occupancy rights therein?

(3) Whether the plaintiffs are estopped from claiming the occupancy rights?

(4) Whether this Court has pecuniary jurisdiction to try this suit?

(5) Whether the plaintiffs are entitled to customary rights to graze cattle on the B schedule lands?

(6) Whether the plaintiffs are entitled to the injunction prayed for?

(7) Whether the plaintiffs can ask for injunction without claiming possession of the B schedule lands; and

(8) Whether the suit is bad for multifariousness and is liable to be dismissed on that ground?

The plaint was filed under the provisions of Order 1, rule 1, which permits all persons to join in a suit as plaintiffs:

> "in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally, or in the alternative, where, if such persons brought separate suits, any common questions of law or fact would arise."

There can be no doubt that the main issues which this plaint and the written statements raise are common to all the plaintiffs. Mr. Kuppuswami has referred me to an English decision reported in *Payne* v. *British Time Recorder Co.*[1], where Scrutton, L.J., made the following observations:

> "It is impossible to lay down any rule as to how the discretion of the Court ought to be exercised. Broadly speaking, where claims by or against different parties involve or may involve a common question of law or fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matters should be disposed of at the same time the Court will allow the joinder of plaintiffs or defendants, subject to its discretion as to how the action should be tried."

Each case has therefore to be viewed on its separate merits, and there is really no hard and fast rule to be laid down in this connection. The difficulty I feel is that the learned District Munsiff after framing issues in the suit felt that this was a fit case in which the plaintiffs should be put to an election and that only the plaintiffs who were jointly interested in particular items of A schedule property should be permitted to prosecute this suit. I have been taken through the pleadings, and I do not think that the District Munsiff has exercised a proper discretion in practically referring these 30 plaintiffs to 30 different suits in this case where outstanding common issues arise for determination.

Mr. Vedantachari has contended for the respondents that this Court in revision under section 115 should not interfere with the discretion of the trial Court in a matter of this kind. The Madras High Court has repeatedly held (*see* for instance *Arunachalam Chettiar* v. *Arunachalam Chettiar*[2]), that it will in the exercise of revisional jurisdiction interfere when the lower Court has wrongly held a suit as bad for misjoinder of causes of action and directed a plaintiff to elect the cause of action which he would proceed with in the suit. It is quite likely that as regards a particular plaintiff there may be a serious contest that he is not in actual possession of the land he claims as an occupancy ryot. As I have said, no issue has been

1. (1921) 2 K.B. 1.
2. (1922) 43 M.L.J. 218.

raised as between particular plaintiffs and the shrotriamdars he has impleaded. In such instances, the District Munsiff would be quite right in referring such a plaintiff to a separate suit before granting him the declaration he seeks of his right, title and interest in particular portions of the plaint A schedule property. In the case of plaintiffs whose possession of the extents they claimed in the plaint A schedule property is not denied, there can, so far as I can see, be no legal impediment and their suits being tried in common within the scope of Order 1, rule 8, Civil Procedure Code. Mr. Vedantachari has also expressed some concern over some cases in which the actual extents claimed by particular plaintiffs in the plaint A schedule property are disputed. In such cases too the District Munsiff would be, I think, acting quite regularly if he merely referred such cases for determination by a separate suit after finding on the main common issues raised in the present suit which can and should be tried together to avoid multiplicity of suits.

As regards costs, I think it is a fit case in which the parties should bear their own.

K.C. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

Palaniyandi Mudaliar and others .. *Appellants**

v.

Palanivel Mudali and another .. *Respondents.*

Provincial Insolvency Act (V of 1920), sections 78 (2), Proviso and 37—Debts to which the proviso to section 78 will apply—Vesting in Official Receiver under section 37—If continues the insolvency proceedings—Exclusion of time between date of adjudication and annulment—When allowed—Proof of debt after annulment when property was vested in Official Receiver under section 37—Proof of debts before him—Saving of time.

The proviso to section 78 of the Provincial Insolvency Act refers only to the debts proved during the pendency of the insolvency proceedings, *i.e.*, from the date of the order of adjudication to the date of the order of annulment and the Act contemplates proof of debts only during such period.

The insolvency proceedings come to an end with the annulment and the subsequent vesting in the Official Receiver under section 37 of the Act has not the effect of continuing the insolvency proceedings.

A final decree was passed against a debtor on 19th December, 1929. The debtor was adjudged insolvent on 30th March, 1930. The adjudication was annulled under section 43 of the Provincial Insolvency Act on 7th December, 1942, and subsequently on 26th March, 1943, an affidavit was filed on behalf of *X* the legal representative of the decree-holder in the Subordinate Judge's Court alleging in the application for bringing *X* on record as the legal representative that an amount of Rs. 1,600 was due to him by the insolvent under the decree of 1927. In an appeal by *X* against the order of annulment of adjudication of the debtor, the order of annulment was confirmed but the property of the debtor was directed to vest in the Official Receiver for one year from 9th December, 1942, under section 37 of the Provincial Insolvency Act. On 11th October, 1943, *X* for the first time filed an affidavit before the Official Receiver proving his claim and the Official Receiver admitted the same on the 25th November, 1943. On 16th April, 1943, *X* filed an execution petition more than 13 years after the final decree in favour of his father. The petition was dismissed as not pressed on 4th October, 1943. Then another execution petition was filed on 6th December, 1944. On a question of limitation,

Held, the affidavit filed on behalf of *X* on 26th March, 1943, cannot be considered to be proof of the debt as it was filed after the date of annulment. The vesting under section 37 not having the effect of making the insolvency proceedings pending during such period, *X's* debt cannot be said to be proved before the annulment. The appointee under section 37 had no right to accept proof of the debt and as there was no proof of *X's* debt during pendency of the insolvency proceedings, the proviso to section 78 of the Provincial Insolvency Act will not apply to save execution of the decree.

Appeal against the order of the District Court, North Arcot, at Vellore, dated 9th March, 1946, and made in A. S. No. 295 of 1945 preferred against the order of the Court of the District Munsiff, Tiruvannamalai, dated 21st April, 1945, in R. E. P. No. 636 of 1944, in O. S. No. 875 of 1926.

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* A. A. A. O. No. 246 of 1946. 3rd December, 1948.

M. S. Venkatarama Aiyar for Appellants.

Respondents not represented.

The Court delivered the following

JUDGMENT.—The question in this civil miscellaneous second appeal is one of limitation and it turns on the construction of section 78 of the Provincial Insolvency Act.

The appellants are the legal representatives of the decree-holder in O. S. No. 875 of 1926 on the file of the District Munsiff's Court, Tiruvannamalai. The final decree in the suit was passed on 19th December, 1929. The judgment-debtor was adjudged insolvent on 30th March, 1930. The adjudication was annulled under section 43 of the Provincial Insolvency Act by an order of the Subordinate Judge of Vellore, dated 7th December, 1942. Subsequent to the annulment on 26th March, 1943, an affidavit was filed by a clerk of the appellants in the Court of the Subordinate Judge of Vellore alleging that the appellants' father died on 8th August, 1941, and that an amount of Rs. 1,600 was due to him by the insolvent under a decree in O. S. No. 875 of 1925, Tiruvannamalai District Munsiff's Court. The appellants preferred an appeal against the order of annulment to the District Court, North Arcot and the learned District Judge by an order, dated 18th August, 1943, confirmed the order of annulment, but he directed the vesting of the properties of the insolvent in the Official Receiver, North Arcot, for one year from 9th December, 1942, under section 37 of the Provincial Insolvency Act. On 11th October, 1943, the appellants for the first time filed an affidavit before the Official Receiver proving their claim and by an order, dated 25th November, 1943, the Official Receiver admitted their claim. The legal representatives of the decree-holder filed E. P. No. 469 of 1943 on 16th April, 1943, more than thirteen years after the final decree; but that execution petition was dismissed on 4th October, 1943, as not pressed. The present execution application was filed on 6th December, 1944.

The application, dated 16th April, 1943, is clearly barred by time unless the period between the date of adjudication and the date of annulment is excluded. Both the courts held that in the circumstances of the case, the said period cannot be excluded in computing the period of limitation.

The learned counsel for the appellants contended that they are entitled to such exclusion under section 78 (2) of the Provincial Insolvency Act whether they proved their debt before annulment of the adjudication or after the annulment. The relevant provisions of section 78 of the Provincial Insolvency Act read as follows:

"(2) Where an order of adjudication has been annulled under this Act, in computing the period of limitation prescribed for any suit or application for the execution of a decree (other than a suit or application in respect of which the leave of the Court was obtained under sub-section (2) of section 28) which might have been brought or made but for the making of an order of adjudication under this Act, the period from the date of the order of adjudication to the date of the order of annulment shall be excluded:

Provided that nothing in this section shall apply to a suit or application in respect of a debt provable but not proved under this Act."

It will be seen that the decree-holder cannot rely on this section unless his claim is in regard to a debt provable but not proved under the Act. Section 33 of the Provincial Insolvency Act prescribes the procedure for proof of debts. Under that section when an order of adjudication has been made under the Act, all persons alleging themselves to be creditors of the insolvent in respect of debts provable under the Act shall tender proof of their respective debts by producing evidence of the amount and particulars thereof, and the Court shall by order determine the persons who have proved themselves to be creditors of the insolvent in respect of such debts, and the amount of such debts, respectively, and shall frame a schedule of such persons and debts. Section 34 gives the kind of debts provable under the Act. Under clause (2) of the said section all debts and liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged

an insolvent or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication, shall be deemed to be debts provable under this Act. Section 49 prescribes the mode of proof. It reads :

> " (1) A debt may be proved under this Act by delivering, or sending by post in a registered letter, to the Court an affidavit verifying the debt."

It has been held that section 49 does not lay down the only method of proof of debt, but it only prescribes one of the modes in which a debt may be proved. A combined reading of these provisions makes it abundantly clear that these sections contemplate the proof of debts only between the date of adjudication and the date of the order of annulment. The scope of these provisions is limited to the pendency of the insolvency proceedings and the object is to facilitate the ascertainment of the distribution pursuant to the provisions of this Act. During the period, *i.e.*, between the date of adjudication and the date of the annulment, the property of the insolvent vests in the Official Receiver for the benefit of the creditors and all personal remedies against the bankrupt are also thereafter stayed except as provided by section 28 (2). A very clear statement of the mutual rights of the creditors and the insolvent during that period is contained in the following passage in the judgment of Bacon, C.J., in Ex parte *Lancaster Banking Corporation* : In re *Westby* :

> " When a bankruptcy ensues there is an end to the operation of that statute, with reference to debtor and creditor. The debtor's rights are established and the creditor's rights are established in the bankruptcy and the statute of Limitation has no application at all to such a case, or to the principles by which it is governed."

By enacting section 78 of the Provincial Insolvency Act the Legislature recognised and adopted that principle. As the creditor's rights to proceed in the ordinary course are suspended, the period during which the rights are so suspended is excluded if the creditor adopted the relief given to him under the Act during that period. It is therefore clear that the proviso to section 78 refers only to the debts proved during the pendency of the Insolvency proceedings, *i.e.*, from the date of the order of adjudication to the date of the order of annulment.

If so, the question to be considered is whether the appellants proved their debt before the annulment of the adjudication. Mr. Venkatarama Aiyar relied on the affidavit, Ex. P-7, filed on behalf of his clients in the Court of the Subordinate Judge on 26th March, 1943, and contended that by filing the said affidavit, the appellants proved their debt within the meaning of the Act. In that affidavit, the clerk of the appellants states that the amount due by the insolvent to the appellants' father was Rs. 1,600 under the decree in O.S. No. 875 of 1926, Tiruvannamalai District Munsiff's Court and the said amount was shown in the insolvent's schedule of debts. It is stated, although there is no evidence, that the Court accepted that affidavit and recognised the appellants as the legal representatives of the deceased decree-holder. It also appears that the legal representatives preferred an appeal to the District Court which, as aforesaid, was dismissed by the District Judge with a modification vesting the properties in the Official Receiver for one year under section 37 of the Act. It is not necessary to go into the question whether this affidavit constitutes a valid proof within the meaning of the Provincial Insolvency Act. Section 49 provides the mode of proof. There is a conflict of decisions on the interpretation of that section and the Madras High Court held in *Manicka Nainar* v. *Murugesa Goundan*[2], that the operation of section 78 (2) of the Provincial Insolvency Act is not confined to the narrow limits of section 49 of the Act, but can be applied where there exists on the record of the insolvency Court sufficient evidence to establish the debt due which the insolvency Court is bound to accept. Whether the allegations in the affidavit are sufficient evidence to establish the debt due which the insolvency Court is bound to accept it is not

1. (1878) 10 Ch.D. 776.
2. (1947) 1 M.L.J. 50 : I.L.R. (1947) Mad. 665

necessary to decide in this case as, in my view, this affidavit was filed after the annulment of adjudication and, therefore, could not be proof within the meaning of the Act.

Mr. Venkatarama Aiyar argued that as the order annulling the adjudication had not become final and as an appeal was filed and disposed of only on 18th August, 1943, the said affidavit proving the debt must be deemed to have been filed only before the termination of the insolvency proceedings by annulment. This argument overlooks the obvious fact that the appellate Court confirmed the order of annulment and the only modification in it related to the vesting of the property in the Official Receiver under section 37. This affidavit having been filed after the order of annulment cannot be relied upon as proof of the debt before annulment.

It was next argued by Mr. Venkatarama Aiyar that the proof of the debt before the Official Receiver in whom the properties vested under section 37 of the Provincial Insolvency Act would also give him the benefit of section 78 (2). I have already stated, the proof of the debts under the Act is confined to the pendency of the insolvency proceedings. The scope of the vesting order after the annulment of adjudication under section 37 of the Provincial Insolvency Act was considered in the Full Bench decision in *Veerayya* v. *Srinivasa Rao*[1], King, J., who delivered the leading judgment has enunciated the legal position in clear terms in the following manner :

> "The fact that not only the Official Receiver but any other person may be appointed under section 37 is against the view that an order under section 37 continues the insolvency proceedings for all purposes. The person appointed under section 37 has no longer by the mere fact of his appointment the powers which a receiver has under the Act. He has only such powers as are necessarily implied by the vesting order which are, as we understood them, to carry out the directions of the Court, and those directions, as we have said, should, so far as the realisation and distribution of the debtor's property are concerned, be in accordance with the provisions of the Insolvency Act. To this extent then we would answer the first question in the affirmative."

It is therefore clear that the powers of the receiver or for the matter of that any other person in whom the properties are vested under section 37 are derived only from the express orders of the Court and they are intended only for a particular purpose, *viz.*, for the realisation and distribution of the debtor's property. The insolvency proceedings come to an end with the annulment and the subsequent vesting is only for a definite purpose, to avoid injustice, *inter se* the various creditors. The receiver's powers or those of any other person in whom the properties are vested are analogous to those of an ordinary receiver appointed in a suit. He would have no right to accept proofs of debts or pay any creditor whose debt has already become barred. If, as I have already stated, there was no proof of the debt during the pendency of the insolvency, the debt was clearly barred when the Official Receiver admitted the claim of the appellants.

I therefore agree with the conclusions of the lower Courts and dismiss the appeal.

V.S. *Appeal dismissed.*

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1. (1935) 69 M.L.J. 364 : I.L.R. 58 Mad. 908 (F.B.).

[THE FEDERAL COURT OF INDIA.]

(On appeal under section 205 of the Government of India Act, 1935, from the High Court of Judicature at Lahore.)

PRESENT: H. J. KANIA, *Chief Justice*, S. FAZL ALI, M. PATANJALI SASTRI, AND B. K. MUKHERJEA, JJ.

Ralla Ram .. *Appellant**

v.

The Province of East Punjab .. *Respondent.*

Punjab Urban Immovable Property Tax Act (*XVII of* 1940) *and Government of India Act* (1935), *sections* 99, 100, 107 (1) *and Sch. VII, List I, item* 54 ; *List II, item* 42—*The Punjab Act if beyond the powers of the Provincial Legislature—Tests to be applied for determination of question.*

The question was whether the Punjab Urban Immovable Property Tax Act passed by the Provincial Legislature inasmuch as the tax imposed by it is on the owner and so does not fall under item 42 of List II of Schedule VII of the Constitutional Act and is really a tax on income which according to item 54 in List I of the same schedule is a federal subject.

Held: There are no words in item 42 of List II to suggest that the tax is to be paid only by the occupier and not the owner and it is wrong to read into that item words which do not occur and thereby limit the scope and meaning of the expressions used. The mere fact that "hearths and windows" occur along with the words " lands and buildings" in item 42 does not indicate that they must all be necessarily read together and that the tax on land and buildings must be of the same nature and incidence as the tax on hearth and windows. It is quite conceivable that the tax on buildings may be levied on the owner whereas the tax on hearth and windows may be levied on the occupiers and *vice versa*. The words of the item are clear and they entitle a Provincial Legislature to impose taxes on lands and buildings, hearths and windows without reference to who has to pay the taxes.

Though the basis of the tax under the impugned Act is the annual value of the property to be taxed it cannot be said that it becomes a tax on income merely because the Income-tax Act has adopted the annual value as the standard for determining the annual value. There are other factors to be taken into consideration and it is the essential nature of the tax charged and not the nature of the machinery which is to be looked at. Section 3 which is the charging section has to be looked into because the identification of the subject-matter of the tax is only to be found in that section and in clear terms it levies not a tax on income but a tax on buildings and lands. There is nothing in the impugned Act to show that there was any intention on the part of the Provincial Legislature to get at or tax the income of the owner from the buildings. In substance the impugned tax is not a tax on income and the extent of the alleged invasion by the Provincial Legislature into the field of the Federal Legislature is not so great in this case as to justify a view that in pith and substance the impugned tax is a tax on income.

The principle that should guide a Court when it has to deal with two apparently conflicting enactments are (1) that the Court must try to ascertain the pith and substance or the true nature and character of the conflicting provisions and (2) that, before an Act is declared *ultra vires* there should be an attempt to reconcile the two conflicting jurisdictions, and only if such a reconciliation should prove impossible, the impugned Act should be declared invalid.

Intervenor: The Province of Bombay.

Narotam Singh Bindra, Advocate, Federal Court, instructed by *Ranjit Singh Narula*, Agent, for Appellant.

Sardar Harnam Singh, Advocate-General of East Punjab (*Mr. Gurdev Singh*, Advocate, Federal Court with him) instructed by *Tarachand Brijmohanlal*, Agent, for Respondent.

P. A. Amin, Advocate-General of Bombay (*J. A. Shah*, Advocate, Federal Court with him) instructed by *P. A. Mehta*, Agent, for Intervenor.

The Judgment of the Court was delivered by

FAZL ALI, J.—The question to be determined in this appeal is whether the provisions of the Punjab Urban Immovable Property Tax Act (Act No. XVII of 1940), which will hereinafter be referred to as the Punjab Act, are beyond the powers of the Provincial Legislature which enacted it. The question arose under the following circumstances:

* Civil Appeal No. 1 of 1947. 4th November, 1948.

The appellant is the owner of a shop in the town of Amritsar. Under the Act to which reference has been made, he was called upon to pay a sum of Rs. 67-8-0 as property tax for the year 1943-44 in respect of the shop. At first, he denied his liability to pay the amount, but, subsequently, he paid it under protest, and thereafter instituted a suit in the Court of the Judge of Small Causes at Amritsar, claiming its refund on the ground that the Act which levied the property tax was *ultra vires* the Punjab Legislature. This suit was dismissed, and thereupon, he made an application for revision to the Lahore High Court, but the application also was dismissed. While dismissing the application, however, the High Court granted a certificate under section 205 (1) of the Government of India Act, 1935, and he has accordingly preferred an appeal in this Court.

At the hearing of the appeal, the Government of East Punjab (the present respondent in the appeal) was represented by the Advocate-General of East Punjab, and the Advocate-General of Bombay was also heard, on the ground that the Government of Bombay was interested in the constitutional point involved in the appeal.

In order to appreciate the grounds on which the Punjab Act is called in question, a brief reference to some of the provisions of the Government of India Act, 1935, seems necessary.

Under section 316 of the Government of India Act, 1935, the powers conferred on the Federal Legislature are exercisable by the Indian Legislature. Section 99 (1) of the Government of India Act gives the power to the Federal Legislature to make laws for the whole or any part of British India or any Federated State, and to the Provincial Legislature to make laws for the Province or for any part thereof. This section is followed by section 100, which runs as follows :

" (1) Notwithstanding anything in the two next succeeding sub-sections, the Federal Legislature has, and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule to this Act (hereinafter called the " Federal Legislative List.").

(2) Notwithstanding anything in the next succeeding sub-section, the Federal Legislature, and subject to the preceding sub-section, a Provincial Legislature also, have power to make laws with respect to any of the matters enumerated in List III in the said Schedule (hereinafter called the " Concurrent Legislative List").

(3) Subject to the two preceding sub-sections, the Provincial Legislature has, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II in the said Schedule (hereinafter called the " Provincial Legislative List").

(4) The Federal Legislature has power to make laws with respect to matters enumerated in the Provincial Legislative List except for a Province or any part thereof."

Lastly, section 107 (1) provides that :

" If any provision of a Provincial law is repugnant to any provision of a Federal law which the Federal Legislature is competent to enact or to any provision of an existing Indian law with respect to any of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of this section, the Federal law, whether passed before or after the Provincial law, or, as the case may be, the existing Indian law, shall prevail, and the Provincial law shall, to the extent of the repugnancy, be void."

The relevant items of Lists I and II to which reference may now be made are : item 54 of List 1 which is " Taxes on income other than agricultural income " and item 42 of List II which comprises " Taxes on lands and buildings, hearths and windows". It is obvious that while a Provincial Legislature is quite competent to levy the tax referred to in item 42 of List II, it cannot encroach on the subjects allotted to the Central Legislature within the ambit of item 54 or any other item in List I. It must also be conceded that if the subject-matter of a tax falls within item 54 of the Federal List and also under item 42 of the Provincial List, the power of the Indian Legislature must prevail to the exclusion of the power of the Provincial Legislature. As the impugned tax purports to be a tax on buildings, it falls *prima facie* under item 42 of List II, and, if on a proper examination of the matter it is found that in fact and in law it does so fall and does not fall under item 54 of List I, there can be no doubt that it was within the legislative competence

of the Punjab Legislature to levy such a tax. The appellant however contends that the tax does not properly fall within item 42 of List II, and he assails the Act imposing the tax on two grounds. Firstly, it is contended that if the expression "taxes on buildings" is construed in the light of British Legislative practice as also with reference to the context in which it occurs, it must be held to refer to some kind of occupation tax payable by the occupier of the building and not by the owner. On this line of reasoning, it is urged that the Punjab Legislature was not competent to levy the present tax which is a tax on the owner.

Secondly, it is urged that the impugned tax is in substance a tax on income and as such falls under item 54 of List I and not under item 42 of List II. To levy such a tax, it is contended, was beyond the power of the Provincial Legislature.

In support of the first contention, the learned Advocate for the appellant relied on the well-known observations of Lord Macmillan in *Croft* v. *Dunphy*[1], which run as follows :

> "When power is conferred to legislate on a particular topic it is important, in determining the scope of the power, to have regard to what is ordinarily treated as embraced within that topic in legislative practice and particularly in the legislative practice of the State which has conferred the power. Thus in considering what might be appropriately and legitimately enacted by the Dominion Parliament under its power to legislate in relation to 'bankruptcy and insolvency,' it was considered relevant to discuss the usual contents of bankruptcy statutes."

It was contended that in interpreting the words "tax on buildings," which occur in List II, regard should be had to the legislative practice prevailing in England; and further that since the taxes on buildings in England, or rates as they were called, were generally speaking in the nature of an occupation tax payable by the occupier, it could not have been contemplated by the British Parliament that the expression "tax on buildings" should be something other than an occupation tax and embrace a tax payable by the owner. This line of argument has its own inherent weakness, but it is further weakened by three important concessions which the learned Advocate for the appellant was obliged to make : (1) that even in England taxes on lands are generally payable by the owner, (2) that the Inhabited House Duty Act, on which reliance was placed, had been repealed many years before the enactment of the Government of India Act, and (3) that, on a reference to a large number of Provincial Acts which have been in force in different parts of the country for a long time prior to the enactment of the Government of India Act, it would appear that taxes on lands and buildings imposed properly upon the owners have been for very many years a well recognised form of taxation within many municipal areas in India.

In In re *the Central Provinces and Berar Act No. XIV of* 1938[2], where a question arose whether an Act of a Provincial Legislature levying a tax on retail sales of motor spirit and lubricants was *ultra vires* the Provincial Legislature, the tax being in the nature of a duty of excise within the meaning of entry 45 in List I of the Seventh Schedule to the Government of India Act, Sir Maurice Gwyer, C.J., observed :

> "Lastly, I am entitled to look at the manner in which Indian Legislation preceding the Constitution Act had been accustomed to provide for the collection of excise duties ; for Parliament must surely be presumed to have had Indian legislative practice in mind, and, unless the context otherwise requires, not to have conferred a legislative power intended to be interpreted in a sense not understood by those to whom the Act was to apply."

If therefore the legislative practice in India is to be taken into consideration, the appellant's argument could be met, by saying that the British Parliament might well have intended to enable the Provincial Governments to continue to impose taxes of the nature imposed in different parts of the country for many years past. It seems however unnecessary to pursue the matter further, because the point can, in our opinion, be disposed of on a surer ground. It appears to us

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1. (1933) A.C. 156 at 165. 18 (53) : 2 F.L.J. 6.
2. (1939) 1 M.L.J. (Supp.) 1 : (1939) F.C.R.

that when the words used in the Act are clear and unambiguous, and they are not unfamiliar or uncommon words or such words as may be aptly described as terms of art, it is unnecessary to travel beyond the Act for the purpose of construing them. Item 42 of List II deals with taxes on "lands and buildings, hearths and windows." There are no words in the Act to suggest that the tax is to be paid only by the occupier and not by the owner, and it seems to us to be wholly wrong to read into item 42 words which do not occur there and thereby to limit the scope and meaning of the expressions used. It is suggested that all the words used in item 42 should be read together, and that if they are so read it must follow that the tax on buildings should be of the same nature as the tax on hearths and windows, which, it is said, must be in the nature of a "consumption tax" payable by the occupier. This argument also appears to us to be based on unwarranted assumptions. The mere fact that the words "hearths and windows" occur along with the words "lands and buildings" in item 42, does not indicate that they must all be necessarily read together, and that the tax on lands and buildings must be of the same nature and incidence as the tax on hearths and windows. It is quite conceivable that the tax on buildings may be levied on the owner, whereas the tax on hearths and windows may be levied on the occupier and *vice versa.* The correct position has, in our opinion, been summed up very lucidly by the learned Chief Justice of the Lahore High Court in the following passage in his judgment :

"It may well have been the policy of the British Parliament to tax occupiers of lands and buildings, etc. and not the owners. In each of the Acts referred to by Mr. Narotam Singh the tax was in terms imposed upon the occupier. The fact that it was the policy of the British Parliament to tax occupiers cannot be used to construe the words appearing in item 42. It appears to me that if Parliament when enacting the Government of India Act intended Provincial Legislatures to tax occupiers only and not owners of lands and buildings, they would have said so. It would have been the obvious thing to say and the fact that they did not say so makes it clear to my mind that Parliament intended Provincial Legislatures to have power to impose any taxes on lands and buildings, hearths and windows, which they could legitimately do.

"When words in a statute are clear and unambiguous, effect must be given to the plain grammatical meaning of the words. By no stretch of imagination can it be said that item 42 is ambiguous. The words are clear and they entitle a Provincial Legislature to impose taxes on lands and buildings, hearths and windows without reference to who has to pay such taxes. If the tax can legitimately be paid by the owner, then it appears to me that item 42 would cover such tax, as it would cover a tax legitimately payable by the occupier. It seems to me, therefore, that no assistance can be obtained from what had been the policy of the English Legislature in construing this particular item."

The second contention put forward on behalf of the appellant is a more serious one, and needs very careful examination. Section 3 of the Punjab Act, which is the charging section in the Act, is in these terms :

"3. (1) There shall be charged, levied, and paid an annual tax on buildings and lands situated in the rating areas shown in the Schedule to this Act at such rate, not exceeding twenty *per centum* of the annual value of such buildings and lands, as the Provincial Government may by notification in the Official Gazette direct in respect of each such rating area.

(2) The Provincial Government may by similar notification direct that during the continuance of the present state of war and for a period not exceeding twelve months after the termination thereof there shall be charged, levied and paid, in addition to the tax leviable under sub-section (1), a surcharge not exceeding fifty *per centum* of the rate notified under that sub-section.

(3) The Provincial Government may, by notification in the Official Gazette, from time to time add to, omit or vary any of the entries contained in the Schedule to this Act.

(4) The tax shall be paid by the owner of the buildings and lands in respect of which it has been levied."

This section must be read with section 5 of the Act which is to the following effect :

"The annual value of any land or building shall be ascertained by estimating the gross annual rent at which such land or building together with its appurtenances and any furniture that may be left for use or enjoyment with such building might reasonably be expected to let from year to year, less—

(*a*) any allowance not exceeding twenty per centum of the gross annual rent as the assessing authority in each particular case may consider reasonable rent for the furniture let with any such building ;

(b) an allowance of ten per centum for the cost of repairs and for all other expenses necessary to maintain such building in a state to command such gross annual rent. Such deduction shall be calculated on the balance of the gross annual rent after the deduction, if any, under clause (a) ; and

(c) any land revenue actually paid in respect of such building or land :

Provided that in calculating the annual value of any building or land under this section the value of any machinery in such building or on such land shall be excluded."

It was contended on behalf of the appellant that on a perusal of section 3 and other provisions of the Act, it would appear that the basis of the tax is the annual value of the building and, since the same basis is used in the Indian Income-tax Act for determining income from property, and generally speaking the annual value is the fairest standard for measuring income and, in many cases, is indistinguishable from it, the tax levied by the impugned Act is in substance a tax on income. This conclusion does not seem to follow from a mere perusal of section 3 of the Act, because all that it provides is that there shall be an annual tax on buildings at such rate not exceeding twenty per cent. of the annual value of such buildings, as the Provincial Government may direct in respect of each rating area. It is possible as a matter of first impression, to read this provision as meaning that while 20 per cent. of the annual value is fixed merely as the ceiling, the rate of tax on a building may have no reference to and be quite independent of the annual value of the building. On this interpretation, the tax will not be open to attack on the grounds urged. But the Act is to be read as a whole, and, having regard to the elaborate provisions made in it for determining the annual value of buildings and to the fact that the rate actually fixed in the Official Gazette has a direct reference to the annual value, there can be no doubt that the basis of the tax is annual value. The appellant's contention therefore has to be examined on the footing that the basis of the tax under the Punjab Act is the annual value of the property to be taxed.

The proper approach to the question such as the one we have before us has been aptly defined by Lord Atkin in *Gallagher* v. *Lynn*[1], in these words :

" It is well established that you are to look at the ' true nature and character of the legislation ' : *Russell* v. *The Queen*[2] ' the pith and substance of the legislation.' If on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorized field. The legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field. Nor are you to look only at the object of the legislator. An Act may have a perfectly lawful object, *e.g.*, to promote the health of the inhabitants, but may seek to achieve that object by invalid methods, *e.g.*, direct prohibition of any trade with a foreign country. In other words, you may certainly consider the clauses of an Act to see whether they are passed ' in respect of ' the forbidden subject."

The Punjab Act purports to tax property which *prima facie* the Provincial Legislature is allowed to do under item 42 of List II of the Government of India Act. But if it appears that the impugned tax, in the guise of dealing with property, is in fact and in substance a tax on the income of the owner of property, then, undoubtedly, the Act is not a valid one. It is argued on behalf of the appellant that the moment it is seen that the basis of the tax is the annual value of property, which is the very basis used by the Indian Income-tax Act for assessing income from property, it should be held that it is in substance a " tax on income " which is a subject outside the authorized field of the Provincial Legislature. The argument appears at first sight to be quite a plausible one, but, on closer examination, the conclusion suggested does not seem to follow so readily from the premises enunciated as is assumed. If the annual value of house property represented in every case the actual income of the owner from the property, the question would not have presented so much difficulty. But that is not so. In many cases, the annual value may approximate to actual income, but, in quite a number of cases, it may not. It is evident that in many cases, there may be a great divergence between the annual value of a property and the actual profits derived or received by the owner from it. It is also quite possible to conceive of cases in which the property

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1. (1937) A.C. 863 at 870.
2. (1882) 7 App. Cas. 829 at 839.

to be taxed does not actually yield any income whatsoever, though every property must have some notional annual value. As has been pointed out in treatises on income-tax, many of the rules framed under the Income-tax Act are highly artificial, so that :

"income calculated for purposes of income-tax does not by any means necessarily correspond with the income actually received in the year which can be spent or saved."

One of these artificial rules is the rule of estimating income from property. This was conceded in In re *a Reference under the Government of Ireland Act*, 1920 : In re *section* 3 *of the Finance Act* (*Northern Ireland*), 1934[1], where it was stated that :

"the method of assessing income derived by ownership or occupation of property is somewhat arbitrarily based on the annual value and not the actual income."

Similarly, Kennedy, L.J., observed in *Rex* v. *Special Commissioners of Income-tax : Essex Hall*, Ex parte[2] :

"An assessment upon 'annual value' may, for certain purposes, be treated, in applying the Income-tax Acts, as an equivalent for an assessment upon 'gains and profits'; but they are not simply synonymous or interchangeable expressions."

Now once it is realised that the annual value is not necessarily actual income, but is only a standard by which income may be measured, much of the difficulty which appears on the surface is removed. In our opinion, the crucial question to be answered is whether merely because the Income-tax Act has adopted the annual value as the standard for determining the income, it must necessarily follow that, if the same standard is employed as a measure for any other tax, that tax becomes a tax on income? If the answer to this question is to be given in the affirmative, then certain taxes which cannot possibly be described as income-tax must be held to be so. A case in point is to be found in In re *a Reference under the Government of Ireland Act*, 1920 : In re *section* 3 *of the Finance Act* (*Northern Ireland*), 1934[1]. The question which arose in that case was whether the provisions of section 3 of the Finance Act (Northern Ireland), 1934, were beyond the powers of the Parliament of Northern Ireland. Section 3 of the Act of 1934 imposed a tax on the council of every county and county borough, and the tax was computed on the basis of the rateable value of the county council or county borough. There was no dispute in that case that the "rateable value" corresponded to the "annual value" as understood in the Income-tax Act, but it was held that the mere fact that the basis of the tax was rateable or annual value was not enough to make it a tax on income. Lord Thankerton, who delivered the judgment in that case, pointed out that :

"It is the essential character of the particular tax charged that is to be regarded, and the nature of the machinery, often complicated, by which the tax is to be assessed is not of assistance except in so far as it may throw light on the general character of the tax."

The tax was not held to be a tax on income, because it was payable by an occupier, and the distinctive feature of the case was described in these words :

"....... the poor rate is levied in respect of the occupation of hereditaments, irrespective of a person's income generally, and irrespective of whether the rate payer is in fact deriving profits or gains from such occupation. A dwelling-house is a burden, not a source of profit, for the occupier who pays rent for it. He is rated on the value of the burden, while he remains unrated in respect of his whole profits, be they from business or from investments. In their Lordships' opinion, this marks the essential difference in character between income-tax and rates, and it is unnecessary to consider other and less important differences between them."

This case demolishes the broad contention that wherever the annual value is the basis of a tax, that tax becomes a tax on income. It shows that there are other factors to be taken into consideration and that it is the essential nature of the tax charged and not the nature of the machinery which is to be looked at.

Now, when looking at the machinery by which the tax is to be assessed, one cannot overlook the difference in the modes of estimating the annual value adopted

1. (1936) A.C. 352. 2. I.L.R. (1940) Bom. 80.

under the Punjab Act and the Income-tax Act respectively. Section 5 of the Punjab Act, which lays down the mode of estimating the annual value, has been quoted before, and a reference to it would show that besides making an allowance for the rent of furniture which, under the section, is to be taken into consideration in estimating the annual value, it permits two allowances only : (1) an allowance of 10 per cent. for the cost of repairs and other expenses necessary for maintaining the building, and (2) any land revenue actually paid in respect of such building. Section 9 of the Income-tax Act however is a much more elaborate provision, and sets out the deductions allowable in seven clauses, which include cost of repairs, insurance premia, interest on mortgages and charges, land revenue, collection charges and vacancies. A comparison of the above provisions will show that whereas under the Income-tax Act every effort has been made to get at the true income or profits from the property, no such intention is apparent in section 5 of the Punjab Act, which does not permit any deduction in respect of any items of expenditure except two, and which draws no distinction between encumbered and unencumbered property or occupied and vacant property. Thus, under section 3 of the Punjab Act, the tax will be payable, whether the property is profitable or not. It would also be payable even though there may be a mortgage existing on the property, no matter what the amount of interest payable under it may be. Indeed it was contended on behalf of the respondent that the omission from the Act of any allowance for such outgoings as interest on mortgages is difficult to explain, except on the footing that the basis of the tax is something not dependent on the income of the assessee.

It was urged on behalf of the appellant that the difference between the two Acts as to the mode of assessing annual value is accidental and is made conspicuous only by reason of the number of deductions allowed under the present Income-tax Act. It was also pointed out that in the old Income-tax Acts, and especially in the Income-tax Act of 1886, deductions were not allowed on such liberal scale. That, however, does not, in our opinion, dispose of the matter. It has to be remembered that the Punjab Act was passed in 1940, by which time the Income-tax law had been greatly developed, and a comparison between that Act and the Indian Income-tax Act as it stood then cannot be ruled out lightly. After all, what we have to find is whether the intention of the Punjab Act was to tax income, and whether in fact it did tax income. If we find that the basis of the tax, though described as annual value, is something not necessarily synonymous with income and is something very different from the annual value as estimated in the Income-tax Act, we have to seriously ask ourselves whether the tax which the Punjab Act purports to impose can legitimately be said to be in substance a tax on income. "Annual value" is after all a mere expression, and what we are concerned with is not the mere expression but its meaning and scope in relation to actual income. It was easy enough for the Punjab Legislature to adopt the standard and the machinery employed in the Income-tax Act for getting at the profits from property, if it was their intention to do so, but it has not been done. The real distinction between these two Acts seems to be that whereas the Income-tax Act purports to get at the true income, there is no such pretence in the impugned Act which uses the annual value merely for the purpose of determining the importance or the value of the property to be taxed.

Reference may be made here to the decision of a Special Bench of the Bombay High Court in *Sir Byramjee Jeejeebhoy* v. *The Province of Bombay and another*[1]. The point which arose in that case was precisely the same as the one raised before us. The point was whether the Urban Immovable property tax levied by section 22 of the amended Bombay Finance Act, 1932, was beyond the powers of the Bombay Legislature, on the ground that it was essentially a tax on income. Section 22 of that Act provided that :

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1. I.L.R. (1940) Bom. 58.

"there shall be levied and paid to the Provincial Government a tax on buildings and lands hereinafter called the 'Urban immovable property tax' at ten per cent. of the annual letting value of such buildings and lands."

The learned judges who heard the case came to the unanimous conclusion that the Act was not *ultra vires*, and delivered three very elaborate and instructive judgments which deal with all the important aspects of the case. These judgments were read to us almost *in extenso* in the course of the arguments, and we agree generally with the conclusions arrived at in them and with most of the reasonings by which they are supported.

Our own conclusion may be summed up very briefly. In the first place, we have to look into the charging section of the statute, because as was pointed out in *Provincial Treasurer of Alberta and another* v. *C. E. Kerr and another*[1] :

"the identification of the subject-matter of the tax is only to be found in that section."

The charging section in the present case is section 3, which in clear terms levies not a tax on income but a tax on buildings and lands. It is true that we must look not to the mere form but to the substance of the levy, and the tax must be held to be invalid, if in the guise of a property tax it is really a tax on income. There is however nothing in the impugned Act to show that there was any intention on the part of the Legislature to get at or tax the income of the owner from the building. It is true that the annual value was used as the basis, but it was very different from the annual value which may be used for getting at the true profits or income. The annual value, as has been pointed out, is at best only notional or hypothetical income and not the actual income. It is only a standard used in the Income-tax Act for getting at income, but that is not enough to bar the use of the same standard for assessing a Provincial tax. If a tax is to be levied on property, it will not be irrational to correlate it to the value of the property and to make some kind of annual value the basis of the tax, without intending to tax income. This is precisely what was emphasised by Broomfield, J., in the following passage in his judgment in *Sir Byramjee Jeejeeboy* v. *The Province of Bombay and another*[2]:

"Suppose a tax were imposed of X rupees on every house in Bombay, payable by the owner. That would be a crude and unequal impost, but perfectly legal. It would be more equitable, but still I imagine perfectly legal, if the tax were graded according to the size of the building, the number of storeys, or rooms, or according to the extent of frontage on important streets, or according to the cost of construction. Why should it not be permissible to go a little further in the direction of making the amount of the tax correspond to the importance and value of the properties, by employing the standard basis of assessment of municipal property taxes? If annual value had been equivalent to income that would not be possible, for income may not be taxed by the Provincial Legislature. But when you speak of income being taxed, within the meaning of item 54, what has to be considered in my opinion is actual income, and not the hypothetical income arbitrarily adopted for income-tax purposes."

In the case of *Subramanian Chettiar*[3], Sir Maurice Gwyer, C.J., observed as follows :

"It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind observance to a strictly verbal interpretation would result in a large number of statutes being declared invalid, because the Legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee, whereby the impugned statute is examined to ascertain its 'pith and substance' or its 'true nature and character' for the purpose of determining whether it is legislation with respect to matters in this list or in that."

Again in In re *the Central Provinces and Berar Act No. XIV of* 1938[4], where, as already stated, the question arose whether a tax on the sale of motor spirits was a tax on the sale of goods within item 48 of the Provincial List or a duty of excise within item 45 of the Federal List, the learned Chief Justice observed as follows :

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1. (1933) A.C. 710.
2. I.L.R. (1940) Bom. 58.
3. (1940) F.C.R. 201.
4. (1939) 1 M.L.J. Supp. 1 : (1939) F.C.R. 1, p. 53 : 2 F.L.J. 6.

"It appears then that the language in which the particular legislative powers which the Court is now considering have been granted to the Central and Provincial Legislatures respectively may be wide enough, if taken by itself and without reference to anything else in the Act, to cover in each case a tax of the kind which has been imposed, whether it be called an excise duty, if imposed by the Central Legislature, or a tax on the sale of goods, if imposed by a Province. Only in the Indian Constitution Act can the particular problem arise which is now under consideration; and an endeavour must be made to solve it, as the Judicial Committee have said, by having recourse to the context and scheme of the Act, and a reconciliation attempted between two apparently conflicting jurisdictions by reading the two entries together and by interpreting, and, where necessary, modifying, the language of the one by that of the other. If indeed such a reconciliation should prove impossible, then, and only then, will the *non obstante* clause operate and the federal power prevail: for the clause ought to be regarded as a last resource, a witness to the imperfections of human expression and the fallibility of legal draftsmanship."

The principles deducible from these pronouncements are (1) that where there is an apparent conflict between an Act of the Federal Legislature and an Act of the Provincial Legislature, we must try to ascertain the pith and substance or the true nature and character of the conflicting provisions, and (2) that, before an Act is declared *ultra vires*, there should be an attempt to reconcile the two conflicting jurisdictions, and, only if such a reconciliation should prove impossible, the impugned Act should be declared invalid.

There is also another mode of approaching the subject, which was indicated by the Judicial Committee in *Prafulla Kumar Mukherjee* v. *The Bank of Commerce, Ltd., Khulna*[1], where the question was whether the substance of the Bengal Money-lenders Act was money-lending (a Provincial subject) or promissory notes or banking (a Federal subject). Their Lordships made the following observations:

"Thirdly, the extent of the invasion by the provinces into subjects enumerated in the Federal List has to be considered. No doubt it is an important matter, not, as their Lordships think, because the validity of an Act can be determined by discriminating between degrees of invasion, but for the purpose of determining what is the pith and substance of the impugned Act. Its provisions may advance so far into Federal territory as to show that its true nature is not concerned with provincial matters, but the question is not, has it trespassed more or less, but is the trespass, whatever it be, such as to show that the pith and substance of the impugned Act is not money-lending but promissory notes or banking?"

It is true that in all these pronouncements, the real emphasis is laid on the necessity of ascertaining the pith and substance, but they also contain useful guidance as to how the Courts should proceed when they have to deal with two apparently conflicting enactments. The conclusion we have arrived at is that in substance the impugned tax is not a tax on income, that it is not impossible to reconcile the seeming conflict between the provisions of the two Acts, and that the extent of the alleged invasion by the Provincial Legislature into the field of the Federal Legislature is not so great in the present case as to justify the view that in pith and substance the impugned tax is a tax on income. In our opinion, therefore, the appeal must fail, and it is dismissed with costs to the East Punjab Government, the respondent in the appeal.

V.S. *Appeal dismissed.*

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1. (1947) 2 M.L.J. 6: L.R. 74 I.A. 23 at 43: 1947 F.L.J. 34 (P.C.).

[PRIVY COUNCIL.]

(On appeal from the Federal Court of India.[1])

PRESENT :—LORD THANKERTON, LORD DU PARCQ, LORD OAKSEY, LORD MORTON OF HENRYTON AND MR. M. R. JAYAKAR.

The North-West Frontier Province .. *Appellant**

v.

Suraj Narain Anand .. *Respondent.*

Government of India Act (1919), *section* 96-*B* (1) *and Government of India Act* (1935), *sections* 240 (2) *and* 243—*Restriction under section* 96-*B* (1)—*Nature of—If could be affected by rules—Nature of the provisions of section* 240 (2)—" *Conditions of service* " *in section* 243—*If includes right of dismissal.*

Section 96 B (1) of the Government of India Act, 1919, is a mandatory statutory restriction which could not be affected by any rules. Hence, any rule inconsistent with its provisions would be invalid and inoperative.

Section 240 (2) of the Government of India Act, though it does not apply in the case of dismissal by the crown itself, is a statutory term of service of the crown and is mandatory and not permissive.

The natural meaning of the expression "conditions of service" in section 243 of the Government of India Act would include provisions which prescribe the circumstances under which the employer is to be entitled to terminate the service, whether they are contractual or statutory and accordingly the right of dismissal would be condition of service within the meaning of the section.

A Sub-Inspector of Police appointed by the Inspector-General of Police on 1st March, 1928, was dismissed by the Deputy Inspector-General of Police on 25th April, 1938. On a contention that such dismissal by an authority subordinate in rank to the officer who had appointed him was unlawful,

Held, on the facts of the case, that the rule of 1934 which authorised such dismissal was inconsistent with the provisions of sub-section (1) of section 96-B of the Government of India Act and was therefore invalid and inoperative and that the Rules of 1937, which authorised such dismissal though valid by reason section 243 of the Government of India Act could not validate the dismissal which was made prior to those Rules being printed and published.

Andrew Clark, K.C. and *B. MacKenna* for Appellant.

The respondent appeared in person.

The Judgment (Part I) of the Court was delivered by

LORD THANKERTON.—This is an appeal by special leave from a judgment and decree of the Federal Court of India[1], dated 4th December, 1941, reversing a decree of the Court of the Judicial Commissioner, North-West Frontier Province, Peshawar, dated 9th September, 1940, which had affirmed a decree of the Senior Subordinate Judge, Peshawar, dated 8th March, 1940. The Federal Court made a declaration that the respondent's dismissal was void and inoperative, and submitted the case to the Court of the Judicial Commissioner for consideration of the respondent's claim for arrears of pay.

On 1st March, 1928, the respondent was appointed as a Sub-Inspector of Police by the Inspector-General of Police, North-West Frontier Province. On 25th April, 1938, the respondent was dismissed by the Deputy Inspector-General of Police, on a charge of copying during a departmental examination. He was therefore dismissed by an authority subordinate in rank to the officer who had appointed him.

After unsuccessful appeals to the Inspector-General of Police and the Provincial Government, the respondent instituted the present suit on 17th June, 1939, in which he claimed a declaration that the order of dismissal was illegal, null and void, invalid and inoperative and that he still retained his office as Sub-Inspector of Police. He further claimed arrears of pay from the date of the order of dismissal up to that date. There was an alternative claim for damages, which no longer survived before this Board. The main question concerns the validity of the order

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1. 1941 F.C.R. 37 : (1942) 1 M.L.J. 77 : 4 F.L.J. 22.

*P.C.A. No. 38 of 1945. 18th March, 1948.

of dismissal, which is challenged on the ground that the dismissing authority was subordinate in rank to the authority by whom the respondent had been appointed. It is sought to be justified on the provisions of the North-West Frontier Police Rules, which are made under the authority of the Indian Police Act, 1861 (Act V of 1861), and it will be convenient to trace the history of these rules, so far as relevant to the point at issue, and the general statutory provisions which affect them.

Section 7 of the Police Act of 1861 provides :

"7. The appointment of all police-officers other than those mentioned in section 4 of this Act shall, under such rules as the Local Government shall from time to time sanction, rest with the Inspector-General, Deputy Inspectors-General and District Superintendents of Police, who may, under such rules, as aforesaid, at any time dismiss, suspend or reduce any police officer whom they shall think remiss or negligent in the discharge of his duty, or unfit for the same."

Sub-Inspectors are not mentioned in section 4, and there is no restriction excluding dismissal by an officer subordinate in rank to the appointing officer.

At the date of the respondent's appointment in 1928, the North-West Frontier Police Rules, 1917, as amended from time to time were in force; the relevant rule was rule 17-I of Chapter XVII, which had been made by a correction slip on 25th September, 1919, which clearly provided that a Sub-Inspector could only be dismissed by the Inspector-General of Police, or by an officer of higher rank.

On 24th January, 1934, by a correction slip, rule 17-1 was amended so as to substitute " Deputy Inspector-General of Police " for " Inspector-General of Police " as entitled to dismiss a Sub-Inspector. Having in view section 96-B of the Government of India Act, 1919, and the decision of this Board in *Rangachary* v. *Secretary of State for India*[1], this amendment of 1934 was clearly invalid and inoperative. Sub-section (1) of section 96-B provided that no person in the civil service of the Crown in India " may be dismissed by any authority subordinate to that by which he was appointed ", and it was held in *Rangachari's case*[1] that this was a mandatory statutory restriction, which could not be affected by any rules. Lord Roche, in delivering the judgment of the Board, said (at page 53) :

" It is manifest that the stipulation or proviso as to dismissal is itself of statutory force and stands on a footing quite other than any matters of rule which are of infinite variety and can be changed from time to time."

The Rules then existing are dealt with in sub-section (4) of section 96-B which provided,

"(4) For the removal of doubts, it is hereby declared that all rules or other provisions in operation at the time of the passing of the Government of India Act, 1919, whether made by the Secretary of State in Council or by any other authority, relating to the civil service of the Crown in India, were duly made in accordance with the powers in that behalf, and are confirmed, but any such rules or provisions may be revoked, varied, or added to by rules or laws made under this section."

It follows that the amendment of 1934 was inconsistent with the provisions of sub-section (1) of section 96-B and was therefore invalid and inoperative.

Before the dismissal of the respondent on 25th April, 1938, the Government of India Act, 1935, had come into operation on 1st April, 1937. Section 240 of that Act, so far as relevant for the present purpose, provided as follows :—

" 240. (1) Except as expressly provided by this Act, every person who is a member of a civil service of the Crown in India, or holds any civil post under the Crown in India, holds office during His Majesty's pleasure.

(2) No such person as aforesaid shall be dismissed from the service of His Majesty by any authority subordinate to that by which he was appointed.

(3) No such person as aforesaid shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him."

The proper construction of this section has been fully dealt with in the judgment of this Board just delivered in *The High Commissioner for India and the High Commis-*

1. (1937) 1 M.L.J. 515 : L.R. 64 I.A. 40 : I.L.R. 1937 Mad. 517 (P.C.).

sioner for Pakistan v. *Lall*[1], to which reference may be made. In that case the question arose as to the effect of non-compliance with the provisions of sub-section (3) of section 240 and it was held that sub-section (3) was a statutory term of service of the Crown, which qualified the provisions of sub-section (1) of section 240, and was mandatory and not permissive. On the principles of this decision, and the decision in *Rangachari's case*[2], it is equally clear that sub-section (2) of section 240, though it obviously does not apply in the case of dismissal by the Crown itself, is a statutory term of the service of the Crown, and is mandatory and not permissive. It follows that the dismissal of the respondent by an authority subordinate to that by which he was appointed would be unlawful and inoperative under that section.

But the appellant relies on another section in the same Chapter—(Chapter II)—of the Act of 1935 as releasing it from the obligation prescribed in sub-section (2) of section 240, namely, section 243, which provides,

"243. Notwithstanding anything in the foregoing provisions of this chapter, the conditions of service of the subordinate ranks of the various police forces in India shall be such as may be determined by or under the Acts relating to these forces respectively."

There was no dispute that the respondent held a subordinate rank in the appellant's police force, and the issue was confined to two questions, (1) whether the right of dismissal was a " condition of service " within the meaning of section 243 and (2) whether, at the time of the respondent's dismissal, there was a valid police rule in operation which authorised dismissal of the respondent by the Deputy Inspector-General, although the latter was subordinate in rank to the officer by whom he had been appointed.

On the first question, apart from consideration whether the context indicates a special significance to the expression "conditions of service," their Lordships are unable, in the absence of any such special significance, to regard provisions which prescribe the circumstances under which the employer is to be entitled to terminate the service otherwise than conditions of the service, whether these provisions are contractual or statutory ; they are therefore of opinion that the natural meaning of the expression would include such provisions. In the second place, it will be found, on a perusal of Chapter II, which includes sections 240 to 263, that sub-sections (2) and (3) of section 240 are the only provisions of Chapter II to which the introductory words of section 243 can be referable in relation to conditions of service, as every one of the other provisions of the Chapter, with one exception, dealt with special classes of service, just as section 243 deals with a special class. The one exception is sub-section (1) of section 240, but that provides for termination by His Majesty, and there can be no question of delegation of that power by virtue of section 243. Their Lordships need only notice one of these other sections, as it was referred to in argument by both parties, namely, section 241, sub-sections (2) and (4). The opening words of sub-section (2)—

" Except as expressly provided by this Act, the conditions of service of persons serving His Majesty in a civil capacity in India"

—relate to the very same persons dealt with in the immediately preceding section 240, and this exclusion from the power of making rules conferred by sub-section (2) of section 241, points unmistakably, in their Lordships' opinion, to the express provisions of section 240, so as to prevent their alteration by rules. There are, of course, other provisions of the Act which will also fall under the exception provided in sub-section (2) of section 241, but there can be no doubt, in their Lordships' opinion, that the provisions of section 240 prescribe conditions of service, which are covered by the exception. Sub-section (4) of section 241 contains a similar exception to the powers conferred. Their Lordships are, accordingly, of opinion that the right of dismissal was a condition of service within the meaning of section 243.

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1. (1948) 2 M.L.J. 55 (P.C.).
2. (1937) 1 M.L.J. 515 : L.R. 64 I.A. 40 : I.L.R. 1937 Mad. 517 (P.C.).

The second question arises in this way :—

The respondent was dismissed on 25th April, 1938, admittedly under rule 16-1 of Chapter XVI of the N.W.F.P. Police Rules, 1937, which authorises the dismissal or removal of Sub-Inspector of Police by the Deputy Inspector-General. That rule is contained in Volume II of these rules, which has the year 1938 on the title page, below a statement that it was printed and published by the Manager, Govt. stationery and printing, North-West Frontier Province, Peshawar. There was no indication as to the date when the rules became binding on the Police Service. At the hearing before the Board, Volume I, which might clear the matter up, was stated to be out of print or unobtainable, and counsel for the appellant asked their Lordships to assume in his favour that that date was subsequent to the 1st April, 1937, when the Government of India Act, 1935, came into force thereby obviating the invalidity of the 1934 correction slip, which would equally apply to the 1937 Rules if issued, before 1st April, 1937. After the hearing was closed, their Lordships thought it right, in view of the difficulties of making such an assumption, and in the true interests of the parties, to suggest to them that further enquiries should be made to see whether Volume I of the Rules could not be made available. The result of these enquiries was that the respondent, at considerable expense, has recovered a copy of the missing volume, and has lodged an affidavit dated 30th December, 1947, as to the relevant passages, and the appellant has agreed that that affidavit should be accepted as evidence before their Lordships, in order to save the time and expense of having the volume transmitted to this country. These passages consist of a *verbatim* reproduction of the title page and preface, and also a similar reproduction from the title pages of Chapters I and II of the same volume, which adds nothing further that is material.

The title page states that they are

"The N.W.F.P. Police Rules, 1937. Issued by and with the Authority of the Local Government under sections 7 and 12 of Act V of 1861."

The word "Local" has been replaced by the word "Provincial" by a correction slip No. 68 which may be taken, on comparison with the dates of correction slips 66 and 73, as having been made in 1939. The name of the Government printer and publisher and year 1938 is at the foot of the page, as in volume II. The preface, which is signed by the Inspector-General of Police on 2nd January, 1937, and refers to the revision as the 1917 edition of the Rules, which had been proceeding since 1933, opens with an important passage as follows :—

"The North-West Frontier Province Police Rules as now issued are binding on all police officers and are an authoritative guide to others concerned. No alterations in the Rules may be made except on receipt of correction orders approved and issued by the Provincial Government and after decision by His Excellency the Governor under section 56 of the Government of India Act, 1935."

In the opinion of their Lordships, only one reasonable inference can be drawn from these facts :—*viz.*, that the revision of the 1917 Rules was completed in January, 1937, in view of the coming into operation of the Act of 1935, on 1st April, 1937, and that they were not issued so as to become operative until they had been put into print and were published in 1938. It may be noted that the first correction slip was dated 14th January, 1939.

Accordingly, their Lordships are of opinion that the Rules under which the respondent was dismissed was a valid rule, made by the appellant under the authority conferred on it by section 243 of the Government of India Act, 1935. This conclusion negatives the respondent's claim for arrears of pay.

Following on the remit of the case to the Court of the Judicial Commissioner by the order of the Federal Court dated December 4, 1941, the respondent obtained a decree for payment of Rs. 2,283 against the present appellant in respect of arrears of pay from the date of dismissal to the institution of the suit on 17th June, 1939, made by the Court of Judicial Commissioner on 4th July, 1942.

Special leave to appeal against the Judgment of the Federal Court, dated 4th December, 1941, was given, *inter alia*, on condition that the order as to costs of the Federal Court should stand and that the costs of the respondent in the appeal should be borne by the appellant as between solicitor and client in any event.

Their Lordships are of opinion that the appeal should be allowed, that the judgment and decree of the Federal Court dated 4th December, 1941, should be set aside except as to costs, and that the decree of the Court of the Judicial Commissioner dated 19th September, in so far as it dismisses the suit, should be restored. Their Lordships will humbly advise His Majesty accordingly.

The appellant will pay the respondent's costs of this appeal as between solicitor and client. The respondent asked that their Lordships should direct that, having no solicitor and having appeared in person before the Board, the cost of his passage to this country and back to India and his cost of maintenance in London should be treated as costs between solicitor and client. He further asks that he should be entitled to recover the cost of the purchase price of Volume I of the Police Rules, which he states as Rs. 500. While their Lordships feel unable to make any order as asked for, they desire to point out for consideration of the appellant that if the respondent had employed a solicitor and counsel, the outlays would have been recoverable under the condition imposed in granting special leave, and that the recovery of the volume in question may well have been vital to their success on the main point in issue in the appeal.

Solicitor for Appellant: *Solicitor, India Office.*

[This appeal was again heard by their Lordships as it was brought to their notice that the relevant Police Rules had not in fact become operative till after the dismissal of the respondent and the following judgment, Part II was delivered.]

B. McKenna for Appellant.

Leon Maclaran for Respondent.

The Judgment (Part II) of the Court was delivered by

LORD DU PARCQ.—On 18th March, 1948, a judgment was delivered by the late Lord Thankerton, in which their Lordships stated the reasons which led them to the conclusion that they should humbly advise His Majesty that this appeal should be allowed. Their Lordships do not propose now to repeat what was then said. It suffices to say that the decision of the Board was given on the assumption, which then appeared to be justified and had not, indeed, been questioned, that the Police Rules of 1937, to which the judgment refers, had become operative in the year 1938, and at some date prior to 25th April, 1938, when the respondent was dismissed from the force.

Subsequently to the delivery of the judgment, and before their Lordships had tendered their advice to His Majesty, the respondent submitted a petition wherein he prayed that their Lordships might reconsider this decision, mainly on the ground that it had been ascertained that the Police Rules of 1937 were in fact printed and published on 29th April, 1938, that is to say four days after the dismissal of the respondent.

Their Lordships accordingly found it necessary to hear further argument on 29th July, 1948, counsel for both parties appeared at their Lordships' bar. It was then admitted that the Police Rules of 1937 were in truth printed and published on 29th April, 1938, as the respondent alleged. It follows, in the opinion of their Lordships, that, applying the reasoning contained in the judgment previously delivered, they can only come to the opposite conclusion to that which they had formed on what is now shown to be an erroneous assumption as to a material fact.

At the hearing of 29th July of this year counsel for the appellant made an alternative submission to the effect that the rule on which the appellant relies came into force immediately upon its approval by the Governor-in-Council, and stated that, according to his instructions, that approval was signified on April 17, 1935. Assuming these instructions to be correct, and further assuming (though without deciding) that the approval of the Governor-in-Council brought the rules immediately into effect, their Lordships are of opinion that, as against the respondent, the rule in question would nonetheless be inoperative, since the Government of India Act, 1935, under which the rule would have been valid against him, did not come into force until 1st April, 1937, and could not then retrospectively affect the respondent's position.

On 6th August, 1948, their Lordships caused a letter to be addressed to the Solicitor representing the appellant, informing him that their Lordships now proposed humbly to advise His Majesty that the appeal should be dismissed, and stating that the order as to costs would not be varied. The letter pointed out that if this advice were tendered, and if His Majesty were pleased to accept it, the effect would be that the declaratory judgment of the Federal Court would stand. Finally, the letter referred to the award of Rs. 2,283 to the respondent by the Court of the Judicial Commissioner which according to a submission made by the appellant's counsel was open to challenge and inquired whether the appellant wished to have an opportunity of satisfying their Lordships that the point was open, and of being heard upon it. By their Lordships' direction, a copy of this letter was sent to the respondent.

Their Lordships have now received an intimation that the appellant does not wish to offer any further argument in this case. The respondent, as his counsel stated when the matter was last before the Board, does desire an opportunity of arguing that he shall now be awarded arrears of pay from the date of the institution of his suit on 17th June, 1939. Their Lordships do not propose to deal further with this matter. If, in accordance with their Lordships' humble advice, the declaratory judgment of the Federal Court is restored, it will be open to the respondent to pursue any remedy which flows from that declaratory judgment in the appropriate Court. Their Lordships must not be understood, however, as expressing an opinion that the respondent was entitled as of right to recover the sum of Rs. 2,283 which was awarded to him, or, that he has any claim to a further sum in respect of arrears of pay. It is unnecessary, owing to the very proper attitude of the appellant, to express any view as to the former question, and the latter question does not arise in this appeal, which is from the decision of the Federal Court. If that decision is affirmed the respondent, who did not himself enter an appeal cannot now ask for anything more.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed, and that the judgment and decree of the Federal Court dated 4th December, 1941, should be affirmed. The appellant must pay the respondent's costs of this appeal as between solicitor and client.

Solicitor for Appellant : *Solicitor, Commonwealth Relations Office.*

Solicitors for Respondent : *Cessavetti Constas & Co.*

V. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO AND MR. JUSTICE PANCHAPAKESA AYYAR.

Muruga Goundan .. *Appellant.**

Criminal trial—Evidence—Conviction on the strength of evidence of witnesses who have given totally different versions in the committing and Sessions Court—Propriety.

It is very unsafe to convict an accused on the evidence of persons who gave one version at the Magistrate's Court and a totally different version before the Sessions Court, unless there is some other reliable evidence in support of the prosecution case.

Harnam Singh v. *Emperor*, A.I.R. 1937 Lah. 597, followed.

Trial referred by the Court of Session of the Salem District for confirmation of the sentence of death passed upon the said prisoner-accused No. 1 in C.C. No. 92 of 1948, on 25th October, 1948 and appeal by the said prisoner.

Mohamed Hibbathullah for Appellant.

The Crown Prosecutor for the Public Prosecutor for the Crown.

The judgment of the Court was delivered by

Subba Rao, J.—The accused has been charged under section 302, Indian Penal Code and has been sentenced to death.

The case of the prosecution is that the accused, along with two others (accused 2 and 3), who have been acquitted, killed Unnamalai Ammal and removed the *saradu* that was worn by her. P.W. 3 is the sister of the accused, and P. W. 4 is the wife of the accused. They gave evidence before the Magistrate implicating the accused, but in the Sessions Court they gave a different version altogether. The two witnesses were treated as hostile, and the learned Sessions Judge marked their depositions in the Magistrate's Court as substantive evidence under section 288 of the Criminal Procedure Code. Ex. P-4 is the deposition of P. W. 3 in the committing Magistrate's Court. She said that, four months ago, on a Monday, her younger brother, *i.e.*, the accused came to her and took from her a *kaiaruval* saying that he wanted it for cutting *pandal* post. On Wednesday he returned it at lamp-lighting time. On Thursday, he came again and asked her to give the *kaiaruval*. In that connection he told her that he and accused 2 and 3 joined together and killed the deceased, and that therefore he wanted to conceal the *kaiaruval*. Pursuant to his directions she concealed it. Later on, the police came along with the accused and asked for the *kaiaruval*. She took it from the place where she had concealed it and gave it to the police. P. W. 3 also gave a statement before the Magistrate under section 164, Criminal Procedure Code. That statement was consistent with the evidence afforded by Ex. P-4 in all material particulars.

Ex. P-6 is the deposition of P. W. 4. P.W. 4 as already said, is the wife of the accused. She deposed that on the night of Wednesday the accused came and gave a gold *saradu* to her and asked her to keep it in the roof of the house, and she did so. When she asked him as to how he got the *saradu*, he asked her to keep quiet. On Sunday the accused came to her along with the police and he removed the *saradu* from the roof and gave it to the police. She also made a statement under section 164 of the Criminal Procedure Code before the Magistrate, and the recitals in that statement are also consistent with the version given by her in the committing Court.

When P.Ws. 3 and 4 gave evidence in the Sessions Court they gave a completely different version and stated that they deposed in the committing Magistrate's Court and made statements under section 164, as the police threatened and beat them to do so. In the circumstances the learned Sessions Judge rightly treated their evidence as substantive evidence under section 288 of the Criminal Procedure Code. It may be stated that there is no other evidence either direct or circumstantial except the discovery of the jewel, with which we shall deal later on.

* Referred Trial No. 109 of 1948. (Criminal Appeal No. 624 of 1948). 10th January, 1949.

We think it is very unsafe to convict an accused only on the evidence of persons who gave one version at the Magistrate's Court and a totally different version before the Sessions Court, unless there is other reliable evidence in support of the prosecution case. In *Harnam Singh* v. *Emperor*[1], the learned Judges accepted the aforesaid principle as the rule of practice and they stated the rule in the following terms :

> "We do not feel, therefore, that on the evidence of this character where every one of the witnesses has been demonstrated at the trial to have contradicted the statement that he made before the committing Magistrate, it would be safe to convict."

With great respect we agree with them.

The learned Crown Prosecutor contended that there was one important fact in this case which corroborated the evidence of P.Ws. 3 and 4. The deceased had a gold *saradu* on her when she died, and it was identified as the one that was in the house of the accused. The learned Sessions Judge was wrong in saying that there were stains of human blood on this jewel. On the other hand, the Chemical Examiner to the Government of India states in Ex. P-3 that the blood-stains on item 95, *i.e.*, the gold *saradu* were disintegrated and their origin could not be determined. The further possibility, namely, that the jewel was taken by the accused either after the deceased was killed or that it was given to him by P. W. 5 could not be completely ruled out in this case. In the circumstances we think, at any rate, the benefit of the doubt should be given to the accused.

The conviction and sentence are set aside, the accused is acquitted, and he is directed to be set at liberty.

V.S. ——— *Conviction set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

Hanuman Prasad Pragdas .. *Appellant**

v.

P. S. Nanjappa Chetty and Sons by partners P.S.N.M. Chidambaram Chetty and others .. *Respondents.*

Contract—Non-performance of the contract within a reasonable time—Right of the other party to repudiate—Jurisdiction—Mode of assessing damages.

Where the seller does not despatch the goods within a reasonable time and no attempt has been made by him for the performance of his part of the contract, the buyer would be justified in repudiating and cancelling the contract.

Where the parties agreed that the railway receipt should be sent to the Bharat Bank, which in the context could only mean the Bharat Bank at Madras, against payment, the Court at Madras would have jurisdiction to try the suit. From this point of view the damages have also to be assessed according to the market rate in Madras, as the performance of the contract and payment for the goods are at Madras and not at the place of despatch.

Appeal against the decree of the City Civil Court, Madras, in O.S. No. 609 of 1944.

P. V. Subramaniam for Appellant.

P. N. Sundaresan and *T. Srinivasaraghavan* for Respondents.

The Court delivered the following

JUDGMENT.—The defendant is the appellant. The appeal is against the decree and judgment of the learned City Civil Judge decreeing the plaintiff's suit for damages for a sum of Rs. 3,220. The plaintiff is a firm carrying on business at Madras, and the defendant is the manufacturer of brass circles at Mirzapur in the United Provinces. In the month of June, 1944, the plaintiff booked three orders for brass circles the particulars of which and the quantity of which have been

1. A.I.R. 1937 Lah. 597.

*C.C.C.A. No. 35 of 1947. 8th December, 1948.

detailed in the correspondence. There is no dispute regarding the quantity and the quality; nor is there any dispute between the parties that there was a concluded contract between them. They are at variance however regarding some of the terms of the contract.

The defendant raised three questions in the suit and the same have been repeated in the course of the arguments here. The first question was that this court had no jurisdiction to try the suit, secondly that the plaintiff repudiated the contract on 4th August, 1944, before a reasonable time had elapsed for the performance of the contract, as no period was fixed under the terms of the contract, and thirdly that the damages should be fixed with reference to the market rate at Mirzapur on the date of the breach and not with reference to the market rate at Madras.

Ex. D-4, a letter from the plaintiff to the defendant shows that the arrangement between the parties with reference to the despatch of the goods was that the goods should be despatched by the defendant F.O.R. Mirzapur and that the railway receipt should be negotiated through the Bharat Bank, Ltd. In the final letter in which all the offers were confirmed once more, Ex. D-7 (*a*), dated 2nd July, 1944, from the plaintiff to the defendant, reference was again made to the fact that the goods were to be despatched F.O.R. Mirzapur and that they might be sent at the earliest booking day and that the defendants might draw on the plaintiff for the purchase price. It is common ground that some time between June and July the booking at Mirzapur was stopped and there was no supply of waggons by the railway authorities. It was for that reason that no specific date for delivery was fixed, though in Ex. D-7 (*a*) it was stated that the goods should be sent at the earliest booking day. On the 22nd July, 1944, the plaintiff seems to have demanded the defendant to despatch the goods at the earliest convenience. There being no reply to this telegram he sent a further telegram on the 26th July, 1944, Ex. P-6, whereby he intimated to the defendant that if immediate despatch of the goods was not effected he would be liable for all loss and demanded him to despatch the goods urgently. On the 27th of July in reply to this telegram the defendant sent Ex. P-7, a telegram which reads "Tried station. Goods will despatch one week." The plaintiff having learnt that some merchants of Mirzapur booked goods even on the 3rd and as he did not hear anything further from the defendant wrote a letter Ex. D-11 on the 4th August, 1944, intimating the defendant that as there was a default on his part the contract was cancelled and that he had covered the contract by purchasing goods in the market. He claimed the difference in the price as damages. This was followed by a telegram of even date. The defendant does not seem to have made any attempt whatever for securing waggons for the despatch of the goods. The only evidence on this point is that of the so-called forwarding agent who says that he signed in some register of the railway company, which was not however produced, in order to secure the supply of waggons for despatch of the goods. The evidence of that witness is wholly unreliable. The position therefore was that on or about this time while other merchants of Mirzapur were trying to despatch the goods in fulfilment of their contracts the defendant did not move his little finger to carry out the terms of the contract. The subsequent correspondence shows that the defendant was inventing untenable grounds for not despatching goods and did not make any arrangements till September for booking goods. All this shows that defendant has not made goods for despatch in August. In the above circumstances there was no option left to the plaintiff but to cancel the contract and he was justified in repudiating the contract.

Apart from the question whether all the offers constituted one single contract or were different contracts, from the fact that the parties agreed that the railway receipt should be sent to the Bharat Bank, which in the context could only mean the Bharat Bank at Madras, against payment by the defendant, the Court at Madras has undoubted jurisdiction to try the suit. From this point of view the damages have also to be assessed according to the market rate in Madras, as the performance

of the contract and the payment for the goods were at Madras and not at Mirzapur. The view of the learned City Civil Judge therefore on all the three points, in my opinion, is correct and he was justified in assessing the damages at the market rate in Madras and granting to the plaintiff a decree on that basis.

This appeal fails and is dismissed with costs.

V.P.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL, AND MR. JUSTICE RAJAGOPALAN.

Sri T. D. Ramayya Pantulu, Industrial Tribunal for Engineering Firms and Type Foundries, Fort St. George, Madras .. *Appellant**

v.

Kutty and Rao (Engineer), Ltd. and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947), sections 7 and 10 (1)—Government notification giving jurisdiction to a particular Tribunal over the whole of the Province with regard to disputes arising in engineering firms and type foundries—Validity—Absence of reference to disputes or specification of parties—If makes notification invalid.

On 5th March, 1948, the Government of Madras issued a notification which ran thus : " Whereas industrial disputes have arisen between the workers and managements of certain Engineering firms and Type foundries in the Province of Madras and whereas industrial disputes are apprehended in the rest of the Engineering firms and Type foundries in respect of certain matters. . . . . . in exercise of the powers conferred by section 7 (1) and (2) read with section 10 (1) (c) of the Industrial Disputes Act, 1947 . . . . . . His Excellency the Governor of Madras hereby constitutes an industrial Tribunal consisting of one person, namely, Sri T.D. Ramiah Pantulu . . . . and directs that the said industrial disputes be referred to that Tribunal for adjudication." On a question as to the validity of the notification,

Held : The notification is valid under section 7 of the Act, in that it gives jurisdiction to a particular Tribunal over the whole of the Province of Madras with regard to disputes arising in engineering firms and type foundries. But a general notification of this kind (which does not refer to any specific disputes between any group of workers and managements nor contains any specification of the firms in which disputes between the management and the workers existed) is not competent under the Act. The Government must have reason to believe that in a particular business a definite dispute is known to exist or is apprehended by reason of demands and discussions taking place amongst the workers and management.

The parties to a dispute must apply to the Government to refer the matter to a Tribunal and it is not competent for the Government to constitute a Tribunal leaving the parties to refer disputes which may arise to that Tribunal.

In a reference made by the Government under section 10 (1), it is most desirable that the Government should state what points they consider are in dispute and should be adjudicated upon by the Tribunal.

On appeal from the judgment and order of Subba Rao, J., dated 17th September, 1948, and passed in the exercise of the Ordinary Original Civil Jurisdiction in Application No. 1816 of 1948.

The Advocate-General (*K. Rajah Aiyar*) and The Government Pleader (*K. Kuttikrishna Menon*) for Appellant.

B. V. Subrahmanyam, N. C. Srinivasan, A. Ramachandran for Row and Reddi for Respondents.

The Judgment of the Court was delivered by

Horwill, J.—On the 5th March, 1948, by G. O. Mis. No. 1115, the Government issued a notification which runs,

"Whereas industrial disputes have arisen between the workers and managements of certain Engineering firms and Type foundries in the Province of Madras and whereas industrial disputes are apprehended in the rest of the Engineering firms and Type foundries in respect of certain matters ; . . . . . . in the exercise of the powers conferred by section 7 (1) and (2) read with section 10 (1) (c) of the Industrial Disputes Act, 1947 . . . . . . His Excellency, the Governor of Madras hereby constitutes an industrial Tribunal consisting of one person, namely, Sri T. D. Ramayya Pantulu. . . . . . and directs that the said industrial disputes be referred to that Tribunal for adjudication."

It is seen that in this notification there is no reference to any specific disputes between any group of workers and managements ; nor is there any specification of

*O.S.A. No. 69 of 1948. 21st January, 1949.

the firms in which disputes between the management and workers existed. The short question to be decided in this appeal is whether a general notification of this kind without specification of either the disputes or the firms in which disputes have arisen, is competent under section 7 of Act XIV of 1947. Subba Rao, J., held that it was not competent and that the Tribunal had no jurisdiction to enquire into disputes brought before it by workers in any particular firm.

There is no doubt that this notification is a valid one under section 7, in that it gives jurisdiction to a particular Tribunal over the whole of the Province of Madras with regard to disputes arising in engineering firms and type foundries; but the question immediately before us is whether it is equally valid under section 10 (1) of the Act.

The general purpose of the Act is to settle disputes which have arisen or are apprehended. It is the duty of the Board, or Court of Enquiry, or Tribunal as the case may be, to make enquiries in accordance with the terms of reference and in accordance with the provisions of the Act and the rules framed thereunder. Under S. 11 (3) every Board, Court, and Tribunal has the same powers as are vested in Civil Courts under the Civil Procedure Code; and every enquiry or investigation by a Board, Court, or Tribunal, shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code; and according to the rules framed under the Act it is the duty of the Chairman of the Board, Court, or Tribunal to call upon the parties to state their case. It is thus clear that in accordance with elementary principles of justice as well as the provisions above set out, it is the duty of a Tribunal to give notice to the parties to the dispute. It would therefore be necessary, if the notification of the Government were competent, for the Tribunal to issue a notice to the workers and management of every engineering firm and every type foundry in the Province and ask them to come forward and state their cases with regard to disputes of which the Tribunal knows nothing and in which no dispute may have arisen or may even have been apprehended. Such a procedure would be impracticable and not in consonance with public interest; because it would foster disputes. The learned Advocate-General conceded this position and was therefore forced to argue that the Government may have had in mind, when they drew up this notification, certain particular firms which we may designate as A, B, C, D, E and F, say, and intended the notification to apply to those firms as well as to other firms like G, H. . . . Z, which the Government did not have in mind; and that it would be the duty of the Tribunal, so the learned Advocate-General contends, to consider only such disputes, as were brought before it by the management or workers of individual firms. In other words, the Tribunal was not to act *suo motu* and enquire of all the engineering firms and type foundries in the Province whether there were any disputes that they desired to have settled, but to wait until it was moved by the workers or management of engineering firms and foundries. If that were the intention of the Government, it would infringe the provisions of section 10 (2), which lays down the procedure to be adopted when parties to an industrial dispute desire to have their differences settled. In such a case, they must apply, not to the Tribunal, but to the Government to refer the matter to a Tribunal. In this view of the matter, therefore, this notification was not competent.

There is another reason for holding that the order was not competent and that is that when a notification is issued and a reference made to a Tribunal, the Government must have in mind some dispute that has actually happened or one that is likely to arise from circumstances known to the Government. It has been argued by the learned Advocate-General that although the Government might know from enquiry the nature of already existing disputes, it cannot foresee what disputes are likely to occur in the future. We cannot agree; for before concluding that a dispute is apprehended, the Government must necessarily have known that certain demands were being made by workers in a particular firm and that the management of that firm were not inclined to comply with those demands and that an industrial dispute was therefore likely to arise. Moreover, it is most unlikely in this case, that the

Government had made enquiries of managements or workers in all the engineering firms and type foundries in the Province and had assured themselves that either disputes already existed or that they were likely to occur in the future. It is true, as the learned Advocate-General has argued, that if a dispute arises in one industry, especially if it relates to a demand for higher wages, and that demand is complied with, there is likely to be a similar demand made by workers doing similar work in other firms of a like nature. But that argument would apply to workers in general in all industries. If the standard of living is raised for a particular body of workers, workers exercising the same degree of skill in other works and industries will naturally, in due course, make similar demands. However that may be, it seems to us, on a fair reading of section 10, that the Government must have reason to believe that in a particular business a definite dispute is known to exist or is apprehended by reason of demands and discussions taking place amongst the workers and management.

In view of our agreement with the learned trial Judge that the reference made by the Government in this case was not competent because of the generality of the application of the notification, it is unnecessary for us to consider the other question whether the notification is bad because it does not specify the actual nature of the disputes between the managements and the workers. It however seems to us that if a dispute is to be referred to a Tribunal, the nature of the dispute must be set out, just as it would if a reference were made to arbitration in an ordinary civil dispute. The tribunal, like any other Arbitrator, can give an award on a reference only if the points of reference are clearly placed before it. It may be true that it is impossible, and perhaps undesirable, that a reference by the Government should contain a great deal of detail; but there should be sufficient specification, in our opinion, for the Tribunal to know what the matter is into which it is necessary to enquire and to give an award. If that is not done, the Government is inviting workers and managements to put forward claims which have never been in dispute, and which were not in the contemplation of the Government when they issued the notification. It seems to us from the general purport of the Act, that a responsibility lays upon the Government of considering the existence and the nature of a dispute and to exercise their mind and decide whether it is necessary to refer that dispute to a Tribunal for an award. Although it is not necessary for us to give a definite finding on this point; yet it seems clear to us that in a reference by the Government under section 10 (1), it is most desirable that the Government should state what points they consider are in dispute and should be adjudicated upon by the Tribunal.

The appeal is dismissed. The costs of the first respondent will be met by the Government, who have appeared in this appeal through the Advocate-General.

K.S. —————— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MACK.

Muppavarapu Kotayya and others .. *Petitioners**

v.

Narahari Devaiah and others .. *Respondents.*

Court-Fees Act (VII of 1870), section 11 and Civil Procedure Code (V of 1908), sections 148 and 151—Order to pay additional Court-fee with direction that petition should stand dismissed on failure to pay the same by a fixed date—Propriety—Order if revisable.

Section 11 of the Court-Fees Act confers, quite apart from section 148 of the Civil Procedure Code, a statutory discretion on a Court to extend the time for payment, if the court-fee is not paid within the time prescribed. A Court cannot and should not deprive itself of this discretion in anticipation by stipulating that in any circumstances the suit or petition will be dismissed if the additional court-fee is not paid within the time prescribed. For the discretion conferred by the section to come into operation there must be an application for extension tendering a sufficient

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*C.R.P. No. 1082 of 1947. 10th December, 1948.

cause, on which a judicial mind has to be brought to bear. Therefore, an order to pay additional court-fee with the direction that if the same is not paid by a fixed date, the suit or petition should stand dismissed is improper and not contemplated by section 11 of the Court-Fees Act.

Where the jurisdiction of the Court is invoked under section 151 of the Code, the order of the Court dismissing the petition on the ground that the Court had no power to extend the time or excuse the delay would be revisable by the High Court.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsiff, Ongole, dated 18th September, 1946, in I. A. No. 1243 of 1946, in O. S. No. 308 of 1941.

P. Satyanarayana Raju for Petitioners.

N. Subramanyam for Respondents.

The Court delivered the following

JUDGMENT.—First petitioner is a plaintiff in a suit for recovery of possession of land. Mesne profits were determined, after the decree, on a petition filed by him, for Rs. 260 and he was, on 16th April, 1946, the date on which the petition was disposed of, directed to pay additional court-fee on or before 23rd April, 1946. The District Munsiff made a rather unusual direction that if he failed to do, the petition would stand dismissed. Petitioner, after the re-opening of the Court after the recess, filed an application on 24th June, 1946, praying for extension of time on the ground of illness. This application, which was filed under section 151, Civil Procedure Code, was dismissed on 18th September, 1946, by the same District Munsiff, on the short ground that he had no power to extend time or to excuse the delay.

The learned District Munsiff relied on a decision of Wadsworth, J., in *Sripathi Baliah* v. *Ramayya*[1]. That decision related to the setting aside of an *ex parte* decree on terms, on condition that one party paid Rs. 15 within a month, and in default the appeal would stand dismissed with costs. There was some mistake committed by the Bench clerk who wrote down Rs. 12 instead of Rs. 15, and neither party was present at the time the order was pronounced. The District Judge held there was a *bona fide* mistake, and extended the time. A revision petition was dismissed by the High Court. Reliance was placed on the following observation of Wadsworth, J. :

"When a Court has granted time within which a payment must be made and has declared that in default of payment within the time specified the proceedings will stand dismissed, there is in my opinion, no power under section 148 of the Civil Procedure Code after the date on which those proceedings would stand dismissed, to extend the time in which the payment was to be made."

I do not think that expression of opinion extends to cases of payment of additional court-fee. It was intended to apply to cases where suits are restored to file or *ex parte* orders set aside on certain specified terms requiring a payment to be made within a certain time.

The governing section is clearly section 11 of the Court-Fees Act, which specifically provides for cases such as these. It lays down that :

"...... if the additional fee is not paid within such time as the Court shall fix, the claim for the excess shall be dismissed, unless the Court, for sufficient cause, extends the time for payment."

The old section 11 did not provide for an extension of time for sufficient cause. There is no decision directly in point, and in my own experience, I have not come across a single order by a Court requiring a deficit court-fee to be paid, stipulating at the first time of call that for failure to pay the court-fee by a fixed date, the suit or petition should stand dismissed with costs. Section 11 clearly confers, quite apart from section 148, Civil Procedure Code, a statutory discretion on a Court to extend the time for payment, if the court-fee is not paid within the time prescribed. I do not think that a Court either can or should deprive itself of this discretion in anticipation by stipulating that in any circumstances the suit will be dismissed

1. (1941) 1 M.L.J. 638.

if the additional court-fee is not paid within the time prescribed. For the discretion conferred by section 11 to come into operation there must be an application for extension tendering a sufficient cause, on which a judicial mind has to be brought to bear. Therefore, such an order as that passed by the District Munsiff, at any rate so far as the requirement to pay additional court-fee is concerned, is, I consider, improper, and also not contemplated by section 11.

It is urged that petitioner should have gone up in appeal to the District Court against the decree dismissing his petition for mesne profits and not have come up here in revision. I am unable to accept this contention, as the jurisdiction of the District Munsiff was invoked under section 151, Civil Procedure Code, and he felt himself unable and helpless to do anything in the matter, fettered as he thought he was by his own previous order. In the circumstances, it can scarcely be said that this revision petition does not lie.

Coming to the sufficiency of reason, this is clearly not a case of wilful default on the part of a plaintiff, who has after much trouble succeeded in getting an executable decree for Rs. 260. It is not likely that he would wilfully and intentionally omit to pay a small sum of about Rs. 30 as court-fee to make his decree executable. I think, in the circumstances the plea that he was ill can be accepted as a sufficient reason.

In the circumstances, I allow seven days' time for payment of the deficit court-fee from the date on which the records are received in the lower Court. In the circumstances, the parties to this petition will bear their own costs.

V.P.S. *Petition allowed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Bombay.)

PRESENT :—LORD SIMONDS, LORD OAKSEY, LORD MACDERMOTT, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

The Commissioner of Income-tax, Bombay City .. *Appellant**

v.

The Great Eastern Life Assurance Company, Ltd. .. *Respondent.*

Income-tax Act (XI of 1922, as amended in 1939), S. 10 (7)—Indian branch of insurance company not resident in British India—Computation of profits and gains—Schedule to Act—Rules 2 and 8—Applicability.

In assessing the profits and gains of the Indian branch of an insurance company not resident in British India recourse must be had in the first instance to rule 8 of the schedule to the Income-tax Act which is the only rule dealing specifically with that subject. In the absence of " more reliable data " the profits and gains must be computed on the proportionate basis laid down in the rule. Insurance companies usually get out an actuarial valuation for a quinquennial or triennial period, which is all that they are required to do by section 13 of the Assurance Act, 1938, and some statutory authority for treating the triennial or quinquennial valuation as the basis for computing the profits of a particular year seems essential. Without rule 2 (*b*) (which enables profits and gains to be computed on the annual average disclosed by an actuarial valuation made for the last inter-valuation period ending before the year in which the assessment is to be made) it would seldom be possible in the case of a life insurance business to find " more reliable data " within rule 8. Rule 8 extends to British Indian branches of any insurance company not resident in British India, whilst rule 2 is confined to life insurance business.

The " more reliable data " referred to in rule 8 are to be employed for the computation of the profits and gains of the British Indian branches of a non-resident insurance company in accordance with the rules in the schedule to the Income-tax Act appropriate to the case, including in the case of a life insurance business rule 2.

Millard Tucker, K.C. and *Handoo* for Appellant.

Cyril King, K.C. and *Graham Dixon* for Respondent.

Their Lordships' Judgment was delivered by

SIR JOHN BEAUMONT.—This is an appeal from a judgment and order of the High Court of Judicature at Bombay, dated the 6th October, 1944, upon a reference

*P.C. Appeal No. 54 of 1947. 14th October, 1948.

made to that Court under section 66 (1) of the Indian Income-tax Act, 1922, raising two questions relating to the computation of the profits and gains of the Bombay branch of the respondent company (hereinafter called "the assessees").

The assessees are a company incorporated in the Straits Settlement having their head office at Singapore and carrying on life insurance business in British India through their branch office at Bombay. It is, therefore, a company not resident in British India. The year of assessment is the year 1939-40, and the previous year, that is the year of charge, is the calendar year 1938. The amendments to the Indian Income-tax Act, 1922, made by the Indian Income-tax (Amendment) Act, 1939, which came into force on the 1st April, 1939, apply to the year of assessment. The Act of 1922 as so amended by the Act of 1939 will hereinafter be referred to as "the Act."

It follows from the above that the problem for determination relates to the proper method of computing the profits and gains of the Indian branch of a non-resident life insurance company, and such problem arises, not under rules 25 and 35 of the old Indian Income-tax Rules, but under the rules contained in the schedule to the Amending Act of 1939.

Section 3 of the Act which is the charging section draws no distinction between resident and non-resident assessees. Section 4 (1) provides that the total income of any previous year of any person includes all income, profits and gains from whatever source derived which (*a*) are received or are deemed to be received in British India in such year by or on behalf of such person, or (*c*) if such person is not resident in British India during such year, accrue or arise or are deemed to accrue or arise to him in British India during such year. Income is deemed to accrue or arise under the provisions of section 42 of the Act. Section 10 (7) of the Act enacts that:

"Notwithstanding anything to the contrary contained in sections 8, 9, 10, 12 or 18, the profits and gains of any business of insurance and the tax payable thereon shall be computed in accordance with the rules contained in the schedule to this Act."

The rule-making power is contained in section 59 of the Act.

The schedule is headed "Rules for the computation of the profits and gains of insurance business" and the following rules or portions of rules are relevant in this appeal:

"1. In the case of any person who carries on, or at any time in the preceding year carried on, life insurance business, the profits and gains of such person from that business shall be computed separately from his income, profits or gains from any other business.

2. The profits and gains of life insurance business shall be taken to be either—

(*a*) the gross external incomings of the preceding year from that business less the management expenses of that year, or

(*b*) the annual average of the surplus arrived at by adjusting the surplus or deficit disclosed by the actual valuation made for the last inter-valuation period ending before the year for which the assessment is to be made, so as to exclude from it any surplus or deficit included therein which was made in any earlier inter-valuation period and any expenditure other than expenditure which may under the provisions of section 10 of this Act be allowed for in computing the profits and gains of a business, whichever is the greater.

(3) In computing the surplus for the purpose of rule 2,—

(*a*) one half of the amounts paid to or reserved for or expended on behalf of policy-holders shall be allowed as a deduction."

The provisos to this rule are not relevant.

"4. Where for any year an assessment is made in accordance with the annual average of a surplus disclosed by a valuation for an inter-valuation period exceeding twelve months, then, in computing the tax payable for that year, credit shall not be given in accordance with sub-section (5) of section 18 for the tax paid in the preceding year, but credit shall be given for the annual average of the income-tax paid by deduction at source from interest on securities or otherwise during such period."

Rule 5 contains various definitions including definitions of "gross external incomings" and "management expenses."

"8. The profits and gains of the British Indian branches of an insurance company not resident in British India, in the absence of more reliable data, may be deemed to be the proportion of the total world income of the company corresponding to the proportion which its British Indian premium income bears to its total premium income. For the purpose of this rule, the total world income of life insurance companies not resident in British India whose profits are periodically ascertained by actuarial valuation shall be computed in the manner laid down in these rules for the computation of the profits and gains of life insurance business carried on in British India."

Before the Income-tax Officer the assessees produced Ex. T-A which is headed

"Consolidated statement of Indian Fund for the Triennium commencing 1st January, 1935, to 31st December, 1937, showing the actuarial surplus for the said triennium of the Indian business separately prepared at Singapore."

This document will be referred to as "the triennial valuation." The assessees also produced Ex. T-C which is headed "Revenue account for Indian business for the year ended 31st December, 1938," and which contained on the credit side an item "Interest Rs. 4,57,424." The Income-tax Officer held that the triennial valuation provided "more reliable data" for the purposes of rule 8 and he calculated the profits and gains of the Indian business under rule 2 (*b*) on the basis of this document. He then calculated the profits and gains under rule 2 (*a*) by reference to the proportionate rule laid down in the latter part of rule 8. Finding the profits and gains under rule 2 (*a*) greater than the profits and gains under rule 2 (*b*) he based his assessment on the former. No one supports the method adopted by the Income-tax Officer for computing the profits and gains under rule 2 (*a*) and his order need not be further discussed.

The assessees appealed to the Appellate Assistant Commissioner who agreed with the Income-tax Officer that the triennial valuation provided "more reliable data" within rule 8 for calculating the profits and gains under rule 2 (*b*), and that was not disputed. The Assistant Commissioner, however, disagreed with the method adopted by the Income-tax Officer for calculating the profits and gains under rule 2 (*a*) and held that the Revenue Account, Ex. T-C, provided "more reliable data" within rule 8 for calculating the income under rule 2 (*a*) since he considered that the item of interest Rs. 4,57,424 could be accepted as the gross external incomings for the purpose of rule 2 (*a*). As the amount of profits and gains calculated under rule 2 (*a*) was greater than that calculated under rule 2 (*b*) the Assistant Commissioner based the assessment on the figures arrived at under rule 2 (*a*).

The assessees then appealed to the Appellate Tribunal. In the memorandum of appeal objection was taken to the figure of Rs. 4,57,424 being treated as gross external incomings and it was alleged that that figure in the Revenue Account did not represent an actual receipt of income, and complaint was further made that the Appellate Assistant Commissioner did not inform the assessees that he was proposing to assume the item of interest appearing in the Revenue account as the gross external incomings of the Indian business.

The Appellate Tribunal disagreed with the view taken by the Appellate Assistant Commissioner as to his construction of rule 8, and held that if there were "more reliable data" available within the meaning of that rule a computation under rule 2 (*a*) or rule 2 (*b*) was not called for. After a full discussion of the facts and the law the Tribunal held that the triennial valuation provided "more reliable data" in terms of rule 8 and that the assessment must be computed upon the data given in that statement. The tribunal considered that rule 2 applied to all insurance companies whether resident or non-resident so far only as related to adjustments and allowances envisaged in that rule.

At the request of the Commissioner of Income-tax, Bombay, Sind and Baluchistan, the Tribunal referred two questions for the opinion of the High Court at Bombay under section 66 (1) of the Act. The questions were: (1) Is the scope of the expression "more reliable data" occurring in rule 8 of the Schedule to the Income-tax Act, confined to the higher of the two computations under rule 2 (*a*) and rule 2 (*b*) of the said schedule? or (2) whether the separate actuarial valuation

statement for the Indian business has rightly been held by the Tribunal to contain "more reliable data" for the purpose of rule 8 of the said schedule?'

The reference was heard by a Bench consisting of Sir Leonard Stone, C.J. and Mr. Justice Kania (as he then was). The Court made some verbal alterations in the first question as mentioned later, and as so amended answered the first question in the negative, and the second question in the affirmative.

The learned Chief Justice thought that the application of rule 2 should be excluded altogether and continued :

"In my judgment, the 'reliable data' referred to in rule 8, is the data necessary to assess the profits and gains of a branch business by some recognised business method which can be applied having regard to the manner in which the insurance company conducts its affairs."

Such a method of assessment ignores section 10 (7) of the Act which requires the profits and gains of any business of insurance to be computed in accordance with the rules. Nor do their Lordships think that there is any recognised business method of ascertaining the profits derived from life assurance business, the liabilities of which must necessarily depend on actuarial calculations and valuations. The learned Chief Justice agreed with the Appellate Tribunal in thinking that the triennial valuation afforded "more reliable data" within the meaning of rule 8, and that the profits and gains should be computed on the basis of that document. But it is to be observed that if rule 2 is not applicable there is no authority for computing the profits of 1938 on the figures of a period which expired before that year.

Mr. Justice Kania was not prepared to say that rule 2 never applied to non-residents, but he thought that it could not be applied to the Indian branch of a non-resident insurance company. He pointed out that the gross external incomings and the management expenses as defined in rule 5 are not in terms confined to the incomings and expenses of the Indian branch of a non-resident assessee. Whilst this is perfectly true their Lordships think that the application of the Rules in the Schedule must of necessity be controlled by reference to the subject-matter to be taxed. A non-resident is only liable to tax in respect of profits and gains which are either received or deemed to be received in British India, or which accrue or arise or are deemed to accrue or arise in British India. Their Lordships think that in calculating the profits and gains of the Indian branch of a non-resident company under rule 2 (*a*) the gross external incomings and the management expenses are confined by the context to those of the Indian branch. In this connection reference may be made to section 42 (3) of the Act. Cases may well arise in which it proves impracticable to supply the necessary data relating to an Indian branch with the result that in such cases there may be no "more reliable data" to take the case out of rule 8.

In their Lordships' opinion in assessing the profits and gains of the Indian branch of an insurance company not resident in British India recourse must be had in the first instance to rule 8 which is the only rule dealing specifically with that subject. In the absence of "more reliable data" the profits and gains must be computed on the proportionate basis laid down in the rule. In that case no other rule is relevant except for the purpose of computing the total world income which has to be apportioned. If there is "more reliable data," that is data more reliable for computing the profits and gains of the Indian business of the assessee than those on which the proportionate rule is based, then rule 8 passes out of the picture and by virtue of section 10 (7) of the Act, the computation of profits and gains must be made under the other rules in the Schedule which are appropriate. Their Lordships feel no doubt that rule 2 extends to the life insurance business of all persons whether or not resident in British India. Rule 2 (*b*) replaces the old rule 25 which was confined to life insurance companies incorporated in British India, but there is no such limitation in rule 2 which in terms draws no distinction between residents and non-residents. Unless the rule applies to non-residents they would lose the valuable privilege conferred by rule 3; nor would rule 4

apply. Furthermore rule 2 (*b*) is the only rule which enables profits and gains to be computed on the annual average disclosed by an actuarial valuation made for the last inter-valuation period ending before the year in which the assessment is to be made. Insurance companies usually get out an actuarial valuation for a quinquennial or triennial period which is all that they are required to do by section 13 of the Assurance Act, 1938, and some statutory authority for treating the triennial or quinquennial valuation as the basis for computing the profits of a particular year seems essential. Without rule 2 (*b*) it would seldom be possible in the case of a life insurance business to find " more reliable data " within rule 8.

Their Lordships think that the view taken by the Appellate Assistant Commissioner was correct. The triennial valuation afforded " more reliable data " for computing profits and gains under rule 2 (*b*) and the Indian revenue account, Ex. T-C (subject to the question of figures mentioned below) afforded " more reliable data " for computation under rule 2 (*a*), and the greater of the two computations can be accepted by the revenue authorities. As already noted the assessees in their appeal to the Appellate Tribunal challenged the figure of interest in the Revenue Account as representing gross external incomings. In the view which the Tribunal took of the case it was not necessary to decide this point. Mr. Tucker on behalf of the Commissioner agreed that it would be open to the assessees to raise this matter when the case is referred back to the Tribunal under section 66 (5) of the Act. Their Lordships will only say, therefore, that they think that the revenue authorities are entitled to accept the figure of interest in the revenue account as representing the gross external incomings for the year unless the assessees produce satisfactory evidence to show what the true figure of gross external incomings should be.

The first question for determination as amended by the High Court reads :

> " Is the scope of the expression ' more reliable data ' occurring in rule 8 of the Schedule to the Income-tax Act confined to the data required for arriving at the higher of the two computations under rule 2 (*a*) and 2 (*b*) of the said Schedule ?"

Their Lordships think that the question is not happily expressed and does not admit of a simple answer in the affirmative such as the appellant claims. Rule 8 extends to British Indian branches of any insurance company not resident in British India, whilst rule 2 is confined to life insurance business. It is obvious, therefore, that " more reliable data " under rule 8 might have to be employed in cases altogether outside the scope of rule 2. Their Lordships propose to answer question one by saying :

> " The more reliable data referred to in rule 8 are to be employed for the computation of the profits and gains of the British Indian branches of a non-resident insurance company in accordance with the rules in the Schedule appropriate to the case, including, in the case of a life insurance business, rule 2."

The second question does not call for an answer. Their Lordships' views on the matter sufficiently appear in this judgment.

For these reasons their Lordships will humbly advise His Majesty that this appeal be allowed and that the first question referred to the High Court be answered in the manner above indicated. The respondent must pay the costs of the hearing in the High Court and of this appeal.

Solicitor for Appellant : *Solicitor, High Commissioner of India.*

Solicitors for Respondent : *E. F. Turner & Sons.*

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

Yellapragada Gopalakrishnamurthi .. *Appellant** (*Plaintiff*)

v.

Pettu Poda Madireddi and others .. *Respondents* (*Defendants*).

Civil Procedure Code (*V of* 1908), *Order* 9, *rule* 9—*Scope and applicability—Plaintiff in subsequent suit impleaded as defendant in prior suit on identical cause of action—Prayer in prior suit for decree in favour of plaintiffs and the particular defendant—Dismissal of prior suit for default—Subsequent suit by that defendant —If barred.*

On 18th March, 1929, the co-owners of an extent of 8 acres of land agreed to sell the lands to *V* for a sum of Rs. 3,700 and paid an advance of Rs. 450. *A* who claimed the rights under the contract from *V* paid on 2nd July, 1929, a sum of Rs. 950 to two of the co-owners obtained a receipt and was ever since in possession of the land through her lessees *B* and *C*. On 2nd March, 1934, one of the co-sharers *X* sold an extent of one acre out of one of the items to *Y*. The co-sharers instituted on 9th March, 1936, a suit in the District Munsiff's Court of Tenali which was the subject-matter of the sale from *V* and *Y* was impleaded as a defendant in that suit. *A* and his lessees were also impleaded as defendants. That suit was based on the allegation that *V* committed default and that the plaintiffs were entitled to recover possession of the property. Reference was made in that plaint to the sale in favour of *Y* of one acre of land and it was prayed that as one of the plaintiffs *X* was bound to secure possession and deliver the same to *Y*, he should be put in possession of the said extent of one acre. *Y* also filed a written statement pleading that he was entitled to possession of one acre of land sold to him under the sale deed of 1934, together with the profits of that land and an issue on that was raised. On 20th September, 1937, the suit was dismissed as the plaintiffs did not appear and the vakils were absent. That order became final.

Y then instituted on 15th March, 1941, a suit to recover possession of the one acre on the strength of the sale deed of 1934 in his favour. The main contesting defendant was *A* who claimed to be entitled to continue in possession of the property and that the sale deed in favour of *Y* was brought into existence fraudulently and was of no legal effect. A plea that the suit was also barred under Order 9, rule 9 of the Civil Procedure Code was raised.

Held : For rule 9 of Order 9 of the Code of Civil Procedure to operate as a bar two things are essential. (1) The plaintiff must be the same and (2) the cause of action must be identical. As in the present case the plaintiff was only a defendant in the prior suit the rule does not operate as a bar though the cause of action was identical.

Quære.—Whether the disability under rule 9 applies to persons deriving title through the plaintiff either as assignees from him or as legal representatives.

Appeal against the decree of the Court of the Subordinate Judge, Tenali, in A. S. No. 135 of 1944, preferred against the decree of the Court of the District Munsiff, Tenali, in O. S. No. 83 of 1941.

M. S. Ramachandra Rao for Appellant.

V. Subramanyam for Respondents.

The Court made the following

ORDER (12*th April*, 1948).—This is an appeal by the plaintiff whose suit for recovery of possession of one acre of land out of 2 acres and 45 cents in Demarcation No. 612/1 in the village of Chandola was dismissed by the Courts below.

One Manthona Butchi Raju and others were co-owners of a plot of land of the extent of 8 acres comprised in Demarcation Nos. 604/2, 606/1 and 612/1. On the 18th of March, 1929, they agreed to sell the land for a sum of Rs. 3,700 to one P. Venkateswarlu. An advance of Rs. 450 was paid that day under a contract of sale, Ex. D-4. The third defendant in the present suit who claims rights under that contract from P. Venkateswarlu paid on 2nd July, 1929, a sum of Rs. 950 to two of the co-owners, and obtained a receipt, Ex. D-5. She was in possession of the land ever since through her lessees, defendants 1 and 2, in the present suit. Ex. D-6 series are leases in their favour and the third defendant was also paying taxes on the land as is evidenced by Ex. D-7 series. On the 2nd March, 1934, one of the co-sharers, Butchi Raju, sold under Ex. P-4 to the present plaintiff an extent of one acre of land out of 2 acres 45 cents comprised in Demarcation No. 612/1 which is the subject-matter of the present suit. The co-sharers

* S.A. No. 2347 of 1945. 26th November, 1948.

instituted on 9th March, 1936, a suit in the District Munsiff's Court of Tenali for recovery of possession of the land which was the subject-matter of the contract of sale, Ex. D-4, from Venkateswarlu, who was impleaded as the third defendant in that suit and the present third defendant was impleaded as the sixth defendant. The lessees of the third defendant, the present defendants 1 and 2, were also impleaded as parties in that suit as defendants 4 and 5. The present plaintiff was the eighth defendant. That suit was based on the allegation that Venkateswarlu committed default and that the plaintiffs were entitled to recover possession of the property. Reference was made in that plaint which is marked as Ex. D-1 to the sale in favour of the present plaintiff of the one acre of land and it was prayed that as one of the plaintiffs, Butchi Raju, in pursuance of the covenant to deliver possession, was bound to secure possession and deliver the same to the eighth defendant in that suit, the present plaintiff, he should be put in possession of the said extent of one acre. That suit was contested by the present third defendant and the present plaintiff filed a written statement Ex. D-2. In that written statement he pleaded that he was entitled to possession of one acre of land sold to him under the sale deed of 1934 together with the profits in respect of that land. An issue was raised in that suit, issue No. 4, which runs as follows :

> "Whether the plaintiffs and defendants 1, 2 and 8 are entitled to recover possession of the suit properties ? "

On the 20th September, 1937, the suit was dismissed by the learned District Munsiff as the plaintiffs did not appear and their vakils were absent. That order became final.

The present suit was instituted by the plaintiff on 15th March, 1941. He sued to recover possession on the strength of the sale deed in his favour executed by Butchi Raju in 1934. The main contesting defendant was the third defendant. She claimed to be entitled to continue in possession of the property in pursuance of the contract of sale in favour of Venkateswarlu ; and further pleaded that the sale in favour of the plaintiff was of no legal effect as it was brought into existence fraudulently with a view to defeat her rights. A further plea that the present suit was also barred under Order 9, rule 9 of the Civil Procedure Code was also raised.

The learned District Munsiff, who tried the suit in the first instance, by a judgment, dated 9th July, 1943, found that the plaintiff had no title as the sale in his favour was a fraudulent one and was not intended to be operative. He however did not record a finding on the objection of the third defendant based on Order 9, rule 9 of the Code and as the contract of sale in favour of Venkateswarlu was prior to the amendment of the Transfer of Property Act in 1929, he also found that though the contract was true and valid and though the third defendant was in possession of the property continuously from 1929, she was not entitled to invoke the doctrine of part-performance. In the result the suit was dismissed. There was an appeal to the Sub-Court by the plaintiff and the learned Subordinate Judge by an order, dated 27th March, 1944, remanded the suit for fresh disposal on the ground that the District Munsiff did not dispose of the case from a proper perspective. After the remand the District Munsiff again found that the plaintiff acquired no title under the sale in his favour and that he also had notice of the prior contract of sale in favour of Venkateswarlu. Under issue 10 he found that there was no bar under Order 9, rule 9 of the Code to the maintainability of the suit. In the result the suit was dismissed. There was again an appeal by the plaintiff to the Subordinate Judge. The Subordinate Judge dismissed the suit on the ground that the suit was barred under Order 9, rule 9 of the Civil Procedure Code. Though he was inclined to agree with both the learned District Munsiffs that the sale in favour of the plaintiff was not supported by consideration and also not genuine, he did not consider that question and record a finding. According to the learned Judge the third defendant was not entitled to invoke the doctrine of part-performance as the contract was prior to the amendment of the Transfer of Property Act though

he agreed with the finding of the learned District Munsiff that the third defendant was continuously in possession from 1929 of the entire land.

The plaintiff canvasses in this second appeal the correctness of the decision of the learned Subordinate Judge under Order 9, rule 9 of the Code. The third defendant contended that the suit in any event could not be disposed of without a finding on the title of the plaintiff.

The question raised under Order 9, rule 9 of the Code is not covered by any decision. The relevant portion of Order 9, rule 9 of the Code is :

> "Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action."

In the prior suit the present plaintiff was a defendant. No doubt the plaintiffs in that action prayed that by virtue of the sale in favour of the present plaintiff who was the eighth defendant in that suit, the eighth defendant should be put in possession of one acre of land sold to him by Butchi Raju under Ex. P-4. The present plaintiff cannot be said to be a person deriving title through the plaintiffs in the earlier suit, O. S. No. 93 of 1936, as the sale in his favour was prior to the date of that suit. It has been decided by the Privy Council in *Chand Kour* v. *Partab Singh*[1] that the dismissal of a suit under section 102 of the old Code corresponding to Order 9, rule 8, Civil Procedure Code of 1908, does not operate as *res judicata*. The rule only imposes a disability on the plaintiff whose suit has been dismissed. For the rule to operate as a bar two things are essential. One is that the plaintiff must be the same ; and the second is that the cause of action must be identical. As regards this latter requisite there is no difficulty in the present case. On an examination of the allegations in the prior plaint and the present plaint, the learned Subordinate Judge arrived at the conclusion that the cause of action in both the suits was identical and I agree with this conclusion. The more difficult question is whether the fact that the plaintiffs in the prior suit claimed that the eighth defendant should be put in possession of the one acre of land sold to him, as they were under an obligation to carry out the covenant for possession, would make them representatives of the eighth defendant ; and, the eighth defendant can hence be deemed to be a plaintiff in that suit. Whether the disability under rule 9 applies to persons deriving title through the plaintiff either as assignees from him or as legal representatives is a more difficult question to answer and does not arise for consideration in the present case. Section 146, Civil Procedure Code, which was introduced for the first time in the Code of 1908 and was intended to resolve the conflict between the decisions of the various High Courts on the question whether a legal representative of a defendant could apply under Order 9, rule 13 to set aside an *ex parte* decree no doubt enables an assignee or any other person deriving interest from the plaintiff to apply under rule 9 to set aside an order under rule 8 as it equally enables a representative of a defendant to set aside an *ex parte* decree. Under Order 9, rule 13, it was decided that a person not brought on record as a party but was a representative of the defendant could apply to set aside an *ex parte* decree by virtue of section 146, Civil Procedure Code (vide *Venkatasubbier* v. *Krishnamurthi*[2]). The position, therefore, is that by virtue of section 146, it is open to a person deriving title through the plaintiff to apply under Order 9, rule 9 to set aside an order under rule 8. Does it therefore imply that the word "plaintiff" in rule 9 should be construed as "plaintiff and his representatives" and does the disability apply also to the representative. I do not see any reason why the disability should not extend to persons claiming through a plaintiff against whom an order under rule 8 dismissing the suit was passed. If the disability does not extend to persons deriving title through the plaintiff it would enable the plaintiff to circumvent the provision of rule 9 by making an assignment after an order dismissing his suit was passed under rule 8. No doubt both section 11 and section 47 of the Code refer to not only parties but also representatives and the

1. (1888) L.R. 15 I.A. 156 : I.L.R, 16 Cal. 98 (P.C.).
2. (1913) I.L.R. 38 Mad. 442.

non-mention of representatives or persons deriving title through the plaintiff in Order 9, rule 9, Civil Procedure Code, may suggest that the bar under rule 9 does not extend to representatives. I do not see any reason for holding that the plaintiff in rule 9 does not include his heirs and representatives in interest on the general principles of law that an order by or against a person binds not only him but also heirs and representatives. The heirs and representatives cannot be in a better position than the person through whom they derive title. However, it is unnecessary in this case to express any final opinion on the question.

In the present case, the present plaintiff was only a defendant in the earlier suit and therefore the disability under rule 9 does not apply to him though the cause of action is identical. The only case which construed Order 9, rule 9, Civil Procedure Code, is the decision of the Patna High Court in *Gopiram Bhotica* v. *Thakur Jagarnath Singh*[1]. In that case, however the assignee of the plaintiff in the earlier suit intervened in the appeal against the order dismissing the suit for default as he took appropriate proceedings to entitle him to the rights and benefits, *qua* proceedings of the original plaintiff, and it was held that he should also be affected with the disability of the original plaintiff. That decision, therefore, is not of very much assistance in deciding the question before me and in my opinion, the learned Subordinate Judge was not right in relying on that decision in support of his conclusion. Decisions under Order 23, rule 1 which imposes a bar against a second suit when the prior suit was withdrawn without obtaining permission to institute the suit have been cited. In *Ramalinga Mudali* v. *Arumuga Mudali*[2], it was held that where a suit by one reversioner was dismissed for default or withdrawn without trial on the merits, a subsequent suit, by another reversioner challenging an improper alienation was not barred. This decision, however, does not throw much light on the application of Order 9, rule 9, Civil Procedure Code, as one reversioner does not derive title through another.

I am therefore of opinion that the learned Subordinate Judge's conclusion that the present suit was barred under Order 9, rule 9 is not correct.

This, however, does not dispose of this second appeal. As the learned Subordinate Judge did not record a finding on issues 1 and 2, the second appeal cannot be disposed of without a finding on those issues. It is, therefore, necessary to call for a finding from the learned Subordinate Judge on those issues. The case will, therefore, go back to the learned Subordinate Judge for findings on issues 1 and 2, on the evidence already on record. Time for submission of the findings, one month, after the reopening of that Court after the summer recess. Seven days for objections.

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After the return of the finding the Court delivered the following

JUDGMENT.—The learned Subordinate Judge has now submitted his findings on the two issues on which findings were called for by my order, dated 12th of April, 1948. On both the questions, he found in favour of the plaintiff. The defendants filed objections to the findings and contended that on the facts as found by the learned Subordinate Judge the only conclusion that is possible is that the sale deed in favour of the plaintiff was nominal and was not intended to be acted upon. I think this contention of the defendants is well founded. The learned Subordinate Judge has found that the only evidence as regards the payment of consideration for the sale is that the plaintiff examined as P.W. 2 and that as his evidence is interested it should not be accepted. The learned Judge, however, in his discussion in the course of the judgment seems to confuse the facts which are necessary to be established to support an inference that the document is nominal with the conclusion that a particular document is nominal. If the document is not supported by consideration it would be a point for consideration in coming to a

1. (1929) I.L.R. 9 Pat. 447.　　2. (1917) 33 M.L.J. 471.

conclusion whether the document was nominal or not. The learned Judge is also clearly of opinion that the plaintiff never obtained possession of the property though the sale deed was as early as 1934 and contained a false recital to the effect that possession was delivered then and there. This is the second circumstance which supports the conclusion that the document was nominal. Thirdly, there is the fact that even in the sale deed Butchi Raju, the vendor, did not give any boundaries for the area of one acre which he wanted to convey under this document to the plaintiff. It should be remembered that Butchi Raju was one of the co-sharers who owned 8 acres in which the suit 1 acre is included. There is a recital by Butchi Raju in the document that there was an earlier partition and that the property covered by the document was allotted to his share in that partition. This is quite inconsistent with the later conduct of Butchi Raju in the suit of 1936, in which the dispute proceeded on the footing that the property was undivided. This is the second false recital in the document and even if the plaintiff succeeds in establishing that the sale deed is a real transaction there is no possibility of granting a decree in his favour as his only right would be to sue for partition impleading all the other co-sharers as parties to the suit. This is not the relief which he asked for in the plaint and he framed his suit as if it were a suit in ejectment. On the strength of the sale deed he is not entitled to this relief. But this does not mean that I am holding that the document in favour of the plaintiff is a real transaction.

The next important circumstance found by the learned Subordinate Judge is the fact that the present suit for recovery of possession was filed when the period of twelve years was about to expire and the plaintiff has not attempted to give any explanation for the delay, at any rate, after 1937 when the earlier suit was disposed of. The learned Judge tries to find some explanation for which there is no basis and which is not the explanation offered by the plaintiff in the witness box. There is also the important circumstance that even in 1929 the third defendant was in possession of the property and the plaintiff says in the witness box that he made enquiries. If really he made enquiries he would have found that the possession was with the third defendant and if he had pursued his enquiries further he would have discovered that the third defendant was in possession of the property under a contract of sale for which she undoubtedly paid consideration.

It must therefore be taken to have been established that the document was not supported by consideration, that neither the plaintiff nor his vendor had possession on the date of the sale, that the document contains false recitals and the property is not specified by boundaries and the plaintiff did not take steps to enforce the rights, if any, under the document till about the expiry of the period of twelve years. From these circumstances the only inference that is possible and which the learned Subordinate Judge should have drawn is that the document is a nominal transaction not intended to clothe the plaintiff with any vesting of title in the suit property.

In the result, the plaintiff is not entitled to any relief in the suit and the dismissal of his suit by the Courts below is correct. The second appeal therefore fails and is dismissed with costs of the third defendant. No leave.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VISWANATHA SASTRI.

T. K. Chakrapani Iyer .. *Petitioner**

v.

Ammalu Amma and another .. *Respondents.*

Civil Procedure Code (V of 1908), Order 22, rules 10 and 11—Assignment of interest during pendency of suit—Assignor not defending appeal—Right of assignee to be brought on record to defend appeal.

The person to or upon whom an interest has come or devolved during the pendency of a suit or appeal is bound by the decision in the suit or appeal, though *eo nomine* he is not added as a party. But there is nothing to prevent a suit or appeal being continued without such person being brought on record. It is only when the presence of such person on record becomes necessary owing to special circumstances that the Court may be inclined to permit such persons to be brought on record. It may be, the person himself may apprehend that his interest may not be sufficiently safeguarded by the parties on record, or the other side may desire to obviate any trouble or obstruction in execution proceedings. Mere omission to make an application under Order 22, rule 10, Civil Procedure Code, will not by itself lead to any consequences, will not confer any right on parties or take away any rights from them. Accordingly there is no reason why a person in whose favour a transfer is made during the pendency of a suit should not choose to come on record only at the stage of an appeal or second appeal, if and when he considers that his presence has become necessary. The provisions of Order 22, rules 10 and 11 are of an enabling character. There is nothing in them to compel an action at the risk of the loss of any right.

Alagar Raja v. *Narayana Raja,* (1938) 1 M.L.J. 882 ; *Rajani Kanta* v. *Jyoti Prasad,* A.I.R. 1924 Cal. 90 ; *Wright Neville* v. *Freser,* I.L.R. (1944) Nag. 520 and *Lakshmi Narain* v. *Babu,* A.I.R. 1946 Lah. 33, approved.

Phul Chand v. *Khwaja Tahir Hussain,* A.I.R. 1934 All. 442, dissented from.

Ratnasabapathi Pillai v. *Gopala Aiyar,* (1940) 2 M.L.J. 349, overruled.

Petition praying that in the circumstances stated in the affidavits filed therewith the High Court will be pleased to issue an order directing to implead the petitioner herein as party respondent in S. A. No. 724 of 1948, preferred to the High Court against the decree of the Court of the Subordinate Judge of South Malabar at Palghat in A. S. No. 46 of 1945, preferred against the decree of the Court of the District Munsiff of Palghat in O. S. No. 347 of 1943.

C. S. Swaminathan for Petitioner.

N. Sundaram Aiyar for Respondents.

The Court made the following

ORDER.—(17th November, 1948). *Rajagopalan, J.*—This is an application under Order 22, rule 10, Civil Procedure Code, to bring the petitioner on record as a party respondent in S.A. No. 724 of 1948 on the file of this Court. The assignment on which the petitioner relied was during the pendency of the first appeal in the lower appellate Court and a few days before that appeal ended in that Court. On behalf of the appellant in the second appeal it was contended that since the assignment on which the petitioner relied was not during the pendency of the second appeal in this Court the petitioner was not entitled to invoke Order 22, rule 10 or Order 22, rule 11, Civil Procedure Code.

There is certainly a conflict between the decision of Stodart, J., in *Alagar Raja* v. *Narayana Raja*[1] and that of Patanjali Sastri, J., in *Ratnasabapathi Pillai* v. *Gopala Aiyar*[2]. Both are decisions of single Judges and my attention has not been drawn to any decision of a Bench of this Court. True, Stodart, J., did not refer to the scope of rule 11 of Order 22, Civil Procedure Code, in reaching the conclusion he did in *Alagar Raja* v. *Narayana Raja*[1]. The conflict between these two decisions should be obvious and that conflict has been specifically referred to by Abdur Rahman, J., in *Lakshmi Narain* v. *Babu*[3]. and by Puranik, J., in *Wright Neville* v. *Freser*[4]. These learned Judges doubted the correctness of the decision in *Ratnasapapathi Pillai* v. *Gopala Aiyar*[2] and were inclined to follow the law as laid down by Stodart, J., in *Alagar Raja* v. *Narayana Raja*[1]. The point is of some procedural importance and I think it is better that the conflict is set at rest as far as this Court is concerned. The papers will be placed before my Lord the Chief Justice for a decision whether the petition should be heard by a Division Bench :

(This petition coming on for hearing in pursuance of the order, dated 17th November, 1948),

The Judgment of the Court was delivered by

The Chief Justice.—This is an aplication made under Order XXII, rule 10 of the Civil Procedure Code to bring the petitioner on record as a party respondent

* C. M. P. No. 5347 of 1948. 17th December, 1948.

1. (1938) 1 M.L.J. 882.
2. (1940) 2 M.L.J. 349.
3. A.I.R. 1946 Lah. 33.
4. I.L.R. (1944) Nag. 520.

in S. A. No. 724 of 1948. The second appeal arises out of a suit, O. S. No. 347 of 1943, on the file of the District Munsiff's Court, Palghat. It was a suit for recovery of possession of certain property and for other reliefs. The trial Court decreed the suit. The first defendant filed A. S. No. 46 of 1945 in the Court of the Subordinate Judge, Palghat. Pending the appeal, the plaintiff, who was the 1st respondent therein, died, and his legal representatives were brought on record as respondents 2 and 3. They assigned their rights in the suit property to one Allu Achan Menon, who was impleaded in the appeal as the 4th respondent. He, in his turn, transferred his rights in the property to the petitioner herein, by a deed dated 30th May, 1947. The appeal was disposed of on 28th June, 1947, without the petitioner being impleaded as a party respondent. The appeal was dismissed, and the 1st defendant has filed the above second appeal. The petitioner has now made this application, because he is the person now interested in the property as the owner, and his transferor does not propose to defend the appeal. This application is opposed by the appellant in the second appeal, merely on the ground that as the assignment was during the pendency of the first appeal the petitioner is not entitled to the benefit of the provisions of Order XXII, rule 10, read with rule 11. The contention, shortly, is that as the petitioner did not bring himself on record in the lower appellate Court, he is precluded from applying to be brought on record in the second appeal. The application originally came on for hearing before Rajagopalan, J., who found a conflict between the decision of Stodart, J., in *Alagar Raja* v. *Narayana Raja*[1] and that of Patanjali Sastri, J., in *Ratnasabapathi Pillai* v. *Gopala Ayyar*[2]. The petition was therefore posted before a Division Bench.

The question which arises in this petition is of some procedural importance, and there has been a divergence of opinion not only in this Court, but in decisions of other Courts as well. We, therefore, propose to first examine the language of the relevant provisions, before discussing the case-law.

The substantive provision is Order XXII, rule 10, which runs as follows :

"(1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1)."

Rule 11 is a general supplemental provision for the application of this order to appeals and says that,

"so far as may be, the word 'plaintiff' shall be held to include an 'appellant' the word 'defendant' a respondent and the word 'suit' an appeal."

Reading these two rules together, the result appears to be this : If there is an assignment, creation or devolution of an interest during the pendency of a suit, an application may be made under Order XXII, rule 10, for a continuation of the suit by or against the person to or upon whom such interest has come or devolved. If such assignment, creation or devolution of interest takes place during the pendency of an appeal, the appeal may be in the same manner continued by or against such person. So far, it is common ground. It has also been decided by this Court that if the assignment, creation or devolution of interest is after the decree in a suit, the person to whom such interest has come or devolved can file an appeal from the decree. An appeal may be filed by or against the person to or upon whom such interest has come or devolved not by virtue of Order XXII, rule 10, but on account of another provision, namely, section 146 of the Code. Vide *Sitaramaswami* v. *Lakshmi Narasimha*[3] and *Subba Pillai* v. *Rangasami*[4].

What is contended, however, on behalf of the respondent in this application is that if the assignment, creation or devolution of interest, takes place during the

1. (1938) 1 M.L.J. 882.
2. (1940) 2 M.L.J, 349.
3. (1917) I.L.R. 41 Mad. 510.
4. (1917) 40 I.C. 846.

pendency of a particular proceeding, that is, a suit or an appeal, an application for continuation of that proceeding can be made by or against the person concerned, but such an application cannot be made at a further stage of the same suit. For instance, if the assignment was made during the pendency of a suit, an application cannot be made under this rule in an appeal from the decree in the suit, and likewise, if the assignment took place during the pendency of a first appeal, an application cannot be made in second appeal. This result is said to follow from the language of rule 11. No doubt, there are certain decisions which support this contention, of which two call for consideration. In *Phul Chand* v. *Khwaja Tahir Hussain*[1], there was an assignment in favour of the applicant during the pendency of the suit. The applicant filed an application in the trial Court for being added as a defendant, and the Court ordered the application on payment of Rs. 50 as costs of the day and half the total costs incurred by the plaintiff. The applicant deposited the sum of Rs. 50 but failed to deposit half the costs, and thereupon the Court dismissed his application. There was a decree in plaintiff's favour, and an appeal by the defendant to the High Court. The applicant filed an application in the appeal to be made a respondent. The learned Judges held that the application should not be granted. The decision was based on two grounds, one of which has no bearing on the present case, that is, that to grant the application would be to set aside the order of the trial Court dismissing the application of the applicant during the pendency of the suit. The other ground was that as the assignment in favour of the applicant was during the pendency of the suit and not during the pendency of the appeal in the High Court, the application was not maintainable under Order XXII, rule 10 read with rule 11. The learned Judges arrived at this conclusion by construing the language of rule 11 to mean that in the application to appeals, the word 'appeal' had to be substituted for the word 'suit' in rule 10, and the rule should run as follows :

> " In other cases of an assignment, creation or devolution of any interest during the pendency of an appeal, the appeal may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved."

Patanjali Sastri, J., took the same view in the *Ratnasabapathi Pillai* v. *Gopala Aiyar*[2]. Several points were decided in that case by the learned Judge, and this point was briefly disposed of as follows :

> " . . . . reading that provision (Order XXII, rule 10), in the light of rule 11 of the same order, it is clear that unless the assignment, creation or devolution referred to in the provision occurred during the pendency of the appeal, this provision would not entitle the appellant to be impleaded in the appeal. . . . ."

With great deference to the learned Judges of the Allahabad High Court and to Patanjali Sastri, J., we are of opinion that rule 11 of Order XXII should not be construed in this manner, that is, that in the application of rule 10 to appeals, there should be a substitution of the word 'appeal' for the word 'suit.' We consider that a proper construction would be to hold that the word 'suit' occurring in rule 10 should, so far as may be, include 'appeal.' Reading rules 10 and 11 together, a composite rule can be evolved as follows :

> " In other cases of an assignment, creation or devolution of any interest during the pendency of a suit or an appeal, the suit or appeal may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved."

It would follow that even if the assignment, creation or devolution of interest is during the pendency of a suit, an application for continuation of an appeal from a decree in the suit may be made by or against the person concerned. Such a construction finds support in the following decisions : *Rajani Kanta* v. *Jyoti Prasad Singh*[3], *Alagar Raja* v. *Narayana Raja*[4], *Wright Neville* v. *Freser*[5] and *Lakshmi Narain* v. *Babu*[6].

1. A.I.R. 1934 All. 442.
2. (1940) 2 M.L.J. 349.
3. A.I.R. 1924 Cal. 90.
4. (1938) 1 M.L.J. 882.
5. I.L.R. (1944) Nag. 520.
6. A.I.R. 1946 Lah. 33.

This construction follows from the language of the two rules. We are also of opinion that this construction is in accordance with justice and reason. Order XXII, rule 10 differs from the other rules in that order in several important respects. In the case of rules 2, 3 and 4, if the conditions laid down in the rules are satisfied, the Court is bound to grant the application made under the said rules. But, on the other hand, even if there has been assignment, creation or devolution of an interest, the Court is not bound to grant an application under rule 10. Then, again, under the provisions of the Indian Limitation Act, there is a time limit for making applications under rules 2, 3 and 4 of the Order. But there is no time limit for making an application under Order XXII, rule 10. These two factors support our view according to which a restricted interpretation should not be placed on the provision of rule 10. The reason is obvious. The person to or upon whom an interest has come or devolved during the pendency of a suit or appeal is bound by the decision in the suit or appeal, though *eo nomine* he is not added as party. But there is nothing to prevent a suit or appeal being continued without such person being brought on record. It is only when the presence of such person on record becomes necessary owing to special circumstances that the Court may be inclined to permit such person to be brought on record. It may be the person himself may apprehend that his interest may not be sufficiently safeguarded by the parties on record, or the other side may desire to obviate any trouble or obstruction in execution proceedings. What is really important is that mere omission to make an application under the rule will not by itself lead to any consequence, will not confer any right on parties or take away any rights from them. In which case we fail to see why a person in whose favour a transfer is made during the pendency of a suit should not choose to come on record only at the stage of an appeal or second appeal, if and when he considers that his presence has become necessary. We are in entire agreement with the reasoning of Abdul Rahman, J., who delivered the judgment of the Division Bench in *Lakshmi Narain* v. *Babu*[1]. As the learned Judge points out, the provisions of Order XXII, rules 10 and 11 are of an enabling character. There is nothing in them to compel any action at the risk of the loss of any right.

We, therefore, hold that this application is maintainable. On the merits, this appears to be eminently a case in which the application should be granted. The petitioner is directed to be impleaded as a party respondent in the second appeal. No order as to costs.

K.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO AND MR. JUSTICE PANCHAPAKESA AYYAR.

Kaliappa Goundan .. *Appellant**

v.

Valliammal .. *Respondent.*

Hindu Law—Guardianship—Girl aged two and a half years—Mother if can be preferred to father for appointment as guardian of person—Proper order to be made.

Though the father is the guardian of a Hindu child, if the mother is suitable and living, it is impossible to find an adequate substitute for her for the custody of a child of tender years (in this case a girl aged two and a half years) and it is in the interests of the child, whose interest should be the paramount consideration with Courts, that the mother should have the custody.

Saraswathibai Shripad v. *Shripad Vasanji*, I.L.R. (1941) Bom. 455, approved.

Prankrishna Sarma, In the matter of, (1882) I.L.R. 8 Cal. 969, not followed.

The proper order to pass in such a case is to give the custody of the child to the mother till the child is 18 years and to enable the father to take the child to his house for three days in every quarter so that he may not lose the society and affection of the child, in addition to allowing the father and the other relatives to visit the child in the mother's house at all convenient times.

1. A.I.R. 1946 Lah. 33.

* A.A.O. No. 403 of 1948. 19th January, 1949.

Appeal against the Order of the District Court, Coimbatore, dated 6th August, 1948, in O.P. No. 1 of 1948.

S. T. Srinivasagopalachari for Appellant.

K. V. Ramaseshan for Respondent.

The Judgment of the Court was delivered by

Panchapakesa Aiyar, J.—This appeal is against the order of the District Judge, Coimbatore, appointing the respondent, the mother of the minor girl, aged about two and a half years, as the guardian of her person, giving the appellant, the father, only the right to visit her at all convenient times, and expressing the hope that the appellant and his first wife, the minor's mother, would again join together in spite of the appellant's having taken for himself a second wife.

The learned counsel for the appellant urged that the lower Court's order cannot be sustained as the parties are Hindus governed by the Mitakshara law and the father's right to be the guardian of his minor children cannot be taken away unless he is proved to be unfit to be the guardian. He relied on the ruling in *In the matter of the petition of Prankrishna Sarma*[1]. That was a criminal case, and there the learned Judges were unable to find any authority for the proposition that the mother can ever have a right to the custody of her legitimate children adverse to the father, the emphasis being on the *adverse* nature of her custody. That ruling is a very old one, and the law has moved, consciously and unconsciously, further in favour of the rights of women and of mothers. The latest ruling relevant for this case is that reported in *Saraswathibai Shripad* v. *Shripad Vasanji*[2], where it has been held that though the father is the natural *guardian* of a Hindu child, if the mother is suitable and is living, it is impossible to find an adequate substitute for her for the *custody* of a child of tender years, and that it is in the interests of the child, whose interest should be the paramount consideration with Courts, that the mother should have the *custody*. We agree, with respect, with the principle laid down in that ruling.

So, the proper order to pass in this case is to give the custody of the child to the mother till the child is 18 years, and to enable the father to take the child to his house for three days in every quarter, so that he may not lose the society and affection of the child, in addition to allowing the father and the other relatives to visit the child in its mother's house at all convenient times. We modify the order of the lower Court accordingly. In the circumstances, we direct all the parties to bear their own costs throughout.

K.S. *Order modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE PANCHAPAKESA AYYAR.

Pulavarthi Ammanna and others .. *Appellants**

v.

Bommireddipalli Ramakrishna Rao and others .. *Respondents.*

Mortgage—Mortgage by members of Hindu coparcenary—Insolvency of adult coparceners during pendency of suit to enforce mortgage—Final decree and sale in execution without impleading Official Receiver—How far binding on Official Receiver or purchaser of insolvents' rights from him—Doctrine of lis pendens*—If applicable —Apprising receiver of date of proclamation of sale in execution of mortgage decree—Effect—Civil Procedure Code* (*V of* 1908), *Order* 21, *rule* 22*—If applicable.*

Provincial Insolvency Act (*V of* 1920), *section* 28-*A* (*inserted by Act XXV of* 1948)*—Retrospective operation and effect—Sale by receiver before introduction of new section* 28-*A—Demand to include shares of sons of Hindu insolvents.*

Practice—Suit for declaration of his rights by purchaser of insolvents' rights from Official Receiver—Advocate's fee—Governed by plaint valuation of the property and not the mortgage amount.

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1. (1882) I.L.R. 8 Cal. 969.
2. I.L.R. (1941) Bom. 455.

* Appeal No. 271 of 1946. 12th November, 1948.

Where during the pendency of a suit on a mortgage (executed by the members of a joint Hindu family) some of the mortgagors (the adult coparceners) are adjudicated as insolvents the action could not properly proceed against such mortgagors in the absence of the Official Receiver to whom the equity of redemption had been assigned by operation of law. Where the Official Receiver was not given an opportunity to come on record and to defend the suit, the decree will not be binding on the Official Receiver or the purchaser of the equity of redemption from him.

Kalachand Banerji v. *Jagannath Marwari*, (1927) 52 M.L.J. 734 : L.R. 54 I.A. 190 : I.L.R. 54 Cal. 595 (P.C.), relied on.

In the matter of *L. W. Nasse, Mansuklal Dolatchand & Co.*, (1928) I.L.R. 7 Rang. 201, considered. *Kandaswami Chetti* v. *Athitha Nadar*, (1926) 26 L.W. 47, not approved.

The fact that the sons of the insolvents were also parties to the suit would be of no avail. It cannot be said that the sons must be deemed to have represented the interests of their fathers also or that the omission to bring on record the Official Receiver would be at the worst analogous to defective representation of the estate of a deceased party by the absence on record of some of his proper legal representatives.

Nagaportharao v. *Subbarao*, (1942) 1 M.L.J. 177 and *Muthuraman Chettiar* v. *Adikappa Chetti* (1934) 67 M.L.J. 681 : I.L.R. 58 Mad. 407, referred to and distinguished.

As there was in the circumstances no valid decree against the Official Receiver representing the estates of the insolvents the provisions of Order 21, rule 22 of the Code of Civil Procedure (as they originally stood or as now amended in Madras) have no application and it cannot be said that a sale in execution of the mortgage decree will be valid and binding on the Official Receiver as the Official Receiver had been apprised of the proceedings in execution and received notice of the date for fixing the sale proclamation.

Raghunathdas v. *Sundardas Khetri*, (1914) 27 M.L.J. 150 : L.R. 41 I.A. 251 : I.L.R. 42 Cal. 72 (P.C.) ; *Fakhrul Islam* v. *Rani Bhubaneswari Kuer*, (1928) I.L.R. 7 Pat. 790 ; *Chandranath* v. *Nabadwip Chandra*, A.I.R. 1931 Cal. 476, referred to and distinguished.

Sunderram v. *Harangiram*, A.I.R. 1938 Pat. 289 ; *Bimalanandan Prasad* v. *United Refineries, Ltd.*, (1933) I.L.R. 11 Rang. 79 ; *Ajablal* v. *Haricharan*, (1944) I.L.R. 23 Pat. 528 (F.B.) ; *Rajagopala Aiyar* v. *Ramanujachariar*, (1923) 46 M.L.J. 104 : I.L.R. 47 Mad. 288 (F.B.) and *Kanchamalai Pathar* v. *Shaji Rajah Saheb*, (1935) 70 M.L.J. 162 : I.L.R. 59 Mad. 461 (F.B.), referred to.

A sale in execution of the mortgage decree though confirmed under Order 21, rule 92 of the Code of Civil Procedure will not be binding on the Official Receiver and cannot prevail over the rights of a purchaser after such execution sale from the Official Receiver of the rights of the insolvents-mortgagors. Such purchaser will have a right to redeem the share of the insolvents in the mortgaged properties.

The mere liability of the sons' shares to be sold for the mortgage debt borrowed by them does not put an end to the power of sale, as it is not analogous either to an attachment or an actual sale of the sons' share before the sale by the Official Receiver.

Arunachalam Chettiar v. *Sabaratnam Chettiar*, (1939) 1 M.L.J. 889, distinguished. The doctrine of *lis pendens* has no application.

The effect of the insertion of section 28-A in the Provincial Insolvency Act by Act XXV of 1948, is to alter the law laid down by *Ramasastrulu* v. *Balakrishna Rao*, (1942) 2 M.L.J. 457: I.L.R. 1943 Mad. 83 (F.B.) and the provision is retrospective in operation. Accordingly the Official Receiver must be deemed to have been vested with also the powers of the insolvent fathers to sell their sons' shares for the family debts, and the sale by the Official Receiver must be held to have been made in exercise of that power. The purchaser from the Official Receiver would therefore be entitled to the shares of the insolvents including that of his sons and entitled to redeem the mortgage to that extent.

The suit being one for a declaration of the right of the purchaser from the Official Receiver valued at Rs. 1,00,000, having regard to the fact that the title of the plaintiff was disputed unsuccessfully the plaintiff will be entitled to the advocate's fee on the value of the property. The mortgage amount (Rs. 12,500) would not be the governing factor as this was not a suit for redemption. The suit being one for a declaration the question whether the plaintiff should be compelled or not to redeem is not a matter to be decided in this suit.

Appeal against the decree of the Court of the Subordinate Judge, Ellore, dated 18th February, 1946, in O. S. No. 42 of 1944.

P. Somasundaram and *P. Suryanarayana* for Appellants.

P. Satyanarayana Raju for Respondents.

The Judgment* of the Court was delivered by

The Chief Justice.—This is an appeal against the decree and judgment of the learned Subordinate Judge of Ellore in O. S. No. 42 of 1944. The plaintiffs are the appellants. The suit was for a declaration that the plaintiffs were entitled to a three-fifths share of the properties in the plaint schedule representing the interests of defendants 4 to 6 and to such specific items as may be allotted to defendants 4 to 6

* 29th September, 1948.

in the final decree in O. S. No. 52 of 1931 and to the net income pertaining to the said share in deposit or to be deposited in the said O. S. No. 52 of 1931 on the file of the Subordinate Judge's Court, Ellore, or in the alternative, for a declaration that the plaintiffs were entitled to redeem the mortgage, dated 25th October, 1931, executed by defendants 4 to 7 and others in favour of the Imperial Bank of India and to pass a decree in favour of the plaintiffs permitting the plaintiffs to redeem defendants 1 to 3 and their successors in interest on payment of such amount as may be found due to them. The learned Subordinate Judge passed a decree declaring that the plaintiffs were entitled to a 11/75th share in the properties in the plaint schedule as well as in the income of the said share which was in deposit in O. S. No. 52 of 1931. The rest of their claim was dismissed. In their appeal, they claim the reliefs which they claimed in the plaint. Defendants 2, 3, and the legal representatives of the first defendant, who died pending the suit, have filed a memorandum of cross-objections, praying *inter alia* that the plaintiffs' suit should be dismissed *in toto.*

The facts of the case are complicated, but it is necessary to set them out in some detail to understand the contentions of the parties. The properties originally belonged to the members of the Cherukuvada family, consisting of five undivided brothers, defendants 4 to 6, the father of the 7th defendant, and the father of the 8th defendant. The 4th defendant has four sons. The 5th defendant has two sons, and the 6th defendant, four sons. On 25th January, 1932, the 1st plaintiff filed a creditor's petition, I. P. No. 8 of 1932 in the Court of the Subordinate Judge at Ellore, to adjudicate defendants 4 to 6 insolvents. The petition was transferred to the Court of the Subordinate Judge at Narsapur, and re-numbered as I. P. No. 92 of 1933 on the file of that Court. On 26th September, 1933, defendants 4 to 6 were adjudicated insolvents, and their rights vested in the Official Receiver, West Godavari.

The Cherukuvada brothers were indebted to the Imperial Bank of India at Rajahmundry and defendants 4 to 7 and the sons of defendants 4 to 6 had executed on 25th October, 1931, a mortgage of all their properties in favour of the bank. On the foot of the said mortgage and the promissory notes which formed the consideration for the mortgage, the Imperial Bank filed two suits in the Court of the Subordinate Judge of Ellore, O. S. Nos. 11 and 12 of 1932. To those suits, defendants 4 to 7 as well as the sons of defendants 4 to 6 were made parties. Preliminary decrees were passed in the two suits on 30th July, 1934, and the final decrees on 27th July, 1935. Though defendants 4 to 6 had been adjudicated insolvents on 26th September, 1933, the Official Receiver was not brought on record in either suit. The Imperial Bank transferred the two decrees obtained by them for consideration in favour of defendants 1 and 2. The bank filed E. P. No. 96 of 1935 in O. S. No. 12 of 1932 on 16th September, 1935. The relief prayed for in the petition was

> " to add the Official Receiver, West Godavari as 18th defendant in the decree as the defendants 4, 9, 11 and 16 were adjudicated insolvents and to sell the properties described in the schedule herewith filed which were ordered to be sold under the decree under Order XXI, rules 64 and 66, Civil Procedure Code ", and " to pay the sale proceeds to the plaintiff in satisfaction of the decree amount."

Defendants 4, 9 and 11 are the present defendants 3, 5 and 6. The Court raised an objection that there should be a separate petition by the decree-holder to add the Official Receiver as defendant. A formal petition was thereupon filed, and by an *ex parte* order, dated 24th October, 1935, the Official Receiver was added as defendant 18. On 18th December, 1935, the Court ordered sale notice to judgment-debtors. On 24th January, 1936, a notice was issued to the Official Receiver, West Godavari, informing him that as the decree-holder had applied for the sale of the defendants' immoveable property, the 10th day of February had been fixed for settling the terms of the proclamation of sale. This notice was received by the Official Receiver on 31st January, 1936 (Ex. D-17). On 24th February, 1936, when the execution petition was called, the Official Receiver was absent;

and it is common ground that he did not take any part in the execution proceedings. As the bank had transferred the decrees in favour of the present defendants 1 and 2, they filed a petition to recognise the transfer and to permit them to continue the execution petition. On 28th January, 1937, the transfer was recognised. On 2nd February, 1937, the Court ordered the properties to be proclaimed and sold on 6th April, 1937.

Meanwhile, on 9th February, 1936, the Official Receiver proclaimed for sale a three-fifths share of the suit properties, subject to the mortgage in favour of the Imperial Bank. On 2nd March, 1936, the properties so proclaimed for sale were purchased by the husband of the first plaintiff. On 6th April, 1936, the Official Receiver executed a registered sale deed in favour of the 1st plaintiff's husband and gave him symbolical delivery on 25th April, 1936.

The purchaser from the receiver was not made a party to the execution proceedings in O. S. No. 12 of 1932. There were similar proceedings in execution of the decree in O. S. No. 11 of 1932, and though it is not clear when the Official Receiver was brought on record in those proceedings also Ex. D-22 is the notice to the Official Receiver intimating that the transferee-decree-holder had made application for sale of the properties and that the 2nd August, 1937, had been fixed for the settlement of the terms of the sale proclamation. Notice of another application made on behalf of the transferee-decree-holders for permission to bid at the sale and set off was also given to the Official Receiver. Even in this execution proceedings, the Official Receiver did not take any part. In the sale held in execution of the decree in O. S. No. 12 of 1932 (E. P. No. 96 of 1935) defendants 1 and 2 purchased the four-fifths share of defendants 4 to 7, and all the sons of defendants 4 to 6 in some of the items in the plaint schedule, and in the execution proceedings in O. S. No. 11 of 1932, defendants 1 and 2 purchased the four-fifths share of defendants 4 to 7 and the sons of defendants 4 to 6 in certain other items in the plaint schedule and the third defendant purchased the four-fifths share in some of the other items. All these sales were duly confirmed and symbolical delivery made. The competing claims of the purchaser from the Official Receiver (whose rights have devolved on the plaintiffs) and the purchasers at the Court-sales held in execution of O. S. Nos. 11 and 12 of 1932 fall to be decided in this appeal and the memorandum of cross-objections.

The learned Subordinate Judge held that the decree in O. S. Nos. 11 and 12 of 1932 and the proceedings therein did not bind the plaintiffs who claimed under the Official Receiver because the Official Receiver had not been impleaded as a party in either of the suits. He also held that the fact that the Official Receiver had notice of some of the applications in the course of the execution proceedings in the two suits did not in law render the court sales valid and binding as against him. He, however, held that the only right which the purchaser from the Official Receiver obtained was the right, title and interest of the three insolvents, defendants 4 to 6, and they together individually were entitled only to a 11/75th share in the suit properties because of the existence of their sons, who had also their individual shares in the properties. He relied on the Full Bench ruling in *Ramasastrulu* v. *Balakrishnarao*[1], in which it was held that the right of a manager or father of a joint Hindu family to sell family assets to discharge debts binding on the joint estate does not devolve on the Official Receiver when such manager or father had been adjudicated an insolvent under the Provincial Insolvency Act. He further held that the plaintiffs could redeem only their share of the properties from the mortgage in favour of the bank.

Mr. P. Somasundaram on behalf of the appellants contended that though the decision of the learned Judge as regards the share to which the plaintiffs were entitled may be right under the law prevalent at the time, under the provisions of the recent enactment, namely, Act XXV of 1948, the plaintiff would be entitled

1. (1942) 2 M.L.J. 457 : I.L.R. 1943 Mad. 83 (F.B.).

to a three-fifths share. Act XXV of 1948 was an Act to amend the Provincial Insolvency Act, 1920, by the insertion of a new section 28-A after section 28. That section runs thus :

> "The property of the insolvent shall comprise and shall always be deemed to have comprised also the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge ;"

There follow two provisos which are not material for the purpose of this appeal. It cannot be denied and it was not denied by Mr. Ch. Raghava Rao, learned counsel for the contesting respondents, that the effect of this provision is to alter the law laid down in the Full Bench decision of this Court, and it was also admitted that this provision is retrospective in its operation. Applying this provision to the facts of this case, the Official Receiver must be deemed to have been vested with also the powers of the insolvent fathers, defendants 4 to 6, to sell their sons' share for the family debts, and the sale to the plaintiffs' predecessor must be held to have been made in exercise of that power. The plaintiffs would, therefore, be entitled to three-fifths share of the suit properties.

Mr. Somasundaram did not wish to challenge the finding of the learned Subordinate Judge that the plaintiffs were entitled only to redeem their share of the properties from the mortgage in favour of the Imperial Bank, particularly in view of the fact that the integrity of the mortgage had been broken by the purchase of a share of the mortgaged properties by the mortgagees themselves.

The attempt of Mr. Raghava Rao consisted in contending that the purchases made at the Court auction by defendants 1 to 3 prevailed over the purchase by the plaintiffs' predecessor from the Official Receiver. This contention of his was developed under several heads of argument : (1) Firstly he contended that the non-joinder of the Official Receiver in the two suits brought on the mortgage, namely, O. S. Nos. 11 and 12 of 1932 did not render the decrees therein in any manner defective and of no avail against the Official Receiver, because the adjudication was after the suit had been instituted. He submitted that the ruling of the Judicial Committee in *Kalachand Banerjee* v. *Jagannath Marwari*[1] would not apply to the facts of this case. In our opinion, there is no support for this argument either in principle or on the authority of decided cases. In *Kalachand Banerji* v. *Jagannath Marwari*[1], the material facts were as follows : One Tara Prasanna Bose had executed, in February, 1913, a mortgage in favour of the defendants over properties belonging to him for a sum of Rs. 40,000. He failed to pay the mortgage interest, and on 11th January, 1915, the mortgagees instituted a suit for foreclosure of the mortgage. It was agreed upon between the mortgagor and mortgagees that the time for payment of the mortgage debt should be extended on the undertaking of the mortgagor to pay the interest regularly every year and failing such payment the mortgagees were to be entitled to foreclose. Before any order could be made on the compromise, thus entered into between the mortgagor and the mortgagees, the mortgagor, Tara Prasanna died on 7th September, 1915, and the equity of redemption in the mortgaged properties devolved by inheritance on his son, Amulya Krishna Bose. Amulya had been adjudicated an insolvent on 21st February, 1914, and a receiver had been appointed of his estate in the insolvency. The mortgagees, instead of bringing on record the Official Receiver, with the leave of the Court, continued the suit after bringing on record the insolvent in the place of his deceased father. They obtained a preliminary decree against him on 15th March, 1916, and notwithstanding the subsequent intervention of the Receiver, a final decree was pronounced on the 31st August by which Amulya was debarred from all right to redeem the mortgaged property. Thereafter, the Receiver in bankruptcy brought a suit to set aside the decree for foreclosure of the mortgage and to redeem the property. The Subordinate Judge made a decree for redemption, but on appeal to the High Court, the decree was set aside and the suit was dismissed. Their Lordships of

1. (1927) 52 M.L.J. 734 : L.R. 54 I.A. 190 : I.L.R. 54 Cal. 595 (P.C.).

the Judicial Committee reversed the decision of the High Court and restored that of the Subordinate Judge. The reasoning on which the decision of their Lordships was based is important to notice for a determination of the soundness of the respondents' contention before us. After referring to the provisions of section 16, clause (4) of Act III of 1907 (Provincial Insolvency Act then in force), their Lordships said as follows :

"This provision is perfectly clear. The moment the inheritance devolved on the insolvent Amulya, who was still undischarged, it vested in the receiver already appointed, and he alone was entitled to deal with the equity of redemption . . . . . The mortgagor was of course a necessary party to the suit for foreclosure, Civil Procedure Code, Order 34, rule 1, and, as on his death his interest devolved on the Receiver in the insolvency of Amulya Krishna Bose, the plaintiffs became entitled to continue the suit by leave of the Court against the receiver, Order 22, rule 10. Instead of adopting this procedure, they chose to transact with the insolvent exactly on the same footing as if he were still undivested, and obtained from him a ratification of the deed of compromise."

An attempt to justify this procedure by the terms of section 16, clause 5 which saved the powers of a secured creditor to deal with the security in the same manner as he would have been entitled to realise or deal with it was made, but did not succeed. Their Lordships went on to say:

"The learned Judges of the High Court interpret this clause as inferring that the secured creditor is entitled to deal with the security as though there had been no vesting in the Court or the Receiver. Their Lordships are clearly of opinion that this construction of the clause cannot be supported. That the rights of the secured creditor over a property are not affected by the fact that the mortgagor or his heir has been adjudicated an insolvent is, of course, plain, but that does not in the least imply that an action against him may proceed in the absence of the person to whom the equity of redemption has been assigned by the operation of law. The latter alone is entitled to transact in regard to it, and he and not the insolvent, has the sole interest in the subject-matter of the suit. To him, therefore, must be given the opportunity of redeeming the property . . . . The ratification by Amulya of the deed of compromise on which the decree against him proceeded was therefore a nullity, and the whole proceedings by which he was made a party to the suit were equally ineffective to bind the equity of redemption vested in the receiver."

Their Lordships repelled a contention that the decree constituted *res judicata* because the receiver, during the pendency of the suit, after the preliminary decree, tried to come on record as a party and was heard on his objections to a final decree, in the following manner :

"All this, however, will not avail the respondents. The decree, which is pleaded as constituting *res judicata*, on the face of it bears that it was pronounced in a suit to which the appellant was not a party, and therefore does not come within the rule as to *res judicata* in section 11, Civil Procedure Code, which only applies to matters which were in issue in a former suit between the same parties."

In our opinion, there is nothing in the facts of the case before us which would take them out of the application of the ruling of their Lordships. The mortgage action could not properly proceed against the mortgagor

"in the absence of the person to whom the equity of redemption had been assigned by the operation of law."

We fail to see how there can be any difference between a case in which the mortgagor was an adjudicated insolvent on the date of the institution of the suit and the case in which the mortgagor was adjudicated insolvent during the pendency of the suit. The decisions cited by Mr. Ch. Raghava Rao in support of such a distinction which he tried to draw are not of any assistance to him. In In the matter of *L. W. Nasse, Mansuklal Dolatchand & Co.*[1], a decision of a single Judge, of the Rangoon High Court, two suits were instituted against one *N* on 29th March, 1923. *N* had been adjudicated insolvent on 28th March, 1923. The Official Assignee was not made a party, though notice was issued to him to report to the Court whether he would defend the suit, and he reported that he would not. The learned Judge held that as the Official Assignee was not a party to the suits he could not be bound by the decrees passed in them. Relying upon the Privy Council decision in *Kalachand Banerjee* v. *Jagannath Marwari*[2], it was argued that the Official Assignee must be

1. (1928) I.L.R. 7 Rang. 201.
2. (1927) 52 M.L.J. 734 : L.R. 54 I.A. 190 : I.L.R. 54 Cal. 595 (P.C.).

deemed to have been a party because he was given an opportunity to defend the suits and elected not to do so. Dealing with this argument, the learned Judge said :

"The procedure which was followed in the suits would have been correct if the insolvency had supervened after the institution of the suits. But at the date of their institution Nassee had been adjudicated and the equity of redemption in the debt had devolved on the Official Assignee. He was a necessary party, and should have been sued in the first instance ; not having been sued in the first instance, he should have been placed on the record as a defendant. The case is analogous to that of a suit brought against a man who was dead at the time of its institution."

In the present case, the insolvency supervened after the institution of the suits, but the Official Receiver was not given an opportunity to come on record and to defend the suits. In *Kandasami Chetti* v. *Jayapandia Athitha Nadar*[1], a decision of Devadoss, J., a preliminary decree was passed in a mortgage suit on 20th September, 1915. The mortgagor had been adjudicated insolvent on 2nd August, 1915. But the Official Receiver was made a party only at a later stage to the application for the passing of a final decree, but he did not object to the passing of the final decree. The learned Judge held that the decree was not an invalid decree by reason of the Official Receiver not having been made a party to the suit before the decree was passed. Though the facts are different, it must be said that in view of the ruling of the Judicial Committee in *Kalachand Banerjee* v. *Jagannath Marwari*[2], the decision of the learned Judge cannot be accepted as sound law ; in particular, the following observations :

"Even if the appellant was aware of the adjudication he is not bound under the law to make the Official Receiver a party to his suit."

It must be mentioned that the judgment of Devadoss, J., was delivered on 1st December, 1926, before the pronouncement of the Privy Council in *Kalachand Banerjee* v. *Jagannath Marwari*[2], which was in March, 1927. The decision in *Prince Victor Narayan* v. *Bhoirabendra*[3], has no bearing whatever on the question to be decided. The question there was whether after his adjudication a defendant was entitled to continue as a party to a suit.

It was next contended by Mr. Raghava Rao that besides the three mortgagors who were adjudicated insolvents pending the suit, their sons were also parties to the suits in their own right and as co-executants of the mortgage, and the omission to bring on record the Official Receiver would be at the worst analogous to defective representation of the estate of a deceased party by the absence on record of some of his proper legal representatives. Mr. Raghava Rao even went to the length of suggesting that the sons must be deemed to have represented the interests of the fathers also. This argument of Mr. Raghava Rao suffers from a fallacy. It may be conceded on the authority of the decision in *Nagaportharow* v. *Subbarow*[4], that when the father of a joint Hindu family is adjudicated insolvent, proceedings can be taken in respect of the sons' interest in the family property without the leave of the Insolvency Court, when no objection is taken in that behalf by the sons. But it is impossible to accept the position that the interests of all the members of the family are substantially represented by the sons. No authority was cited for the broad proposition that when several coparceners own the equity of redemption, even if some are made parties, they would properly represent all the coparceners. Such a right of representation is unknown to Hindu law. It may be held on the facts of a particular case that a coparcener had been put forward as the manager of the family to represent the interests of the family in a particular litigation, but that is not the case here. The sons did not purport to represent their fathers ; actually some of them were minors. The analogy of some of the legal representatives representing adequately the estate of a deceased person is not apposite. In *Muthuraman Chettiar* v. *Adaikappa Chetti*[5], Varadachariar, J., held that the preponderance of

1. (1926) 26 L.W. 47.
2. (1927) 52 M.L.J. 734 : L.R. 54 I.A. 190 : I.L.R. 54 Cal. 595 (P.C.).
3. A.I.R. 1930 Cal. 388.
4. (1942) 1 M.L.J. 177.
5. (1934) 67 M.L.J. 681 : I.L.R. 58 Mad. 407.

authority is in favour of the view that in the absence of fraud or collusion the representation by some of the heirs of a deceased party will be sufficient representation of his estate. He was not inclined to the view that unless all the legal representatives were actually on record, there could be no representation at all and the whole decree was void. It was not necessary for the purpose of that case to say whether such a partial representation was such a representation as to preclude the person not a party from seeking to re-open the decree by appropriate proceedings. What actually happened in the present case was that the fathers and sons were parties as mortgagors. When the rights of the three fathers devolved by operation of law on the Official Receiver, the latter who alone could effectively represent their interests was never brought on record and there was no other person who could validly represent their interests.

Mr. Raghava Rao developed at great length an argument that a notice under Order XXI, rule 22, Civil Procedure Code, was not necessary to be issued to the Official Receiver in the circumstances of the case and as the Official Receiver was certainly apprised of the proceedings in execution and received the notice intimating the date for the fixing of the proclamation of sale it must be assumed that the Official Receiver was aware of the execution proceedings and had an opportunity to intervene, and he could not, and therefore the plaintiffs claiming under him equally could not object to the validity of the Court sales. There was probably some justification on his part for dealing at some length on these points, because the learned Subordinate Judge held that there was no notice under Order XXI, rule 22, Civil Procedure Code, to the receiver calling upon him to show cause why the decree should not be executed against him. In our opinion, the provisions of Order XXI, rule 22, as they originally stood or as they now stand, after the amendment by this Court on 20th October, 1936, have no application to the facts of the present case. The provisions of that rule only govern a case where an application for execution is made against a party to the decree after the lapse of a certain time after the date of the decree or is made against the legal representative of a party to the decree, by reason of the death or the devolution of the interests of a party to the decree, subsequent to the date of the decree. According to the Madras Amendment, a notice under that rule is necessary when application for execution is made, where a party to the decree has been declared insolvent, against the assignee or receiver in insolvency. The language clearly implies that the rule will not have any application to a party who even prior to the decree had been declared insolvent and where the Assignee or the Receiver in insolvency had not been made a party before the decree. In *Raghunathdas* v. *Sundardas Khetri*[1], the judgment-debtors filed their petition in insolvency after the decree.

Mr. Raghava Rao relied upon a number of decisions in which it was held that the absence of notice under Order XXI, rule 22, Civil Procedure Code, when such a notice was necessary, does not *ipso facto* render a sale eventually held a nullity when the judgment-debtor by his conduct has precluded himself from relying upon that irregularity. In *Fakhrul Islam* v. *Rani Bhubaneswari Kuer*[2], for instance, the judgment-debtor appeared and contested. In *Chandranath* v. *Nabadwip Chandra*[3], it was held by Rankin, C.J., that where the parties had been litigating actively with each other upon the question whether an execution should proceed and how it should proceed for a period of more than two years on a notice under Order XXI, rule 66, it would be merely piling unreason upon technicality to hold that it was open to the judgment-debtors to object to the jurisdiction of the Court, because they had not got a formal notice to do something, namely, to dispute the execution of the decree which in point of fact they were busy disputing in all the Courts for the best part of two years. (Vide *Sunderram* v. *Harangiram*[4] and *Bimalanandan Prasâd* v. *United Refineries, Ltd.*[5]) On the other hand, Mr. Somasundaram drew our attention to

1. (1914) 27 M.L.J. 150 : L.R. 41 I.A. 251 : I.L.R. 42 Cal. 72 (P.C.).
2. (1928) I.L.R. 7 Pat. 790.
3. A.I.R. 1931 Cal. 476.
4. A.I.R. 1938 Pat. 289.
5. (1933) I.L.R. 11 Rang. 79.

the Full Bench ruling of the Patna High Court in *Ajablal* v. *Haricharan*[1], where the decision in *Bimalanandan Prasad* v. *United Refineries, Ltd.*[2] was distinguished. He also referred us to the two Full Bench rulings of our Court in *Rajagopala Aiyar* v. *Ramanujachariar*[3] and *Kanchamalai Pathar* v. *Shahaji Rajah Saheb*[4]. We do not consider it necessary to deal at any length with this contention or with the several cases cited before us relating to it, because this is not a case in which any of the contingencies referred to in Order XXI, rule 22 had happened. In all the decided cases cited before us, there was a valid decree obtained against persons who were properly parties to the suit and after the decree there was a devolution by death or by insolvency. No decision was cited before us in which the facts were similar to the facts of the present case, that is, where death or devolution had taken place before the passing of the decree and there was no decree against the representative as such.

Mr. Raghava Rao invoked the doctrine of *lis pendens* in favour of his clients. He presented his argument in two ways : He urged that as the Official Receiver sold the properties to the plaintiffs only after he had been made a party to the execution petition in O. S. No. 12 of 1932, the plaintiffs were bound by proceedings in the said execution petition culminating in the Court sale. The sale having been duly confirmed under Order XXI, rule 92, neither the Official Receiver nor the plaintiffs were entitled to question its validity in any collateral proceeding. The flaw in this argument is that in no sense was the Official Receiver a party validly impleaded in the mortgage suits. Our attention was not drawn to any provision of law or any authority, according to which a person who ought to have been joined as a party to the suit but had not been joined before the decree, could, after the decree, be impleaded in the course of execution proceedings so as to make him bound by the decree to which admittedly he was not a party. The other way in which the doctrine of *lis pendens* was sought to be pleaded was that the sons were parties to the mortgage suits in their own right, and therefore the sale by the Official Receiver after the institution of the suit and before the proceedings ended in a sale of the properties in execution of the mortgage decrees was affected by the rule of *lis pendens* in so far as it purported to convey the interests of the sons. The answer to this argument is obvious. There was no sale by the sons as such to the predecessor of the plaintiffs. The Official Receiver did not purport to sell their shares on their behalf. The plaintiffs do not therefore claim derivatively under the sons. On the other hand, they claim title by virtue of the exercise by the Official Receiver of a power conferred by Hindu Law on the fathers, defendants 4 to 6, to convey the shares of their sons also to discharge the debts binding on the family. The doctrine of *lis pendens* can have no application to this case.

The decision in *Arunachalam Chettiar* v. *Sabaratnam Chettiar*[5], was sought to be pressed into service by contending that the attachment of the sons' interest before the exercise of the father's power by the Official Receiver was similar to the liability of the sons' share to be sold to satisfy the mortgage in favour of the bank. The analogy is not sound, though it would have been if there had been in the present case also either an attachment or an actual sale of the sons' shares before the sale by the Official Receiver in favour of the plaintiffs' predecessor.

We find ourselves unable to accept any of the contentions of Mr. Raghava Rao and to hold that the sales in favour of his clients in execution of the mortgage decree would prevail over the purchase by the plaintiffs' predecessor from the Official Receiver, so far as the three-fifths share of defendants 4 to 6 and their sons is concerned. The appeal is therefore allowed and the memorandum of objections dismissed with costs.

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1. (1944) I.L.R. 23 Pat. 528.
2. (1933) I.L.R. 11 Rang. 79.
3. (1923) 46 M.L.J. 104 : I.L.R. 47 Mad. 288 (F.B.).
4. (1935) 70 M.L.J. 162 : I.L.R. 59 Mad. 461 (F.B.).
5. (1939) 1 M.L.J. 889 : I.L.R. (1939) Mad. 585.

Mr. Raghava Rao drew our attention to the decree which merely declares the plaintiffs' right to a share in the properties without declaring their obligation to redeem the mortgage in favour of the bank. The suit itself was not for redemption, but for a declaration that the plaintiffs by virtue of their title, were entitled to redeem the mortgage. Now that their title to the three-fifths share has been declared, it follows that they would be entitled to redeem the mortgage to that extent. Whether they should be compelled or not so to do is not a matter to be decided in this suit.

This case having been set down to be mentioned this day, the Court made the following Order (delivered by the Chief Justice) :—

The advocate for the respondents desired the case to be mentioned on three points. The first is that there should be a declaration that the appellants-plaintiffs are entitled to three-fifths share in the plaint properties including the moneys deposited in O. S. No. 52 of 1931 on their redeeming to the extent of the said three-fifths share the mortgage dated the 25th October, 1931, executed by Ramachandra Rao and others in favour of the Imperial Bank. We do not think that the decree can be made conditional in the manner suggested. By reason of our judgment the plaintiffs will be declared to be entitled to three-fifths share in the properties. As the properties are subject to a mortgage, the plaintiffs' right will be to the equity of redemption. They cannot however be compelled to redeem the mortgage even in respect of their share in this suit. It is for the mortgagee or his representative in interest to take appropriate proceedings on foot of his mortgage.

The respondents' advocate next objects to the award of the advocate's fee on Rs. 1,00,000. The suit was valued at Rs. 1,00,000 so far as the declaratory relief was concerned. Having regard to the fact that the title of the plaintiffs was disputed by the respondents and as the plaintiffs have succeeded, they will be entitled to the advocate's fee on the value of the property. Rs. 12,500 only represents the mortgage amount, but as this is not a suit for redemption, that would not be the governing factor. This objection must be overruled.

Lastly, it is brought to our notice that our judgment did not provide for the costs of the suit. We direct that the plaintiffs do recover half the costs of the suit from the contesting respondents.

K.S. *Appeal allowed and memorandum of objections dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. V. RAJAMANNAR, *Chief Justice*, MR. JUSTICE HORWILL AND MR. JUSTICE RAJAGOPALAN.

S. M. Nathaniel and others .. *Appellants.**

Criminal Procedure Code (V of 1898), section 411-A (introduced by Act XXVI of 1943)—Constitutional validity—Government of India Act, 1935—Schedule VII, List II, entries 2 and 15—Scope.

Act XXVI of 1943 is a valid enactment of the Central Legislature and the appeals (against convictions and acquittals on trials held by a High Court in the exercise of its Original Criminal Jurisdiction, notwithstanding anything contained in the Letters Patent of any High Court and without prejudice to the provisions of section 449 of the Criminal Procedure Code), provided for by section 411-A of the Criminal Procedure Code are maintainable.

A right of appeal may be a valuable and substantial right and in practice almost equivalent to a rule of substantive law. Nevertheless, in form, it may belong to the category of procedure.

It is reasonable to presume that the framers of the Constitution Act intended to convey by the words "Criminal Procedure" in entry No. 2 of List III concurrent legislative list, in Schedule VII of the Government of India Act, 1935, all that was commonly being treated as part of criminal procedure in the legislative enactments of the Indian Legislatures before the date of the Constitution Act.

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*Crl. Appeals Nos. 169, 182 and 183 of 1948. 12th November, 1948.

Entry 15 of List III gives ample power to the Central Legislature to pass legislation with respect to the jurisdiction and powers of Courts, if the provision relating to appeals falls within the words in entry 2 " Criminal Procedure." Even assuming that the subject-matter of Act XXVI of 1943, does not fall within the words "Criminal Procedure" in entry No. 2 of the Concurrent List, it will fall within the words " all matters included in the Code of Criminal Procedure at the date of the passing of this Act " in the same entry. It is reasonable to presume that the matter of providing appeals in criminal cases generally is a matter included in the Code of Criminal Procedure.

The fact that further jurisdiction was superadded to the jurisdiction already possessed by the High Court does not amount to the constitution of a new Court so as to bring the subject-matter of Act XXVI of 1943, within entry 1 in List II in respect of which only the Provincial Legislature had power to legislate.

Legislative authority in respect of criminal procedure would include the power to provide for and affect the right of appeal in these matters. Even if there is any overlapping then under section 100 (2) of the Constitution Act, 1935, the Concurrent List would prevail in so far as a particular subject can be said to fall within entries both in List II and List III.

The Resolution of the Governor of the Province (who had assumed to himself all the powers vested in the Provincial Legislatures under a proclamation issued under section 93 of the Constitution Act) approving the bill which was ultimately passed as Act XXVI of 1943 can be treated as the Resolution such as is referred to in section 103 of the Government of India Act.

Appeals under section 411-A, Criminal Procedure Code, against the convictions and sentences passed upon each of the said accused in Case No. 10 of the first Criminal Sessions of 1948 of the High Court of Judicature at Madras, passed in the exercise of its Original Criminal Jurisdiction on 11th March, 1948.

The Court (*Horwill* and *Govinda Menon, JJ.*) made the following

ORDER.—Since the important questions raised in the preliminary objection of the Public Prosecutor that Act XXVI of 1943 was *ultra vires* of the Federal Legislature were considered by the Full Bench in Cr. M.P. No. 1072, etc., but not finally decided, we feel that it is desirable that this preliminary objection should be considered by a Full. Bench. The papers will be placed before the Chief Justice for orders.

K. S. Jayarama Aiyar, C.R. Pattabhiraman, V.T. Rangaswami Aiyangar, R. Santanam, R. J. Manickam, D. Narasaraju and *V. A. F. Coelho* for Appellants.

K. Rajah Aiyar (Advocate-General) and the Public Prosecutor (*V. L. Ethiraj*) as Crown Prosecutor on behalf of the Crown.

The Judgment of the Court was delivered by

The Chief Justice.—The appellants in the above appeals were accused 1 to 4 in Case 10 of 1948 at the first Criminal Sessions of this Court in the year 1948. All the four appellants were found guilty by a majority of the jury of the offence of conspiracy to murder the late Dr. Habibulla. The appellants in Criminal Appeal No. 183 of 1948 were found also guilty of murdering him, while the appellants in Criminal Appeals Nos. 169 and 182 of 1948 were found guilty of abetting the murder. The majority verdicts of the jury were accepted by Bell, J., who tried the case, and they were sentenced to death. The appeals were preferred under section 411-A of the Code of Criminal Procedure which had been added to the Code by Act XXVI of 1943, with the leave of the appellate Court on matters of law and fact. The appeals came up for hearing before Horwill and Govinda Menon, JJ. The learned Public Prosecutor raised a preliminary objection that the appeals were not maintainable because Act XXVI of 1943 was invalid as being *ultra vires* of the Central Legislature, which had enacted it. As the learned Judges felt that it was desirable that the preliminary objection should be considered by a Full Bench, the papers were placed before me, and this Full Bench was constituted to hear the preliminary objection. At the hearing before us, the learned Advocate-General appeared on behalf of the Provincial Government and argued in support of the preliminary objection.

Before the passing of Act XXVI of 1943, the provisions of law relating to the conviction and sentence or acquittal by the High Court at its Criminal Sessions were as follows : Under section 25 of the Letters Patent there was no appeal to

the High Court from any sentence or order passed or made in any criminal trial before the Courts of Original Criminal Jurisdiction which may be constituted by one or more Judges of the said Court. But it was in the discretion of any such Court to reserve any point or points of law for the opinion of the High Court. When such point or points of law were so reserved, or, if it was certified by the Advocate-General that, in his judgment, there was an error in the decision of a point or points of law decided by the Court of Original Criminal Jurisdiction or that a point or points of law which has or have been decided by the said Court should be further considered, the High Court had full power and authority to review the case, or such part of it as may be necessary, and finally determine such points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as may seem fit. The Code of Criminal Procedure did not contain any provision conferring a right of appeal from a sentence or order passed by the High Court in exercise of its original jurisdiction except in cases specified in section 449 which ran thus :

"Where—

(*a*) a case is tried by jury in a High Court or Court of Session under the provisions of this Chapter, or

(*b*) a case which would otherwise have been tried under the provisions of this Chapter is under this Code committed to or transferred to the High Court and is tried by jury in the High Court, or

(*c*) a case is tried by jury in the High Court in a Presidency-town and the High Court grants leave to appeal on the ground that the case would, if it had been tried outside a Presidency-town, have been triable under the provisions of this Chapter, then, notwithstanding anything contained in section 418 or section 423, sub-section (2) or in the Letters Patent of any High Court, an appeal may lie to the High Court on a matter of fact as well as on a matter of law.

(2) Notwithstanding anything contained in the Letters Patent of any High Court, the Provincial Government may direct the Public Prosecutor to present an appeal to the High Court from an original order of acquittal passed by the High Court in any such trial as is referred to in sub-section (1).

(3) An appeal under sub-section (1) or sub-section (2), shall, where the High Court consists of more than one Judge, be heard by two Judges of the High Court."

By Act XXVI of 1943 passed by the Indian Legislature, section 411-A was inserted after section 411 of the Code, providing for appeals against convictions and acquittals on trials held by a High Court in the exercise of its original criminal jurisdiction notwithstanding anything contained in the Letters Patent of any High Court, and without prejudice to the provisions of section 449. Section 7 of that Act, *inter alia*, also declared that clauses 25, 26 and 41 of the Letters Patent for the High Courts at Bombay, at Madras and at Fort William in Bengal, shall cease to have effect.

The legislative powers of the Central and Provincial Legislatures are contained in the provisions of Part V of the Government of India Act, 1935. Section 99 (1) declares that the Federal Legislature (corresponding to the Central Legislature) may make laws for the whole or any part of British India, and a Provincial Legislature may make laws for the Province or any part thereof. The subjects with respect to which these two Legislatures have power to make laws are indicated in section 100, which runs thus :—

"(1) Notwithstanding anything in the two next succeeding sub-sections, the Federal Legislature has and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule to this Act (hereinafter called the 'Federal Legislative List').

(2) Notwithstanding anything in the next succeeding sub-section, the Federal Legislature, and, subject to the preceding sub-section, a Provincial Legislature also, have power to make laws with respect to any of the matters enumerated in List III in the said schedule (hereinafter called the 'Concurrent Legislative List').

(3) Subject to the preceding sub-sections, the Provincial Legislature has, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II in the said schedule (hereinafter called the 'Provincial Legislative List').

(4) The Federal Legislature has power to make laws with respect to matters enumerated in the Provincial Legislative List except for a Province or any part thereof."

It is clear from this section that if the subject matter of Act XXVI of 1943 is one of the matters enumerated in List I or in List II in the Seventh Schedule to the Act, then the Central Legislature is perfectly competent to pass the said enactment. If it is not, then, *prima facie* the Central Legislature has no such power, according to the provisions of this section. I do not think there is any substance in the contention of Mr. K. S. Jayarama Aiyar, the learned advocate who appears on behalf of accused 1, that under sub-section (4) of section 100, the Central Legislature has power to make a law with respect to a matter enumerated in the Provincial Legislative List, if that law is made not for a Province or any part thereof but for all the Provinces or for more than one Province. "Province" is defined in section 46 (3) of the Act as "a Governor's Province", that is to say, "Province" would not include what are described as "Chief Commissioner's Provinces" in Part IV of the Act, which do not have Legislatures. For these latter Provinces, the Federal or Central Legislature would have power to make laws, even with respect to matters enumerated in the Provincial Legislative List. Any other construction would lead to the absurd result of altogether destroying the difference between the several lists, Federal, Concurrent and Provincial. In my opinion section 100 (4) empowers the Federal or Central Legislature to make laws with respect to matters enumerated in the Provincial Legislative List only for areas other than the Governor's Provinces.

It was common ground that the subject matter of Act XXVI of 1943 is not covered by any of the entries in List I, the Federal Legislative List. It was contended by the learned Advocate-General that it falls within the scope of entries 1 and 2 of List II, the Provincial Legislative List, and that it does not fall within entries 2 and 15 of List III, the Concurrent Legislative List, as contended by the counsel on behalf of the accused. Naturally, the contest ranged mostly around the interpretation to be placed on the language of entry 2 of the Concurrent Legislative List, which runs thus :

"Criminal Procedure, including all matters included in the Code of Criminal Procedure at the date of the passing of this Act".

On the one hand, the learned Advocate-General argued that the subject matter of Act XXVI of 1943 was neither Criminal Procedure nor a matter included in the Code of Criminal Procedure. On the other hand, counsel for the accused argued that it was criminal procedure, and even if it were not, it was certainly a matter included in the Code of Criminal Procedure at the date of the passing of the Government of India Act.

Procedure, though a familiar word, is a word of uncertain and indefinite import. Jurists have found difficulty in defining exactly what procedure comprises, and where the line of distinction should be drawn between procedural or adjectival law and substantive law. Salmond[1] describes the true nature of the distinction thus :

"The law of procedure may be defined as that branch of the law which governs the process of litigation. It is the law of actions—*jus quod ad actiones pertinet*—using the term action in a wide sense to include all legal proceedings, Civil or Criminal. All the residue is substantive law, and relates, not to the process of litigation but to its purposes and subject matter. Substantive law is concerned with the ends which the administration of justice seeks ; procedural law deals with the means and instruments by which those ends are to be attained. The latter regulates the conduct and relations of Courts and litigants in respect of the litigation itself; the former determines their eonduct and relations in respect of the matters litigated."

The learned author points out the error in describing substantive law as that which defines the right and procedural law as that which determines the remedies. In this context, he says—

"This application, however, of the distinction between *jus* and *remedium* is inadmissible. For, in the first place, there are many rights which belong to the sphere of procedure ; for example, a right of appeal, a right to give evidence on one's own behalf, a right to interrogate the other party and so on. In the second place, rules defining the remedy may be as much a part of the substantive law as are those which define the right itself."

The learned Advocate-General invited our attention to the well-known class of cases in which it has been held that a right of appeal is a substantial and vested

1. Salmond's Jurisprudence, 8th Edition, pp. 495-6.

right, which would not be presumed to have been taken away, by retrospective operation of a statute, passed after the accrual of such a right. (*Colonial Sugar Refining Co.* v. *Irving*[1]). It has been pointed out again and again in these cases that a right of appeal is not such a right of mere procedure which could be adversely affected retrospectively. In my opinion, no assistance can be derived from this class of cases, because an appeal may be a valuable and substantial right, and in practice almost equivalent to a rule of substantive law. Nevertheless, in form, it may belong to the category of procedure. In *Venugopala Reddiar* v. *Krishnaswami Reddiar*[2], Varadachariar, J., says :

> " In one sense, a right of appeal may be spoken of as a matter of procedure and it is usually provided for in Codes relating to Procedure."

The following passage from Salmond on Jurisprudence, 8th edition, at page 497, is apposite in this connection :

> " Although the distinction between substantive law and procedure is sharply drawn in theory, there are many rules of procedure which, in their practical operation, are wholly or substantially equivalent to rules of substantive law. In such cases the difference between these two branches of the law is one of form rather than of substance."

Now, we are here called upon to construe the word ' procedure ' to find out what it was intended to comprise as subject matter with respect to which a Legislature can make laws. We are not called upon to construe it to find out if a particular matter is a matter of procedure so as to exclude the presumption against retrospective operation of a rule affecting it. It may be that several matters would be comprised within the definition of procedure, which would nevertheless be matters relating to substantial rights of parties, with respect to which retrospective opetion may not apply.

Mr. Jayarama Aiyar argued that the subject matter of "appeal" has always been included in the Procedure Codes, Civil and Criminal, in the continuous course of legislation in India, and that such legislative practice can be utilised as a useful guide in the interpretation of the descriptive terminology adopted in the Constitution Act, and particularly in the Lists in Schedule VII. In *C.P. Motor Spirit Taxation Act*, In re,[3] Gwyer, C.J., accepted this as legitimate. He said :

> " Lastly, I am entitled to look at the manner in which Indian legislation preceding the Constitution Act had been accustomed to provide for the collection of excise duties ; for Parliament must surely be presumed to have had Indian legislative practice in mind and unless the context otherwise clearly requires, not to have conferred a legislative power intended to be interpreted in a sense not understood by those to whom the Act was to apply."

In the same case, Sulaiman, J., referred to the following observations in *E.R. Croft* v. *Sylvester Dumphy*[4].

> " When a power is conferred to legislate on a particular topic it is important, in determining the scope of the power to have regard to what is ordinarily treated as embraced within that topic in *legislative practice*, and particularly in the legislatice practice of the state which has conferred the power."

In *Sir Byramji Jeejeebhoy* v. *The Province of Bombay*[5], the learned Judge of the Bombay High Court applied the same rule. Kania, J., as he then was, after citing from *Croft* v. *Dunphy*[4], said :

> " These observations show that in construing the words used in the Constitution Act the powers of the Imperial Parliament which passed the Act and its practice have to be borne in mind in ascertaining the meaning of the words used in the Constitution Act."

There can be no doubt that the provisions regarding appeals have always found a place in Codes of Procedure. Part VII of the Code of Criminal Procedure, as it stood on the date of the passing of the Constitution Act, dealt with "appeal, reference and revision." I think it is reasonable to presume that the framers of the Constitution Act intended to convey by the words 'Criminal Procedure' all that was

1. (1905) A.C. 369.
2. (1943) 2 M.L.J. 57 : (1943) 6 F.L.J. 47 at 51 (F.C.).
3. (1939) M.L.J. (Supp.) 1 : (1939) 2 F.L.J. 6 (F.C.).
4. (1933) A.C. 156 at 165.
5. 3 F.L.J. 25 (H.C.).

commonly being treated as part of criminal procedure in the legislative enactments of the Indian Legislatures, before the date of the Constitution Act.

The learned Advocate-General relied strongly on the decision of the House of Lords in *The Attorney-General* v. *Herman James Sillem*[1], and certain observations therein. In that case, the validity of rules made by the Barons of the Court of Exchequer under section 26 of the Queen's Remembrancer's Act, conferring a right of appeal in motions on the Revenue side of the Exchequer came up for decision. Under section 26 of the Act, the Barons had the power to make rules and orders as to the " process, practice, and mode of pleading on the Revenue side of the Court." It was held by the Court, by a majority, that the rules were void, because the words, " process, practice, and mode of pleading " were not in the abstract, but with reference to existing Courts, and that ' practice ' means the rules which guide the mode of proceeding within the walls of the Court itself. The creation of a right of appeal was an act which required legislative authority, and neither the inferior nor the superior tribunal, nor both combined, could create such a right, it being essentially one of the limitation and extension of jurisdiction. The judgment of the Lord Chancellor (Lord Westbury), rested on the fundamental juristic conception that the creation of a new right of appeal required legislative authority, because the Court from which the appeal is given and the Court to which it is given must both be bound, and that can be only by the act of some higher power. It was not competent to either tribunal or both collectively to create such rights. A power to regulate the practice of a Court "does not involve or imply any power to alter the extent or nature of its jurisdiction ". After holding that the words, "process, practice, and mode of pleading " occurring in the two places of the section should be given the same meaning, the learned Lord Chancellor proceeded to say :

> " Taking, then, the word ' practice ' as equivalent to the *cursus curiae*, or regulation of proceedings within the Court itself, the question is whether the 34th, 35th and 36th sections of the Act of 1854 can, with any propriety of language, be denominated provisions of rules respecting process, practice, and mode of pleading. . . . . . . An appeal is the right of entering a superior Court, and invoking its aid and interposition to redress the error of the Court below. It seems absurd to denominate this paramount right part of the practice of the inferior tribunal."

Clearly, neither the decision, nor the observations therein, have any bearing whatever on the question which falls for decision in this case. Entry 15 of List III gives ample power to the Central Legislature to pass legislation with respect to the jurisdiction and powers of Courts, if the provisions relating to appeals falls within the words in entry 2, " criminal procedure."

Even assuming that the subject matter of Act XXVI of 1943, does not fall within the words " criminal procedure " in entry 2 of the Concurrent List, I am clearly of opinion that it will fall within the words,

> " all matters included in the Code of Criminal Procedure at the date of the passing of this Act,"

in the same entry. The learned Advocate-General contended it would not fall into that category, because the word "matters" should be construed as meaning " provisions" and also because a right of appeal from a sentence or order of a Judge of the High Court sitting in criminal sessions to the High Court in the exercise of its appellate jurisdiction is not a matter which specifically finds a place in the Code of Criminal Procedure. I do not think there is any warrant for such a construction. The word ' matters ' is much more comprehensive and is of wider import than the word ' provisions.' The learned Advocate-General was forced to admit that a logical application of the construction for which he contended would lead to the anomalous result that the provisions of section 411-A inserted by Act XXVI of 1943 would be valid if they were inserted by way of amendment to section 449 of the Criminal Procedure Code, but as a separate section it would be invalid. Obviously, the Code of Criminal Procedure deals with matters which cannot be described as matters of procedure. Such are, for example, matters contained in Chapter X, Public

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1. (1864) 10 H.L.C. 704 : 11 E.R. (House of Lords) 1200.

Nuisances; Chapter XII, Disputes as to Immoveable Property; Chapter XIII, Preventive Action of the Police; Chapter XXXVI, Of the Maintenance of Wives and Children and Chapter XXXVII, Directions of the Nature of *Habeas Corpus*. These matters would certainly be covered by entry 2, and would be matters in respect of which the Central Legislature would have power to make laws. Support can be found for this construction of the latter part of the entry in the recent judgment of the Full Bench of this Court in Cr. M. P. No. 1072, etc., of 1948[1] which dealt with section 491 of the Code. It was there pointed out that the word 'including' is used in that entry as a word of enlargement and not of restriction. (Vide *Dilworth* v. *Commissioner of Stamps*)[2]. Part VII of the Code comprises Chapter XXXI and XXXII which deal with appeals, references, and revisions. Section 449 is a special provision relating to an appeal from a Judge of the High Court sitting in Sessions to a Division Bench of the High Court in certain cases. It is, therefore, reasonable to presume that the matter of providing appeals in criminal cases generally is a matter included in the Code of Criminal Procedure.

Considerable reliance was placed by the learned Advocate-General on certain observations of Narasinga Rau, J., in *Stewart* v. *Brojendra Kishore*[3]. In that case, the impugned provision was section 10-C inserted by the Assam Court of Wards (Amendment) Act 1937, which was passed by the Assam Legislature after 1st April, 1937. Under that enactment, Civil Courts were precluded from executing any decree or order against the person or property of a ward of the Court of Wards, within certain periods prescribed. One of the arguments in support of the contention that it was invalid was that it fell within entry 4 of the Concurrent List, which ran thus:

"Civil Procedure, including the Law of Limitation and all matters included in the Code of Civil Procedure at the date of the passing of this Act;"

and that there was a repugnancy within the meaning of section 107 of the Government of India Act. That argument was not accepted, because the subject matter of section 10-C was not strictly Civil Procedure, and it was also not a matter included in the Code of Civil Procedure. In the course of the discussion relating to this contention, the learned Judge, Narasinga Rao, J., made the following observations:

"Some difficulty is created by the last part of this item: "all matters included in the Code of Civil Procedure, etc." It so happens that the Code contains certain provisions relating to the jurisdiction and powers of Courts, *e.g.*, *see* part I of the Code. Sections 9 to 25 dealing with 'jurisdiction and *res judicata*', "section 42 dealing with the powers of Courts in executing transferred decrees, section 75 dealing with the power of Courts to isue commissions and so on. But merely because of this, it does not follow that "Civil Procedure" in the Concurrent Legislative List includes everything relating to the jurisdiction and powers of Courts. So to hold would be completely to wipe out the second entry in the Provincial Legislative List: "jurisdiction and powers of all Courts except the Federal Court with respect to any of the matters in this list." It is true that where the subject might fall either in the Concurrent Legislative List or in the Provincial Legislative List, section 100 makes the former the dominant list; but this principle cannot apply where the result would be to rob the Provincial entry of all its content."

After citing the case of *Marriage Reference* In re[4], the learned Judge proceeded to say:—

"'Civil Procedure' in the Concurrent Legislative List must be held to exclude matters relating to jurisdiction and powers of Courts, since special provision is made for these matters elsewhere in the lists. The provisions of the Civil Procedure Code itself, whether they are 'Civil Procedure' in this limited sense or not, are of course specifically included in the fourth entry of the Concurrent Legislative List. But we consider that there is no warrant for including in that entry any provisions which are not in the Code and which do not appertain to 'Civil Procedure' in the limited sense explained above."

The observation of the learned Judge that Civil Procedure in the Concurrent Legislative List must be held to exclude matters relating to the jurisdiction and powers of Courts, besides being *obiter* certainly cannot be supported, if by that is meant that in no case can legislation with respect to jurisdiction and powers of Courts

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1. (1949) 1 M.L.J. 1 (F.B.).
2. (1899) A.C. 99 at 105, 106.
3. A.I.R. 1939 Cal. 628.
4. (1912) A.C. 880.

fall within the Concurrent List. That would be equally to rob entry 15 of the Concurrent List of its content. Each of the Lists I to III contains an entry, "jurisdiction and powers of Courts." *Vide* entry 53 of List I, entry 2 of List II, and entry 15 of List II, and it should not be overlooked that each of these entries has reference to, and is with respect to, any of the matters in the corresponding List. If the subject-matter falls within either List I or List III, then certainly the Central Legislature has power to make laws affecting the jurisdiction and powers of Courts with respect to that matter. I cannot agree that the decision in *Stewart* v. *Brojendra Kishore*[1], is an authority in favour of the contention of the learned Advocate-General. The observations of Govinda Menon, J., in Crl.M.P. No. 1072, etc., of 1948[2] do not carry the matter any further, because the learned Judge only applied that decision to the facts of the case before him.

The learned Advocate-General, to further strengthen his contention that the subject matter of Act XXVI of 1943, would not fall within entry 2 of List III, argued that it fell within entries 1 and 2 of List II. Clearly, entry 2 is not of much help, and certainly is not conclusive, because the jurisdiction and powers of all Courts except the Federal Court covered by that entry, should be "with respect to any of the matters" in that List. It is only when a subject falls within any of the other entries in that List the Provincial Legislature is empowered to make laws affecting the jurisdiction and powers of all Courts except the Federal Court with respect to such a matter. So, we are thrown back on entry 1. That entry comprises several subjects, and so far as it is relevant, for the purpose of the present discussion, it runs thus :—

> ". . . . . the administration of justice ; Constitution and organisation of all Courts, except the Federal Court, and fees taken therein."

The learned Advocate-General tried to maintain that the provision for appeal contained in section 411-A is a matter which falls within either, if not both, of these two categories, namely (1) administration of justice, and (2) constitution and organisation of all Courts except the Federal Court.

"Administration of Justice" is no doubt capable of being understood in a very wide sense, and in that sense, may comprise even the establishment of Courts, providing for the institution, and trial of suits, and provisions regarding appeals and revisions. It can take in all civil and criminal proceedings, including execution in civil matters and punishment in criminal matters.

Nor would every case of conferment of a right of appeal from an inferior Court to a superior Court amount to the constitution or organisation of Courts. But the learned Advocate-General tried to maintain that by section 411-A a new Court was being constituted, and therefore, it was only the Provincial Legislature which had the power to pass a law providing for such constitution, as that subject has specially been assigned to it by entry 1 in List II. He refereed us to the Act of Parliament contained in 7 Edward VII, c. 23, by which a Court of Criminal Appeal was established in England, consisting of some of the Judges of the Court of King's Bench. That Act is not relevant here, because it cannot be said that the High Court as such did not have appellate criminal jurisdiction before Act XXVI of 1943. Clause 27 of the Letters Patent constitutes the High Court as a Court of Criminal Appeal, and clause 26 gives the High Court appellate jurisdiction even in respect of sentences and orders passed or made in a criminal trial before the Courts of original criminal jurisdiction which may be constituted by one or more judges of the High Court. In my opinion, the power and jurisdiction conferred by clause 26 is really in the nature of appellate jurisdiction and power (See *Chappan* v. *Moidin Kutti*[3]). It has already been mentioned that under section 449 of the Code the High Court was already a Court exercising appellate criminal jurisdiction in certain cases. The fact that further jurisdiction was superadded to the jurisdiction already possessed by the High Court does not amount to the constitution of a new Court. I also con-

1. A.I.R. 1939 Cal. 628.
2. (1949) 1 M.L.J. 1 (F.B.).
3. (1898) 8 M.L.J. 231 : I.L.R. 22 Mad. 68 at 80 (F.B.)

sider that it would be an undue straining of the language to construe 'organisation' as comprising, providing a right of appeal.

On this point, considerable assistance can be derived from decisions of the Judicial Committee dealing with the interpretation of similar entries in the Canadian Constitution. The distribution of legislative powers between the Dominion Legislature and the Provincial Legislatures is to be found in sections 91 and 92 of the British North America Act. It is sufficient to refer to the following provisions :—

Section 91 :

". . . It is hereby declared that notwithstanding anything in this Act the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated ; that is to say :—

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters."

Section 92 :

"In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say,—

14. The administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in these Courts."

Section 101 :

"The Parliament of Canada may, notwithstanding anything in this Act, from time to time provide for constitution, maintenance, and organization of a general Court of Appeal for Canada, and for the establishment of any additional Courts for the better administration of the Laws of Canada."

In *Nadan* v. *King*[1], it was held that section 1025 of the Criminal Code of Canada, if and so far as it is intended to prevent the King in Council from giving effective leave to appeal against an order of a Canadian Court in a criminal case, was invalid, on two grounds namely, (1) that it was repugnant to the Privy Council Acts of 1833 and 1884 and was therefore void under the Colonial Laws Validity Act, 1865, and (2) that it could only be effective if construed as having an extra territorial operation, whereas according to the law as it was in 1926, a Dominion Statute could not have extra-territorial operation. We are not concerned in this case with either of these grounds, and so, much time need not be spent on this case. But at page 490, there are the following observations which suggest that but for the two grounds of invalidity abovementioned, it would have been a valid provision :—

"The Attorney-General, who argued the case for the Crown, did not contest the view that, having regard to the provisions of section 1025, it was not open to the Supreme Court of Alberta to give leave to appeal in this case—presumably on the ground that the Dominion Parliament, having exclusive legislative authority in respect of the procedure in Criminal matters throughout Canada, had power to deprive the Canadian Courts of any jurisdiction to grant leave to appeal in those matters."

I think the implication is that the legislative authority in respect of criminal procedure would include the power to provide for and affect the right of appeal in these matters.

Both the limitations on account of which section 1025 of the Canadian Criminal Code was held to be invalid in *Nadan* v. *The King*[1], were abrogated by the Statute of Westminster. The extent of the legislative competence conferred on the Canadian Legislature in regard to appeals to the King in Council in criminal matters had therefore to be ascertained from the provisions of the British North America Act, 1867, in the case of *British Coal Corporation* v. *The King.*[2] It was there held that section 91 of the Act, read with the rest of the Act, not by express words, but by necessary intendment, invested the Canadian Dominion Legislature with power to regulate or prohibit appeals to the King in Council in criminal matters. In discussing the effect of the Statute of Westminster, their Lordships point out that in truth Canada was in enjoyment of the full scope of self-government, and its Legislature had been invested with all necessary powers for

1. (1926) A.C. 482. 2. (1935) A.C. 500.

that purpose by the Act, and what the Statute did was to remove the few fetters already mentioned. Their Lordships then observed :

"Among the powers which go to constitute self-government there are necessarily included powers to constitute the Law Courts and to regulate their procedure and to appoint their judges: save for the provisions of the Act, these powers in regard to the then newly constituted Dominion would have all belonged to the King as the fountain of justice : but by the Act these powers are vested in the Dominion Legislature, and thus *pro tanto* the prerogative is merged in the statutory powers. A most essential part of the administration of justice consists of the system of appeals. It is not doubted that with the single exception of what is called the prerogative appeal, that is, the appeal by special leave given in the Privy Council in London, matters of appeal from Canadian Courts are within the legislative control of Canada, that is, of the Dominion or the Provinces as the case may be."

The learned Advocate-General relied on the sentence in which it is said that a part of the administration of justice consists of the system of appeals. But surely it is evident their Lordships were there not discussing the scope of the entry 14, " administration of justice " in section 92, but they were using that phrase in a general and popular sense, from the fact that they expressly say that matters of appeal are within the legislative control either of the Dominion or of the Provinces, as the case may be. Their Lordships repelled the argument that the class of appeal with which that case was concerned, was a matter external to Canada, because the Privy Council sits in London, in the following manner :

" As already explained, this latter proposition is true only in form, not in substance. But even so the reception and the hearing of the appeal in London is only one step in a composite procedure which starts from the Canadian Court and which concludes and reaches its consummation in the Canadian Court."

Their Lordships, in conclusion, saw no valid reason since the Statute of Westminster why the power to regulate or prohibit appeals to the King in Council should not be held to be vested in the Dominion Parliament by the Act with the consequence that it was validly exercised by the impugned section of the Act to amend the Criminal Code. Their Lordships, however, pointed out that it was neither necessary nor desirable to touch on the position as regards civil cases. In my opinion, this decision of the Privy Council is opposed to the contention of the learned Advocate-General based on the part of entry 1, " administration of justice."

Though *Attorney-General for Ontario* v. *Attorney-General of Canada*[1], was decided on a construction of section 101 of the British North America Act, under which the Dominion Parliament had power to establish a general Court of Appeal for Canada, there is one passage at page 152 which lends some support to the contention on behalf of the accused that the words " administration of justice " would not comprise provisions in regard to appeals. It is as follows :

" In coming to this conclusion their Lordships do not think it useful to embark on a nice discrimination between the legislative powers contained in sections 91 and 92 respectively of the Act. Nor, as it appears to them, is it necessary to determine whether the words of head 14 of section 92, " The administration of justice in the province " would if they were disembarrassed of any context, be apt to embrace legislation in regard to appeals to His Majesty in Council. There appear to be cogent reasons for thinking that they would not. But their Lordships do not make this the ground of their decision ; for it is elsewhere, it is in section 101 of the Act that the solution lies."

The following passage from Clement's Canadian Constitution, Third Edition, at page 539, supports the same conclusion, namely, that appeals form part of procedure :—

" The assignment to the Federal Parliament of exclusive authority over ' criminal law. . . . including the procedure in criminal matters ' has been held to preclude provincial legislatures from giving a right of appeal in particular instances ; so that the creation of an appellate tribunal with a general criminal jurisdiction is futile unless the federal parliament confers the right of appeal in the particular instance. As a matter of fact, the Criminal Code covers negatively as well as affirmatively almost entirely the whole field of criminal appeals ; and so far as such provisions extend they are of paramount authority."

If, for any reason, it should be held that there is a certain amount of overlapping, and such overlapping is bound to occur (Vide *P. K. Mukherjee* v. *Bank of Commerce Ltd., Khulna*[2]), then, under section 100 (2) the Concurrent List would pre-

1. (1947) A.C. 127.
2. (1947) 2 M.L.J. 6 at 12 and 13 : L.R. 74 I.A. 23 : (1947) F.L.J. 34 (P.C.).

vail, in so far as a particular subject can be said to fall within entries both in List II and List III.

Even assuming that the subject-matter of Act XXVI of 1943 falls entirely within any of the entries in the Provincial List, Mr. Jayarama Ayyar contended that it is nevertheless valid, because of the special provision contained in section 103 of the Government of India Act. It runs thus :

"If it appears to the Legislatures of two or more Provinces to be desirable that any of the matters enumerated in the Provincial Legislative List should be regulated in those Provinces by Act of the Federal Legislature, and if resolutions to that effect are passed by all the Chambers of those Provincial Legislatures, it shall be lawful for the Federal Legislature to pass an Act for regulating that matter accordingly, but any Act so passed may, as regards any Province to which it applies, be amended or repealed by an Act of the Legislature of that Province."

From the statements of objects and reasons published in the Gazette of India, Parts IV and V relating to Bill No. 1 of 1943, which subsequently became Act XXVI of 1943, it appears that all Provincial Governments were unanimously in favour of amending the law as provided in that bill. It is useful to extract the statement in full :—

STATEMENT OF OBJECTS AND REASONS.

"At the instance of the Bombay High Court the Bombay Government proposed to the Central Government in May 1941, that legislation should be undertaken to provide for a restricted right of appeal in criminal cases against the decisions of a High Court exercising its original jurisdiction, on the lines contained in the Criminal Appeal Act, 1907 (7 Edw. VII, c. 23).

The Letters Patent of the various High Courts prohibit appeals in such cases, but provide a restricted power of review, corresponding to that embodied in section 434 of the Code of Criminal Proceedure, 1898. The Code of Criminal Procedure provides by section 449 enacted in 1923 to implement a recommendation in the Report of the Racial Distinctions Committee, for appeals from decisions in cases tried before a High Court by a Jury under the special provisions of Chapter XXXIII but contains no provision for appeals in similar trials not held under that Chapter.

This absence of any general provision for appeals from the decisions of a High Court exercising original Criminal jurisdiction is perhaps attributable to the state of English law on the subject when the Letters Patent were issued long before the passing of the Criminal Appeal Act, 1907. Provincial Governments and High Courts when consulted upon the Bombay Government's proposal, were unanimously in favour of amending the law in the direction indicated.

The Bill is designed to give effect to the conclusions which have emerged from a collection of opinions expressed by the various authorities consulted."

Mr. Jayarama Ayyar contends that as all the Provinces thought it desirable that the proposed legislation should be undertaken by the Central Legislature, it was lawful for the latter to pass the Act in question.

The learned Advocate-General sought to meet this contention in two ways : First, he said that the condition laid down in the section was not satisfied, because there was no resolution passed by the Chambers of the Provincial Legislture, as these Legislatures were not in existence. At the time of the passing of the impugned Act in most of the Provinces, the Governor had issued proclamations under section 93 of the Act assuming to himself all the powers vested in the Legislatures. So far as Madras is concerned, the Proclamation clearly stated that the Governor had assumed to himself all powers vested by or under the Act in the Provincial Legislature and all powers vested in either Chamber of that Legislature. I do not see why in these circumstances, it cannot be said that the Resolution of the Governor should not be the resolution such as is referred to in section 103. The Governor had assumed the powers of both the Chambers of the Legislature, and that power would include a power exercisable under section 103 of the Act. Another way in which the Advocate-General tried to meet the contention was by urging that the impugned Act did not purport to be passed by the Central Legislature in pursuance of action under section 103. I do not think that if it appears to us that the condition of section 103 is satisfied in fact, an Act passed by the Central Legislature, in the circumstances, should be held to be invalid, merely because it did not appear that the Central Legislature was enacting the law in exercise of the power conferred under section 103. On the whole, I think there is considerable force in the

contention of Mr. Jayarama Ayyar, based on section 103 of the Government of India Act.

Mr. Jayarama Ayyar also addressed to us an argument based on a presumed policy which could be gathered from the distribution of powers, namely, that a certain uniformity of law was contemplated in all the Provinces in matters of general importance, like Criminal Law and Procedure, including rights of appeal, evidence, etc. A perusal of the subjects contained in the Concurrent List does lend some support to this argument, but I do not think it necessary to rest our conclusions on any presumption of a general policy underlying the distribution of legislative powers between the Centre and the Provinces.

In my opinion, Act XXVI of 1943 is a valid enactment of the Central Legislature, and the appeals are therefore maintainable.

It was a matter for surprise that the objection to the maintainability of the appeal based on an attack on the validity of Act XXVI of 1943 should have been taken on behalf of the Government. Section 411-A had been inserted by that Act and has remained in force for nearly five years, without any objection being taken to its validity. Several appeals including appeals by the Madras Government have been preferred and disposed of on the footing that the new section had been validly inserted in the Code. There was no apparent reason why after the lapse of such a long period the Provincial Government should have suddenly raised this objection. Apart, however, from the lapse of time, there is one circumstance which calls for particular comment. Before the passing of the Act, the Provincial Government was consulted, and it was also at the desire and with the consent of this Provincial Government among other Governments that the impugned legislation was undertaken by the Central Legislature. Having practically invited the Central Legislature to pass the Act in question, it was not proper on their part to have now raised this objection. Presumably, the Provincial Government was aware of what had taken place before the passing of the Act. But the learned Advocate-General was unable to explain why in spite of that, the Government now insisted on taking this objection to the maintainability of the appeals. He did not say that in the opinion of the Provincial Government such a right of appeal as has been conferred by section 411-A should not have been conferred. If that were not so, I fail to see why this objection was taken.

The appeals will be posted in due course before the Division Bench dealing with Criminal Appeals.

Horwill, J.—I agree.

Rajagopalan, J.—I agree.

K.S. ——— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL AND MR. JUSTICE GOVINDA MENON.

Veeramachineni Seethiah .. *Appellant**

v.

Bode Venkatasubbiah and others .. *Respondents.*

Companies—Petition for compulsory winding up in the Original side of the High Court—Oral evidence—If and how far admissible—Costs—Discretion.

Companies Act (VII of 1913), *section* 162 (vi)—*Winding up—Mere difference of opinion among majority directors and minority directors—If sufficient for compulsory winding up.*

There is no inflexible rule or practice prohibiting the adducing of oral evidence or the cross-examination of the deponents of affidavits in original petitions before the High Court, such as for compulsory winding up of companies. Where necessity suggests or expediency requires, it is open to the Judge trying winding up proceedings to allow oral evidence.

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* O. S. A. No. 12 of 1948. 10th December, 1948.

Sabapathy Rao v. *Sabapathy Press Co., Ltd.*, (1924) 48 M.L.J. 118 : I.L.R. 48 Mad. 448 and *Ripon Press and Sugar Mills Co.* v. *Gopal Chetti*, (1931) 61 M.L.J. 783 : L.R. 58 I.A. 416 : I.L.R. 55 Mad. 180 (P.C.), relied on.

Relevant statutory provisions and English practice considered.

But where the application for cross-examining the deponents of affidavits are made only at a later stage in the hearing and tend to retard and delay the progress of the application, the Court has the discretion to grant or not to grant an adjournment for getting the deponents of affidavits for cross-examination. As expedition is absolutely necessary in a winding up petition, the Court will be exercising a proper discretion in refusing an adjournment having a dilatory tendency.

The Court has a discretion to award costs to a creditor appearing in support of a winding up petition.

In the absence of evidence of misappropriation or malversation of funds by the management, a company should not be wound up merely on account of differences of views between the majority directors and the minority directors.

Appeal against the order and Judgment of the Hon'ble Mr. Justice Clark, dated the 14th day of November, 1947, and passed in the exercise of the ordinary Original Civil Jurisdiction of the High Court in O. P. No. 261 of 1947.

K. Krishnaswami Aiyangar and *N. C. Raghavachari* for Appellant.

C. V. Dikshitulu, V. Radhakrishnayya, B. Lakshminarayana, S. Subbiah, N. Rajeswara Rao, V. K. Tiruvenkatachari, K. Krishnamurthi and *G. Suryanarayana* for Respondents.

The Judgment of the Court was delivered by

Govinda Menon, J.—This is an appeal against the judgment of Clark, J., dismissing an application by three share-holders of a private limited company known by the name of Sri Gopalakrishna Motor Transport Co., Ltd., for the winding up of that Company. The appellant was the first petitioner on the original side and he claimed to be the managing director of the motor transport company from 1st July, 1946. The other two petitioners, who are respectively respondents 12 and 13 in this appeal, were a shareholder and a director of the same company. This joint stock company carried on business as a bus operator in and around Bezwada. The application before the learned Judge was under clause (vi) of section 162 of the Indian Companies Act on the ground that it is just and equitable that the company should be wound up by Court. Various reasons are alleged in the statutory affidavit filed in support of the application, which in essence, come to this, that the directors, far from working in harmonious co-operation, are at loggerheads with the result that the business is at a standstill on account of the deadlock. The gravamen of the charge is mainly against the first respondent as as well as the second respondent. In answer to the application, the respondents filed separate affidavits denying the charges levelled against them and further stated that the company is carrying on business properly and that substantial profits have been earned in addition to acquiring valuable good-will. It is further alleged that the appellant, during the time he was managing director, had misappropriated large sums of money belonging to the company and committed acts of misfeasance as a result of which the shareholders had to convene a special meeting wherein the second respondent was elected as the managing director. The affidavits on either side disclose charges and countercharges and it is incumbent therefore on the Court to find out how far there is justification for any of them.

Before we concern ourselves with the merits of the application on which the learned trial Judge has bestowed considerable attention, it is necessary to advert to a matter of procedure in which, according to the learned counsel for the appellant, the trial Judge has erred and therefore the learned counsel urges, if we take a view different from that of the trial Court on that matter of procedure, it would be necessary to remand the application for further hearing and disposal afresh.

The point arises this way. The application for winding up was filed on 29th August, 1947, and the hearing date was fixed as the 27th October, 1947. It was taken up the next day, *i.e.*, 28th October, 1947, and on that date respondents 1 to 9 in the appeal appeared by counsel and requested that time may be granted

to them for filing counter-affidavits. This request was acceded to and the learned Judge directed that counter-affidavits should be filed within ten days and thereafter the petition should be posted for hearing on 10th November, 1947. The intention of the learned Judge, was, as is clear from his judgment, that if the applicants wanted to file any reply affidavit they could do so before 10th November, 1947. There is no complaint that the appellant and the other two petitioners on the orignal side did not have sufficient time to prepare or file their reply affidavit. In fact the reply affidavit was actually filed by the appellant on the 10th November, itself. The respondents filed their counter-affidavits earlier than the time allowed, *viz.*, on 5th November, 1947 and the case came into the daily cause list on Monday the 10th November, 1947. On account of other work, it was not reached that day and as the next day (Tuesday, 11th November) was a holiday, the case was taken up for hearing, and that too just before the Court rose for the day, on Wednesday, the 12th November. At that time the applicants' counsel asked for an adjournment on the ground that the documents on which he relied to prove the case had not been typed. The respondents opposed the application for adjournment, whereupon the learned Judge ruled that the hearing should proceed but that the difficulty, if any, to be experienced on account of the absence of typed copies of the documents would be alleviated by probably looking into the manuscripts themselves. The hearing was resumed on Thursday, the 13th November, with the petitioners' counsel reading the petition, the affidavit, the counter-affidavits and the reply affidavit. In this Court, the respondents' counsel stated that on 13th November, 1947, the applicants' counsel requested the Court for a further adjournment for the reason that the documents were not only not typed but that most of them had not even been translated into English. This was a reason quite different from what was given the previous day in support of the application for adjournment. Since the learned Judge does not make any mention about this request, we do not intend to rely upon this circumstance at all. As is seen from the judgment of the learned Judge, after having read the petition, the affidavit, the counter-affidavits and the reply affidavit, the applicants' counsel proceeded to make his submissions on the facts set forth in those pleadings and also argued questions of law. Thereafter, towards the close of the working day on 13th November, 1947, the applicants' counsel proceeded to call oral evidence in support of the application by putting the appellant into the box to give oral evidence. Thereupon the learned counsel for the respondents objected to the procedure mainly on the ground that at that stage no oral evidence should be allowed to be let in. Then ensued arguments regarding the legal position as to what the practice is, or should be, about adducing oral evidence in winding up proceedings, on which the learned Judge was of opinion that it was contrary to the settled practice of the Court, in disposing of applications for compulsory winding up, to allow oral evidence to be let in. He also held that in the circumstances of the case, it was improper to exercise it at that late stage. On this ruling by the learned Judge, the applicants' counsel prayed that he might be allowed to cross-examine the respondents on the averments contained in their counter-affidavits but this application had to be refused because no notice of it had been given to the respondents' counsel in order to enable him to see that his clients were present in Court for the purpose of being cross-examined. It was also represented to this Court that the respondents were not present in Court. The learned Judge refused this request also, because it was made at a belated stage and not even before the proceedings commenced earlier. He was of opinion that if the request had been made on the day when the case first came into the cause list, *i.e.*, on 10th November, 1947, the requested adjournment would have been granted. The applicants' counsel had perforce to proceed with the materials contained in the affidavit, the counter-affidavits and the reply affidavit and supplement the facts therein by arguing legal questions.

The question therefore arises as to whether the procedure adopted by the learned Judge in holding that it was against the settled practice of the Court to

allow oral evidence to be let in, in winding up applications is right; and secondly, even if such a practice was not commonly or universally accepted, whether in the circumstances of the case, the application for adjournment ought to have been allowed or not. The learned Judge states that he refused the adjournment application for cross-examining the respondents because they were not present in Court but were in Bezwada and other places and since no earlier intimation of the applicants' determination to cross-examine the respondents had been given it was not desirable or proper to adjourn the case at all. After a consideration of the various provisions of the rules made under the Indian Companies Act, Clark, J., decided that there was no provision in the Indian Companies Act or the rules made thereunder, for the taking of oral evidence in winding up applications. He therefore sought guidance from the procedure followed in the High Court of Justice in England and referred to Palmer's Company Precedents from which it was seen that in England oral testimony is permitted in support of a petition only by permitting the cross-examination of deponents where there is a conflict of evidence or when the evidence of some persons who decline to make an affidavit is required. As already stated, the application for cross-examination was not made at the earliest opportunity and so the learned Judge was not inclined to exercise his discretion in favour of the applicants.

Mr. K. Krishnaswami Ayyangar, learned counsel for the appellant, strenuously urges that the procedure adopted by the learned Judge is wrong and unsupported by the precedents in this Court. It is contended that an application for winding up is commenced by an original petition and that the procedure to be adopted in such matters is that laid down under the Code of Civil Procedure under which statute oral evidence is admissible in original petitions. We have therefore to consider in some detail the provisions of the Companies Act and the rules as well as other statutes like the Code of Civil Procedure, to find out what should be the procedure to be adopted. It is only in cases where proper guidance cannot be obtained from these authorities that recourse should be had to the procedure in the High Court of Justice in England. The rules under the Companies Act in vogue in our Court are framed under section 246 of the Act which lays down that the High Court may, from time to time, make rules consistent with the Act and with the Code of Civil Procedure concerning the mode of proceedings to be had for winding up of a company in such Court, etc. What is laid down in this section is that the rules framed by this Court should not be inconsistent with the provisions of the Code of Civil Procedure. Rule 6 of the rules under the Companies Act provides that in cases not provided for by these rules or by the rules of procedure laid down in the Companies Act or in the Code of Civil Procedure, the practice and procedure of the High Court of Justice in England in matters relating to companies shall be followed so far as they are applicable and not inconsistent with these rules or the Act. Rule 8, sub-rule (*viii*) provides that an application under section 166 of the Companies Act (Section 162 of the present Act) for winding up of the Company shall be made by an original petition and rule 9 provides that all applications other than those mentioned in the different sub-rules to rule 8 arising under the Companies Act or under the companies Rules shall be made by a Judge's summons. It is provided in rule 11 that the petition for winding up of a company shall be verified by an affidavit referring thereto and made by the petitioner or one of the petitioners where there are more than one etc. Such affidavit shall be filed along with the petition and shall be sufficient *prima facie* evidence of the statements in the petition and shall be in form No. 1. There is a proviso to this rule which it is unnecessary to refer to. It is unnecessary to discuss the meaning of the words "original petition" because it is the subject matter of a definition in order 1, rule 4 (9) of the Original Side Rules. Both the rules made under the Companies Act as well as the Original Side Rules are silent with respect to the question whether oral evidence can be let in to substantiate an application for winding up. It is undisputed that in the case of an original petition filed in a mofussil Court under many other statutes, for example, the Indian Succession Act, the Guardian and Wards Act or the Lunacy Act, the party is entitled

to let in evidence both oral and documentary to prove his case. Section 141 of the Code of Civil Procedure lays down that the procedure provided in the Code in regard to suits shall be followed as far as it can be made applicable, in all proceedings in any Court of Civil Jurisdiction. This is sufficient authority for the practice obtaining in the mofussil Courts that in original petitions evidence, oral and documentary can be adduced.

Does the same practice appear to have been followed on the original side of this Court, or is it different from what is obtaining in the mofussil Courts, in trying an issue raised by an original petition? The learned counsel for the appellant invited our attention to the observations contained in *Sabapathy Rao* v. *Sabapathy Press Co., Ltd.*[1], where Spencer, O.C.J., in allowing an appeal against an order from the Original Side refusing to wind up a company has expressed the view that in that case certain objections required further investigation and that neither of the two persons against whose conduct criticisms have been levelled has "as yet gone into the witness box and attempted to explain the ugly facts appearing against them." There is a further observation also that the applicants there have proved sufficient facts to call upon the respondents to enter on their defence if the conduct of the affairs of the company is capable of an honest explanation. From these observations Mr. Krishnaswami Iyengar is able to show that in such matters on the Original Side oral evidence is not only permitted but becomes an obligatory necessity in cases where sufficient facts have been shown by the applicants. In Palmer's Company Precedents, fifteenth edition Part II at page 160 occurs the following passage :

"In winding up proceedings, occasion sometimes arises for obtaining the oral evidence of witnesses. Thus, if there is a conflict of evidence on the affidavits, orders may be made for cross-examination. Further, upon a winding up petition the petitioner or respondents may require the evidence of some person who declines to make an affidavit ; and, in proceedings after the winding up order, a creditor whose claim is disputed, or an alleged contributory, may desire to obtain such evidence. In such cases, the Court will give liberty to examine the witness before the Court itself or before the registrar or before an examiner of the Court or special examiner . . . . An order giving liberty to petitioner to examine witnesses who had refused to make an affidavit, and directing them to attend in Court, for examination, was made . . . ."

At page 169 of the same book, the subject relating to cross-examination on affidavits is dealt with in the following terms :

"By order XXXVIII, rule 28, either party may give notice to cross-examine a deponent who had made an affidavit, and, unless such deponent is produced for cross-examination, his affidavit cannot be used, unless the Court gives special leave . . . . . A witness cannot be compelled to attend under this rule : but under Order XXXVIII, rule 1, the Court or a Judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit . . . . and under Order XXXVIII, rule 20, any party or witness having made an affidavit, is bound on being served with a subpoena to attend before the examiner, or other officer of the Court, or a special examiner, for examination. A subpoena cannot issue under rule 20 until an order has been obtained for the examination of the witness. . . . . . ."

From these observations it is sufficiently clear that both in England and in this country there is no inflexible rule or practice prohibiting the adducing of oral evidence or the cross-examination of the deponents of affidavits in matters like the present. We cannot agree with the learned Judge that such evidence is confined only to the cross-examination of the deponents of affidavits. Even the very first sentence from Palmer's Company Precedents quoted above suggests that sometimes occasion arises for obtaining oral evidence of witnesses and instances of such occasions are given thereafter. The correctness of the decision of the Division Bench of this Court in *Sabapathy Rao* v. *Sabapathy Press Co., Ltd.*,[1] was canvassed before their Lordships of the Judicial Committee in *Ripon Press and Sugar Mills Co.* v. *Gopal Chetti*[2]. Their Lordships did not disapprove of the directions contained in the judgment of Specner, O.C.J., that the party should go into the witnexx box and explain the circumstances against him. If there had been a

1. (1924) 48 M.L.J. 118 : I.L.R. 48 Mad. 448 at 453.

2. (1931) 61 M.L.J. 783 : L.R. 58 I.A. 416 : I.L.R. 55 Mad. 180 (P.C.).

compelling rule in England that in winding up proceedings the only kind of oral evidence that could be permitted is the cross-examination of the deponents of the affidavits, we are of opinion that Lord Blanesburgh who delivered the judgment of their Lordships would certainly have mentioned that. Moreover, Order XIX, rules 1 and 2 of the Code of Civil Procedure permitting evidence to be given by proof of affidavits also allows the attendance of the deponent for cross-examination. In addition, we have rule 12 of Order XIV of the Original Side Rules, laying down that the Court may, at any time, direct that any person shall attend before the Court for cross-examination upon the affidavit. In these circumstances, we are clearly of opinion that where necessity suggests or expediency requires, it is open to the Judge trying winding up proceedings to allow oral evidence.

We have next to consider whether the learned Judge exercised his discretion properly in refusing to allow oral evidence. The learned Judge expressed the opinion in the following emphatic terms :

> " Further in my view, it would be most unsuitable to allow oral evidence beyond this in these cases. I am confident that to do so would only lead to a great waste of time. These were the grounds on which I refused to allow the petitioner to call oral evidence, and, as I have already observed, I should have refused it in any event as the application was so belated. The petitioner then asked that he might be allowed to cross-examine the respondents. Admittedly, he had given no notice to the respondents that he would require them to attend for cross-examination and I was informed by their counsel that none of them was present in Court; they are in Bezwada or other places. Accordingly, I refused the application to cross-examine the respondents, or, to grant any adjournment for that purpose."

We are in entire agreement with the learned Judge that the application was not only belated but was, in the circumstances, intended to retard and delay the progress of the application. The applicants had ample time to summon any witness whom they wanted to examine, or to take out subpoenas to the respondents for their attendance in Court for cross-examination. Though the application was filed on 28th August, 1947, the date fixed for hearing was the 27th October, 1947, nearly two months after the filing of the application. No steps were taken to summon any witness during this period of two months. There was some discussion at the Bar as to the stage at which such an application should be made and reference was made to rule 23 of the Rules framed under the Companies Act. In the case in question, the first hearing must be deemed to be when the application came on initially on 28th October, 1947 and on that date at least when the learned Judge gave directions for the filing of counter-affidavits, the applicants, ought to have intimated the Court that oral evidence was necessary. Even if the applicants were unaware of the defence that was going to be raised by the respondents on 28th October, 1947, they were perfectly aware of the allegations contained in the counter-affidavits on 5th November, 1947. At least on that day notice should have been given to the respondents' counsel asking for the attendance of the deponents to the counter-affidavits in Court for cross-examination. Even this was not done and it was only at the fag-end of the proceedings, after the applicant's counsel had made his submissions both on facts and on law, that he desired the attendance of the respondents for being cross-examined. Mr. V. K. T. Chari, the learned Counsel for the company brought to the notice of the Court that the applicants had not taken the necessary steps, even for the translation of the documents as is necessary under Order IX, rules 2 and 4 of the Original Side Rules ; nor was there any mention of the documents intended to be filed in the statutory affidavit, to which the description of such documents was not appended as an annexure. In view of this dilatory procedure adopted by the applicants, we are unable to hold that the learned Judge exercised his discretion in any manner other than in a perfectly justifiable and proper way.

The learned counsel for the company, in an interesting argument clearly brought out the distinction between the expedition required in winding up proceedings and the time usually allowed in other original petitions. Section 168 of the Indian Companies Act provides that in a case a company is wound up, the

proceedings shall be deemed to have commenced at the time of the presentation of the petition for winding up, *i.e.*, the whole matter relates to an antecedent date, *viz.*, the date when the application was filed. In view of the application of the result of winding up proceedings retrospectively, it is very essential that there should be the least possible delay in the disposal of winding up proceedings because, during the pendency of winding up proceedings if the company were to transact any business or to enter into contracts, then, they will not be valid unless the Court, in later proceedings, sanctions such actions. That the date of the commencement of the winding up proceedings is an important factor is discernible from various provisions of the Act, *viz.*, sections 156, 157, 227, 230, 232, 233 and 234. Therefore it is, that both under the English Law and under the Indian Statute it is made obligatory that all the necessary matters to be placed before the Court for the purpose of getting a company wound up, should be stated succinctly and without elaboration in the statutory affidavit which is considered to be *prima facie* evidence enabling the Court to order the winding up of the company. If the contents of the statutory affidavit disclose a *prima facie* necessity for winding up, then only it becomes obligatory for the respondents to let in any evidence contra. In *Chapal House Colliery Co.*[1], it is stated that the Court will not, as a rule, order a petition to stand over for a lengthened period as it would not be just to the company. Expedition is the very essence of winding up proceedings, and the interests not only of the company, but an element of public policy in regard to commercial morality also, should be considered in the disposal of winding up petitions. It is in this background and with this object, that the statutory affidavit is made *prima facie* evidence of the contents of an application for winding up. In this connection it is not only pertinent but highly instructive to refer to a decision reported in In re *The London Fish Market and National Fishing Company, Ltd.*[2]. In that case before Chitty, J., the petitioners asked the case to stand over in order to give them an opportunity for cross-examining the respondents' witnesses on their affidavits. The petitioners admitted that they had no direct evidence except the statutory affidavit (in the present case also there was no other evidence) and desired to cross-examine the opposite side as to the extent and nature of the business carried on by the company, as to its means of carrying on business, and as to its *bona fide* character ; and they claimed that under the Chancery Procedure Act, 1852, sec. 40, *ex debito justitiæ* they were entitled to cross-examine. On this Chitty, J., held that it was the established practice that the Courts have a discretion in allowing cross-examination in a case of winding up proceedings. The result of acceding to an application to allow the case to stand over would be to keep the petition hanging over the head of the company ; and the learned Judge also made a distinction between that case and a case where an application was made for adjournment in the case of proceedings to strike a shareholder's name off the register in which the rule was otherwise, and said that in the latter case the Court would be very slow to refuse cross-examination, as there was no special urgency in such proceedings. But in the case of a winding up petition, the procedure was different as expedition was absolutely necessary and therefore leave to cross-examine was refused. We respectfully follow the observations of Chitty, J., and are of opinion that nothing can be said against the procedure adopted by Clark, J.

Mr. Krishnaswami Ayyangar, by relying upon various rules, orders and provisions of the Original Side Rules showing that it was not necessary to annex the documents sought to be used at the hearing to the statutory affidavit, contended that it is not the law that documents should be filed along with the petition or the affidavit. The appendix or annexure to an affidavit mentioning documents can relate only to such documents as are referred to for the purpose of elucidating the affidavit. We are inclined to agree with him that whatever documents are intended to be used at the hearing of the application need not necessarily be set forth as an appendix to the petition ; but in the circumstances of the present case, it was

1. (1883) 24 Ch. D. 259 at 267. 2. 27 S.J. page 600.

necessary that the existence of such documents ought to have been brought to the notice of the Court and to the other side at least on the first hearing day, *i.e.*, on 28th October, 1947. As we have already stated that expeditious disposal of winding up petition is a matter of prime importance, it is the duty of the parties to produce the necessary documentary evidence, at the first hearing. The passage cited by him from Halsbury's Laws of England, Hailsham Edition, Volume 5, page 563, paragraph 904, showing that adjournments in such matters are of frequent occurrence is of no help in the disposal of this petition. Our attention was invited to the decision of Leach, C.J. and Lakshmana Rao, J., in O. S. A. No. 67 of 1943 where the learned Judges set aside an order of Bell, J., sitting on the Original Side in an application to rectify the register of a certain company by deleting therefrom the names of four persons as shareholders. Bell, J., on the original side, refused leave to cross-examine the persons who had sworn affidavits in support of the respondents' case and also did not allow oral evidence to be adduced. The Court of appeal disagreed with him and directed oral and documentary evidence to be adduced as in an ordinary trial. We are unable to find any similarity between the circumstances mentioned in that judgment and those in the present case. As is seen from the observations of Chitty, J., in In re *The London Fish Market and National Fishing Company, Ltd.*[1], the entire basis of an application for rectification of the company's register is different from the winding up proceedings. There is no urgency in the matter of the removal of a shareholder or two from a company's register. The business of the company will not in any way be affected ordinarily by the retention or deletion of one or two shareholders and such a case cannot ordinarily be tried on affidavits. The proper course certainly would be to frame issues and try them. We have already held that in the case of winding up the business of the company will be affected retrospectively, and therefore, as far as possible, avoidable delays should never creep in during winding up proceedings at all. Moreover, the rectification of a register of a company is governed by section 38 of the Indian Companies Act, where the proviso to sub-clause (3) says that the Court may direct an issue to be tried in which any question of law may be raised, so that, in such matters, the procedure to be followed is more of that obtaining in a suit than in an application. Therefore we do not think that the unreported decision in O. S. A. No. 67 of 1943 is of any useful guidance for the disposal of the present case.

The appellant's learned counsel was at great pains to show that Order 9, rule 13, Civil Procedure Code, applies to proceedings under the Companies Act for which purpose he cited the ruling in *Hindustan Bank* v. *Maharaj Din*[2]. We see no ground for thinking that an *ex parte* order cannot be set aside if proper reasons are given to the satisfaction of the Court. This case does not help us in any way in deciding the present question regarding the justification for not allowing the application to stand over.

We have next to turn to the merits of the application. In this connection the leading case in *Yenidje Tobacco Company, Ltd.*, In re[3], was relied upon, especially the observations at pages 430 and 431, for the purpose of showing that where there is an irreconcilable faction amongst the directors of a company it is always just and equitable that the company should be wound up. The Court of Appeal was dealing with a private limited company and Lord Cozens-Hardy, M.R., at page 430 observed as follows :

"In these circumstances, supposing it had been a private partnership, an ordinary partnership between two people having equal shares, and there being no other provision to terminate it, what would have been the position? I think it is quite clear under the law of partnership, as has been asserted in this Court for many years and is now laid down by the Partnership Act, that that state of things might be a ground for dissolution of the partnership for the reasons which are stated by Lord Lindley in his book on Partnership at page 657 in the passage which I will read, and which, I think, is quite justified by the authorities to which he refers : 'Refusal to meet on matters of business, continued quarrelling, and such a state of animosity as precludes all reasonable hope of reconciliation and

1. 27 S.J. page 600.
2. (1920) I.L.R. 1 Lah. 187.
3. (1916) 2 Ch. D. 426.

friendly co-operation have been held sufficient to justify a dissolution. It is not necessary, in order to induce the Court to interfere, to show personal rudeness on the part of one partner to the other, or even any gross misconduct as a partner. All that is necessary is to satisfy the Court that it is impossible for the partners to place that confidence in each other which each has a right to expect, and that such impossibility has not been caused by the person seeking to take advantage of it'."

Again at page 431, we have the following observations :

"The matter does not stop there. It is proved that these two directors are not on speaking terms, that the so-called meetings of the board of directors have been almost a farse or comedy, the directors will not speak to each other on the board, and some third person has to convey communications between them which ought to go directly from one to the other.

Is it possible to say that it is not just and equitable that that state of things should not be allowed to continue, and that the Court should not intervene and say this is not what the parties contemplated by the arrangement into which they entered ? They assumed, and it is the foundation of the whole of the agreement that was made, that the two would act as reasonable men with reasonable courtesy and reasonable conduct in every way towards each other, and arbitration was only to be resorted to with regard to some particular dispute between the directors which could not be determined in any other way. Certainly, having regard to the fact that the only two directors will not speak to each other, and no business which deserves the name of business in the affairs of the company can be carried on, I think the company should not be allowed to continue. I have treated it as a partnership, and under the Partnership Act of course the application for a dissolution would take the form of an action ; but this is not a partnership strictly, it is not a case in which it can be dissolved by action. But ought not precisely the same principles to apply to a case like this where in substance it is a partnership in the form or the guise of a private company ? It is a private company, and there is no way to put an end to the state of things which now exists except by means of a compulsory order. It has been urged upon us that, although it is admitted that the 'just and equitable' clause is not to be limited to cases *ejusdem generis*, it has nevertheless been held, according to the authorities, not to apply except where the substratum of the company has gone or where there is a complete deadlock. Those are the two instances which are given, but I should be very sorry, so far as my individual opinion goes, to hold that there are strictly the limits of the 'just and equitable' clause as found in the Companies Act. I think that in a case like this we are bound to say that circumstances which would justify the winding up of a partnership between these two by action are circumstances which should induce the Court to exercise its jurisdiction under the just and equitable clause and to wind up the company."

Warrington, L.J., also refers to similar circumstances and holds that where there are only two persons interested and there are no shareholders other than these two, and where there are no means of overruling by the action of a general meeting of shareholders the trouble which is occasioned by the quarrels of the two directors and shareholders, the company ought to be wound up, if there exists such a ground as would be sufficient for the dissolution of a private partnership at the suit of one of the partners against the other. We are of opinion that there is a wide divergence between the circumstances in that case with those in the present one. Where two directors would not even speak to each other and they constitute the entire Board of Directors, the company has necessarily to be wound up. Here, we have nine or ten directors solidly taking one view as against the minority of three holding other views. If there are no other grounds which necessitate the winding up other than irreconcilable differences of views between different groups in the directorate, one of whom is in a large majority, it stands to reason that the majority view should prevail ordinarily and therefore we do not think that the observations of Lord Cozens-Hardy, M.R. or Warrington L.J., can help us in deciding this case.

The other case on which the learned counsel for the appellant placed reliance was in *Loch* v. *John Blackwood, Ltd.*[1]. Lord Shaw of Dunfermline delivering the judgment of the Judicial Committee observed as follows at page 788 :

"It is undoubtedly true that at the foundation of applications for winding up, on the 'just and equitable' rule, there must lie a justifiable lack of confidence in the conduct and management of the company's affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. Furthermore, the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company. On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, then the former is justified by the latter, and it is under the statute just and equitable that the company be wound up."

Observations in *Madan Gopal* v. *Peoples Bank of Northern India*[2], were also relied upon in support of the appellant's argument. But we are unable to hold that

1. (1924) A.C. 783. 2. (1935) I.L.R. 16 Lah. 1029.

these cases can be of any help in coming to a conclusion, on the allegations contained either in the affidavits or the counter-affidavits filed before the learned Judge. Lack of probity on the part of the first respondent as well as the other directors is claimed to be at the root of the whole trouble and when the management suffers from the absence of such an elementary rule of good conduct, it is urged that the company ought not to be allowed to function. From the counter-affidavits we find that except respondents 1 and 2 the rest of the directors cannot be said to be in any way involved in the active management of the company. The counter-affidavit of the seventh respondent as well as the fifth respondent show that they put the blame as much on the appellant as on the first respondent himself. It is unnecessary for the disposal of this application to dilate upon the mode of management followed by the first respondent. But even if his management has been unsatisfactory, the second respondent has already been elected managing director. But this election is questioned on the ground that no meeting was actually held ; or if at all any such meeting was held, it was illegal and against the rules. The learned Judge has carefully considered the various allegations made by the applicants and has refused to exercise his discretion to wind up the company because, in his opinion, the allegations are not sufficient to justify the winding up. Two things are clear, and they are that even during this period, despite the actions of a minority, the company has been earning profits and that it has accumulated something like a good-will. Even so, the applicants contend that this incompatbility of good relations between two rival factions in the directorate would necessitate the dissolution of the company so that the minority may get back the equivalent of its share money.

With regard to the allegations that the first respondent during his management, omitted to have the accounts audited and obstructed the appellant in his efforts to do so, and also that he withheld the company's accounts from his co-directors and the shareholders, we are inclined to agree with the learned Judge in his view that these allegations have not been satisfactorily proved. As regards the holding of the meeting, the learned Judge was not quite definite that it even took place, but he went on to say that if it took place, it was entirely invalid. It is unnecessary for us to give a definite finding on that aspect of the case. Having carefully perused the statutory affidavit and the counter-affidavit as well as the reply affidavit, we are not satisfied that a *prima facie* case has been made out for the winding up of the company. It is unnecessary to discuss in any detail the charges and the counter-charges for the reasons that in any event since the company has been working and earning profits for more than a year after the filing of the winding up petition, it is certainly not just and equitable that the same should be wound up. There is no proof that the circumstances in regard to the management of the company have deteriorated since the filing of the winding up application. That in a company one shareholder has a preponderating influence in its affairs by reason of owning or controlling a large number of shares is of itself no reason for its winding up, is to be found from the observations of the Judicial Committee in the appeal from the decision in *Gopal Chetti* v. *Ripon Press & Sugar Mill Co., Ltd.*[1], reported in *Ripon Press and Sugar Mill Co.* v. *Gopal Chetti*[2]. The just and equitable clause in section 162 (*vi*) of the Indian Companies Act though not *ejusdem generis* with the previous sub-clauses should not be invoked in cases where the only difficulty is the difference of view between the majority directorate and those representing the minority. Not only the interests of the company, its directors and shareholders, but that of the general public, as in the present case where a motor transport company is sought to be wound up, should be considered before an order directing the winding up is made.

The learned Judge has found that the allegation regarding the misappropriation of a sum of Rs. 1,000 by the first respondent was wholly unfounded as it was not even made in the petition and that such a charge was never made before. We

1. (1924) 48 M.L.J. 232. I.L.R. 55 Mad. 180 (P.C.).
2. (1931) 61 M.L.J. 783 : L.R. 58 I.A. 416 :

find it unnecessary, in the view we take, now that the first respondent is no longer the managing director, to give any definite finding on this charge. In regard to the charge that the first respondent was withholding accounts from his co-directors and shareholders the learned Judge has rejected the allegation made by the applicants and having carefully gone through his judgment we see no reason to differ from his conclusion. The learned Judge further found that the affairs of the company were not in a bad financial condition. We are satisfied that respondents 2 to 10 before us cannot be held guilty of any of the allegations of mismanagement or other improper acts made against the first respondent, especially since some of these respondents state that both the appellant and the first respondent are to be tarred with the same brush. In the counter-affidavit of the seventh respondent who is a well-educated Vysya gentleman having obtained a degree in the Andhra University, we find sufficient materials for coming to the conclusion that there is nothing wrong with the present management of the company except that the appellant and the two other co-adjutors of his are holding views different from those held by the majority in relation to the details of management. The counter-affidavit filed on behalf of the fifth respondent is also instructive. In para. 8 the guardian of the fifth respondent states that her late husband who was one of the directors, was very much worried before his death over the conduct of the appellant in managing the company's business. She also gives other reasons why the company should be allowed to continue to do business. Among the majority of ten directors, we find that there are persons belonging to different religious persuasions as well as separate communities among the Hindus themselves. There are four Kammas, two Mussalmans, three Vysyas and one Goldsmith among the majority directors, whereas the applicants belong to the Kamma caste. When there is such unanimity among the majority belonging to different communities, that by itself is a reason, in the absence of any evidence of misappropriation or malversation of funds by the management to conclude that on account of difference of views alone the company should not be wound up. As we are in entire agreement with all the reasons given by the learned Judge, it is unnecessary to state our reasons for agreeing with him at great length. In these circumstances the order of the learned Judge cannot be justifiably taken objection to and we confirm his judgment.

The learned Judge has, in the exercise of his judicial discretion, directed that the contesting respondents before him should be given four sets of costs. On the authority of *Hasan Khaleeli* v. *Varadarajulu Naidu*[1], Mr. Krishnaswami Aiyangar wants us to hold that this order is incorrect. The learned Chief Justice in that case held that a creditor appearing in a winding up petition is not entitled to his costs as a matter of right, and that to entitle him to the costs he must show reasonable ground for appearing. He based his view on the observations contained in In re *Hull and County Bank.*[2] But there is an observation at page 291 that the question of costs must be decided in the light of the facts of the particular case. As a general rule, the successful party is entitled to his costs in his favour if the unsuccessful party is liable to have an order of costs against him. The principle on which the learned Judges of the Court of appeal in *Hasan Khaleeli* v. *Varadarajulu Naidu*[1], disallowed costs was that the opposing respondents in that case were not the successful parties. We fail to see how this decision can be called in aid to set aside the discretionary order made by the learned Judge in this case.

The appeal is therefore dismissed with costs of respondents 1 to 11—one set.

K.S. *Appeal dismissed.*

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1. (1937) 2 M.L.J. 825 : I.L.R. 1938 Mad. 284.
2. (1878) 10 Ch.D. 130.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VISWANATHA SASTRI.

Dr. P. Tirumal Rao .. *Petitioner**

v.

T. Ranganatha Mudaliar and another .. *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XV of 1946), section 12—Evicted tenant obtaining time from landlord to comply with order of eviction—If amounts to abandonment of right to appeal against eviction order.

Merely because a tenant against whom an order for eviction has been obtained prays for and obtains from his landlord time to comply with the order of eviction passed against him, it cannot be said that he had elected to treat the order of eviction passed by the Rent Controller as final or that he had abandoned his right of appeal under section 12 of the Madras Buildings (Lease and Rent Control) Act.

An order for eviction of a tenant was passed on 30th March, 1948, and when the landlord took out execution proceedings to execute the order and went with the bailiff to take delivery of the premises on 22nd April, 1948, the tenant passed a letter to the landlord in the following terms : " As you have brought a warrant of possession against me . . . . . . I request you time for to-day and I assure you that I will give complete possession of the said place by to-night. The tenant however did not give possession but filed an appeal and obtained an order for stay of delivery on 24th April, 1948. On a question whether the appeal was maintainable in view of the above letter,

Held, that *prima facie* there was nothing in the letter expressly waiving the right of appeal, a right which the tenant was entitled to under section 12 of the Act and that there was no implied undertaking not to file an appeal which could be gathered from the language of the letter and as such the appeal was maintainable.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in H. R. A. No. 731 of 1948 on the file of the Third Judge, Court of Small Causes, Madras, and quash the proceedings in the said H. R. A. No. 731 of 1948.

S. Suryaprakasam and *P. V. Ramachandra Rao* for Petitioner.

N. Suryanarayana for Respondents.

The Order of the Court was pronounced by

The Chief Justice.—On the respondent's application under the Madras Buildings (Lease and Rent Control) Act, 1946, the Additional Rent Controller, Madras, passed on 30th March, 1948, an order for eviction against the petitioner. The respondent took out proceedings to execute the order and went with the bailiff to take delivery of the premises on 22nd April, 1948. On that day the petitioner passed a letter to the respondent in the following terms :

" As you have brought a warrant of possession against me in the above E. P. for the ground-floor No. 93, Thagaraja Rao, Thyagarayanagar, I request you time for to-day and I assure you that I will give complete possession of the said place by to-night."

The petitioner however did not give possession but filed an appeal and obtained an order for stay of delivery on 24th April, 1948. When the appeal came on for hearing before the Third Judge of the Court of Small Causes, the respondent raised a preliminary objection that the appeal was not maintainable because of the above letter. The learned Judge upheld the objection and dismissed the appeal as not maintainable. He held that in that letter the petitioner had accepted the order of the Rent Controller and that it was not open to him thereafter to impeach it by filing an appeal, in other words, that he could not be permitted to approbate and reprobate. The petitioner seeks a writ of *certiorari* from this Court to quash the order dismissing his appeal.

Prima facie there is nothing in the letter expressly waiving the right of appeal, a right which the petitioner was entitled to under section 12 of the Act. We are unable to hold that there is any implied undertaking not to file an appeal which

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* C. M. P. No. 6277 of 1948. 13th December, 1948.

can be gathered from the language of the letter. The petitioner was faced with a warrant of possession and the prospect of being turned out of the house unceremoniously by the bailiff. He therefore requested time till the night to surrender possession. Merely because he prayed for and obtained time to comply with the order of eviction passed by the Rent Controller it cannot be said that he had elected to treat the order of the Rent Controller as final or that he had abandoned his right of appeal.

Mr. Suryanarayana, the learned advocate for the respondent, strongly relied upon the decision of the Court of Appeal in *Bartlam* v. *Evans*[1]. The facts of that case were as follows. The defendant had certain betting transactions with the plaintiff who was a bookmaker which resulted in the defendant becoming indebted to the plaintiff in a certain sum. A suit was filed for the recovery of that sum and judgment in default of appearance by the defendant was signed in the action on 24th September, 1935. On the same day plaintiff's solicitor wrote to the defendant informing him that judgment had been obtained against him for a certain sum together with costs and asking for payment of the total amount to obviate the necessity of execution. On 26th September, 1935, the defendant approached the plaintiff and requested him to ask his solicitor to give him time in which to pay the amount due under the judgment. In his letter, he, *inter alia* said :

> " I have never refused to pay him (plaintiff) but have not had any income to do it with owing to bad trade . . . . . At the moment I have nothing and no assets and know he does not want to lose his money."

The plaintiff's solicitor replied that in the circumstances he was prepared to let the matter stand over for seven days and that if he did not receive payment at the expiration of that period, proceedings would be taken to enforce the judgment without further notice. The defendant therefore took out summons praying that the judgment be set aside and that he should be at liberty to defend. The Master dismissed the application but the learned Judge sitting in Chambers allowed the appeal from the Master and ordered that the judgment be set aside. The plaintiff thereupon appealed to the Court of Appeal. The Court of Appeal, by a majority, Greer, L.J., dissenting, allowed the appeal. Slesser, L.J., held, after referring to the correspondence which passed between the defendant and the plaintiff's solicitor, that the defendant having approbated the judgment in order to obtain the benefit of delay, he should not be heard to say that it should be set aside. According to him the case was "nearer an estoppel by record than an estoppel *in pais*." Scotts, L.J., agreed with Slesser, L.J., that the appeal should be allowed but he based his decision on the ground of election. He thought that the correct inference on a consideration of the evidence was that the defendant had elected to treat the judgment as binding and therefore he should be treated as having abandoned his right to apply to set it aside. Greer, L.J., who dissented, definitely took the view that the principle of approbate and reprobate could have no application to the case because the defendant took no benefit whatever from the judgment which was entirely against him. He also held that there could be no estoppel on the acts. What the defendant promised was that he would perform that which he was under legal obligation to perform having regard to the existence of the judgment which had not been set aside. It will thus be seen that the three learned Lord Justices who heard the appeal took practically three different views of the matter, and to add to this divergence of opinion, there is the further fact that the nature of the correspondence in that case is entirely different from the nature of the letter addressed by the petitioner in this case when faced by the warrant of possession. We are therefore unable to derive much assistance from the judgment of the Court of appeal for a decision on the facts of this case.

The learned Advocate for the respondent referred us to cases in *Anant Das* v. *Ashburner and Co.*[2] and *Protab Chandra Das* v. *Arathoon*[3] in which in consideration

1. (1936) 1 K.B. 202.
2. (1876) I.L.R. 1 All. 267.
3. (1882) I.L.R. 8 Cal. 455.

of a concession or indulgence from the decree-holder the judgment-debtor agreed not to file an appeal. They can have no bearing whatever on the facts of this case.

As in our opinion the petitioner did not elect by his conduct to treat the order of the Rent Controller as final and had not either expressly or impliedly abandoned his right of appeal, the learned Judge of the Court of Small Causes was clearly in error in holding that the appeal was not maintainable. His order is therefore quashed with the result that the appeal will be restored to file and disposed of according to law. The petitioner will be entitled to his costs.

V.S. *Order quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO AND MR. JUSTICE PANCHAPAKESA AYYAR.

Chelliah *alias* Mariappa Kudumban .. *Appellant.**

Madras Borstal Schools Act (*V of* 1926), *section* 8—*Scope of*—*Criminal tendencies and propensities*—*Indications.*

All adolescents with criminal tendencies will clearly be covered by section 8 of the Madras Borstal Schools Act.

Public Prosecutor v. *Nagappa Pujari*, (1948) 2 M.L.J. 630, preferred to other rulings.

The very fact that an accused aged about sixteen is found to have inflicted severe injuries to a deceased for a very petty reason and to have thrown the dead body into a well would show pronounced criminal tendencies and propensities in him. It would be inequitable to send adolescents with records of thefts, cheatings and criminal tendencies of that type alone to the Borstal institution and to send adolescents with different criminal tendencies as above, to the ordinary jail, with the far greater hardships involved and the lesser facilities for reformation and of settlement in life by teaching a useful occupation.

Appeal against the order of the Court of Session of Ramnad Division at Madura, in C. C. No. 51 of 1948, dated 28th July, 1948.

K. P. Raman Menon for Appellant.

The Crown Prosecutor (*Govind Swaminathan*) for the Public Prosecutor for the Crown.

The Judgment of the Court was delivered by

Panchapakesa Ayyar, J.—The accused, a boy past 16, has been convicted under section 302, Indian Penal Code, by the Sessions Judge of Ramnad, and sentenced to transportation for life with the recommendation for action under section 10-A of the Borstal Schools Act.

The facts are simple : The accused and the deceased a neighbouring boy of 12, were friends, though, like boys of that age, they were also now and then quarrelling. On 26th March, 1948, the accused called the deceased to go with him to collect some *babul* beans which he had taken on lease for a rupee. The two boys went together, the accused taking with him a *thorotti* stick (a stick with a small iron bill hook at the end) for plucking the beans. They were seen together fairly chatting and laughing and proceeding towards the *babul* tree by P. W. 7, the accused's step-mother. That night, the deceased did not return home ; so, his relatives went about enquiring for him. Finally, the accused was questioned. At first he said that the deceased had gone to a cinema, circus, etc. Later on, he said that the deceased had climbed up a palmyrah tree to gather palmyra fruits and had fallen down and died. Still later, when questioned sternly by the assembled villagers, he confessed, in the presence of P. Ws. 4, 5, 9, 10 and 12 and others, that he and the deceased went together and gathered *babul* beans from the tree leased out by him, and that he divided the collected beans into three equal shares, and offered one share to the deceased, taking two for himself, one by virtue of his lease and one by virtue of his aiding in gathering the beans. The deceased, however, insisted

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* Crl. Appeal No. 473 of 1948. 7th January, 1949.

that he should receive a full half share. The accused would not agree. Thereupon, the deceased, in a huff, scattered the beans, saying that he did not want any. Then the accused gave him a slap on the cheek for refusing the one third offered to him. The deceased then threw a stone at the accused, and the accused hit him with the *thoratti* stick (M.O.1) and the deceased died of that one blow. Being afraid of the consequences, the accused said that he threw the dead body of the deceased into an adjoining well. He showed the assembled villagers the corpse of the deceased in that well; that was the first time that any body knew that the deceased's corpse was in that well. The clothes of the accused were also seized, and they were found stained with human blood. The prosecution suggestion is that the blood was that of the deceased.

The learned Counsel for the appellant urged that the offence had not been brought home to the accused and especially the fatal blow covered by injury, No. 8, which, even according to the doctor (P. W. 1) could have been caused by a fall. We too are of the opinion that though the quarrel is proved and the infliction of some of the injuries on the deceased, including the grievous injury on the jaw, is proved to have been caused by the accused, there is no satisfactory proof that the fatal injury (injury No. 8) on the deceased was dealt by the accused, and that it might very well be that the deceased ran away after receiving some injuries and fell down and sustained injury No. 8 and died. In these circumstances, we set aside the conviction of the accused under section 302, Indian Penal Code and substitute for it a conviction under section 325 of the Code.

It is clear to us, from the very facts proved in this case that the accused is an adolescent offender with criminal tendencies. Considering the entire circumstances, we are of opinion that the proper order to pass in this case is to direct the accused under section 8 of the Borstal Schools Act, to be detained in the Borstal School, Palamcottah for a period of five years from the date of the lower Court's conviction. We are of opinion that the very fact that this young boy dealt such injuries to the deceased for such a petty reason and threw the dead body into the well, will show pronounced criminal tendencies and propensities in him. We also consider that it is somewhat inequitable to send adolescents with records of thefts, cheatings and criminal tendencies of that type alone to the Borstal School, and to send adolescents with different criminal tendencies as here, to the ordinary jail, with the far greater hardships involved and the lesser facilities for reformation and of settlement in life by teaching a useful occupation. All adolescents with criminal tendencies will clearly be covered by section 8 in our opinion. We have no hesitation in following the ruling in the *Public Prosecutor* v. *Nagappa Pujari*[1] in preference to the different views taken in some other rulings. The age of the appellant is declared to be just past 16 at the time of his conviction by the lower Court.

V.S. — *Accused directed to be detained in Borstal School.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE PANCHAPAKESA AYYAR.

Sri Lakshmi Narasimha Devaru by Adalthedar or Trustee M. Narayana Acharya and another .. *Appellant**

v.

The Revenue Divisional Officer, Mangalore (Land Acquisition Officer) and another .. *Respondents.*

Land Acquisition Act (I of 1894), sections 9 (2) and 23—Sufficient compliance with section 9 (2)—What would amount to—Compensation in respect of wet and dry lands—Number of years' purchase to be adopted for capitalisation—Different rule if applicable to case of dry lands having potential value as building sites.

Where the claimant in respect of land acquired under the Land Acquisition Act files a statement complaining that the valuation adopted was grossly inadequate and that he was "entitled to not

1. (1948) 2 M.L.J. 630.

* A. A. O. Nos. 608 and 679 of 1946. 16th September, 1948.

less than Rs. 3,000 per acre of nanja lands and Rs. 2,000 in respect of garden lands," it cannot be said that the provisions of section 9 (2) of the Land Acquisition Act have not been complied with so as to disentitle the claimant to pray for enhancement of the award.

Subbanna v. *District Labour Officer, East Godavari,* (1930) 59 M.L.J. 33 : I.L.R. 53 Mad. 333, distinguished.

For fixing compensation in the case of wet lands capitalisation of the net annual income at twenty years' purchase is the proper method to be adopted.

Revenue Divisional Officer, Trichinopoly v. *Varadhachari,* (1944) 1 M.L.J. 142, followed.

Radhakrishna Chettiar v. *Province of Madras,* (1948) 2 M.L.J. 159, explained.

There is no reason to adopt a different rule in the case of lands which were ordinary dry lands at the time of the notification under section 4 (1) of the Act though they had a potential value as building sites.

Appeals against the decrees of the Court of the Subordinate Judge of South Kanara dated 28th February, 1946, and respectively passed in L. A. C. Nos. 15 and 13 of 1945.

A. Narayana Pai for Appellants.

The Government Pleader (*K. Kuttikrishna Menon*) and *C. Vasudeva Mannadiar* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—These two appeals arise out of two, among other references, made to the Court of the Subordinate Judge of South Kanara on the acquisition of about 25 acres and 10 cents of wet, dry and garden lands in the village of Jeppinamogru adjoining Mangalore town. The acquisition was for the agricultural Department to open a paddy breeding station. The material notifications under section 4 (1) of the Land Acquisition Act are dated 29th June, 1943 and 21st September, 1943. The Land Acquisition Officer adopted the method of capitalising the annual rent of the lands for the award of compensation. The same method was followed by the learned Subordinate Judge and it is common ground before us that it was the correct method. The learned Subordinate Judge substantially accepted the award of the acquiring officer in so far as the average rent of the wet lands was concerned, but increased the price of rice from Rs. 7-4-0 to Rs. 9-5-6 per mura. In respect of the garden lands, the learned Judge confirmed the award of the Land Acquisition Officer. In respect of dry lands with which we are concerned only in A. S. No. 679 while the Land Acquisition Officer adopted a rental of Rs. 25 per acre as the annual rent for building purposes, the Court increased it to Rs. 60. The claimants have preferred the two appeals, and their learned counsel has urged for a higher valuation for the wet lands and the dry lands. He did not seriously contest the valuation of the garden lands.

Before dealing with the valuation, a preliminary point which arises in A. S. No. 608 and which found acceptance with the Court below may be dealt with. The claimant filed a statement before the Land Acquisition Officer in response to a notice under section 9 of the Act in which he put forward his claim in the following manner :

> "That the valuation adopted is grossly inadequate and low considering the nature of the land, its situation, yield and the disadvantages caused by the acquisition of the same to the adjoining lands of the claimant. This claimant is entitled to not less than Rs. 3,000 per acre of nanja lands and Rs. 2,000 for garden lands exclusive of the value of trees which are proposed to be acquired in this case."

The objection on behalf of the Land Acquisition Officer was that as the claimant had not mentioned a specific amount as the compensation claimed by him for his lands, he must be deemed to have not made a claim and it was not open to him to pray for any enhancement of the award made by the Land Acquisition Officer. Reliance was placed on the ruling of a Bench of this Court in *Subbanna* v. *Dt. Labour Officer, East Godavari*[1] and following that ruling the learned Subordinate Judge

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1. (1930) 59 M.L.J. 33 : I.L.R. 53 Mad. 533.

upheld the contention. In our opinion, the principle of that ruling does not apply to the facts of this case. In that case beyond filing certain sale deeds of neighbouring lands, the claimant did not mention the rate at which he prayed that his lands must be valued. It was contended that the mere filing of the sale deeds amounted to making a claim for the amount which the sale deeds showed, but the learned Judges refused to accept that contention. The learned Chief Justice at page 538 said :

"What the Act does require is that there should be a specific claim, namely, a claim which states in rupees the value the claimant places upon his property."

In the present case in paragraph 10 of his petition which we have extracted above, the claimant does mention his figures for nanja lands and for garden lands respectively. The land Acquisition Officer himself understood the claim to be the said rates. We do not therefore agree with the learned Subordinate Judge that the provisions of section 9 (2) of the Act have not been complied with and that therefore the claimant is not entitled to pray for enhancement of the award.

[Then their Lordships dicussed the price of rice and also the rental of dry land in the neighbourhood at about the time of the notification under S. 4 (1) of the Act.]

The learned Subordinate Judge capitalised the net annual income at 20 years' purchase. The learned counsel for the appellants contended that the number of years' purchase should be 33 1/3 relying upon the recent ruling in *Radhakrishna Chettiar* v. *Province of Madras*[1]. In that case the subject-matter was a site measuring 7156 square feet with a building thereon situate in Kumbakonam. It was held that the number of years purchase to be adopted for capitalisation had to be arrived at by taking into account the interest yielding by Government securities at the time of the notification under section 4 (1) of the Land Acquisition Act. One of the earlier decisions discussed therein was that of Krishnaswami Aiyangar and Horwill, JJ. in *Revenue Divisional Officer, Trichinopoly* v. *Varadachari*[2] which related to the acquisition of ryotwari land. Horwill, J., who delivered the judgment of the Bench made the following observations with reference to the principle applicable to the valuation of agricultural lands.

". . . . . . Whatever may be said with regard to a melwaram interest in a zamindari land or a vacant site it is difficult to accept the current rate of interest on gilt-edged securities as a safe guide to the multiple to be applied to the annual profits on ryotwari land. The landlord in such cases not only expects to get a return on the capital invested on the land but also something in addition to that as compensation for his trouble in attending to the land and for the risks involved in the cultivation of land. Although the tenants may agree to pay him a fixed rent in money, yet if a full crop is not raised on the land either through failure of rain or because of pests or for any other reason, it is extremely difficult for the landlord to realise the rent. For these reasons, the landlord naturally expects an appreciably larger return than he would expect from gilt-edged securities, which he leaves in the bank and for the realisation of interest on which he is put to no trouble whatsoever."

With respect we agree entirely with these observations. In the case of *Radhakrishna Chettiar* v. *Province of Madras*[1] it was not necessary to deal with the valuation of agricultural land. No decided case was brought to our notice in which for the valuation of such land a multiple of over 20 has been ever adopted for capitalisation.

The learned advocate for the claimant contended that at least for the dry land which had been valued as potential building sites, the valuation may be made at more than 20 years' purchase. But these lands were ordinary dry lands at the time of the acquisition though they had a potential value as available for building purposes. We do not think that a different rule should be applied to these lands. We therefore agree with the learned Subordinate Judge in adopting 20 times the annual net income as furnishing the correct value of the lands.

The appeals are allowed in part to the extent indicated above and dismissed otherwise. The parties will pay and receive proportionate costs in this Court.

V.S. ——— *Appeals allowed in part.*

1. (1948) 2 M.L.J. 159.
2. (1944) 1 M.L.J. 142.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDARAJACHARI.

P. Umanath Bhandary and another .. *Appellants**.

v.

Pedru Souza .. *Respondent.*

Civil Procedure Code (V of 1908), Order 21, rules 98 and 103 and section 144—Defeated obstructor's suit for declaration of title pending when order under Order 21, rule 98 is passed against him—Defeated obstructor not filing a fresh suit under Order 21, rule 103—If can recover possession and mesne profits by way of restitution on his succeeding in the appeal in his suit for declaration of his title—Scope of powers of Court in ordering restitution.

It cannot be said that even when there is in respect of the same property a suit or appeal filed by a defeated obstructor pending at the time when an order under Order 21, rule 98, Civil Procedure Code is passed against him, it is still obligatory on his part to file another suit under Order 21, rule 103, after the passing of the said order.

B obtained decrees for possession of two parcels of lands on 30th August, 1938. On 25th October, 1938, one *P* filed a suit against *B* for a declaration that those two parcels of lands were his mulgeni holdings and that the decrees were not binding on him. *B's* application for delivery of possession alleging *P's* obstruction was dismissed as *P's* suit was pending. *P's* suit was dismissed on 21st July, 1941. Relying on that dismissal *B* filed fresh applications which were ordered under Order 21, rule 98. Meanwhile *P* filed an appeal against the dismissal of his suit which was allowed in his favour on 16th March, 1944. As *B* had taken possession of the properties in pursuance of the order of 4th August, 1942, *P* sought to recover possession and mesne profits by way of restitution which was resisted on the ground that as *P* filed no suit as contemplated by Order 21, rule 103, within one year of the orders of 4th August, 1942, those orders had become final and that the reliefs of possession and mesne profits could not be given in restitution proceedings as those reliefs were not asked for in *P's* suit.

Held, as there was already a suit in respect of the same property it could not be held that notwithstanding the later decision in that suit in *P's* favour his title must be regarded as having been negatived by his inaction in so far as he did not file a fresh suit within one year after the passing of the order under Order 21, rule 98. Further, as between two inconsistent decisions of 1942 and 1944 between the same parties in regard to the same subject matter, the later would have to prevail.

The jurisdiction to grant restitution is not confined to those cases which directly fall within the strict language of section 144, Civil Procedure Code and the power and duty of the Court to grant restitution is extensive and is not circumscribed by the wording of section 144. The order of possession in favour of *B* was based upon the dismissal of *P's* suit and when that decision was reversed in appeal there should be restitution as a matter of course. The mere fact that in the appellate decree in *P's* suit there is no direction for delivery of possession or for payment of mesne profits, etc., is no reason whatever for the Court refusing those reliefs as they necessarily flow out of *P's* title to the properties in question.

Appeals against the decree of the Court of the Subordinate Judge, South Kanara, dated 1st April, 1947, in A. S. Nos. 335 and 336 of 1946, preferred against the orders of the Court of the District Munsiff, Mangalore, in R. E. P. Nos. 356 and 357 of 1944 (O. S. No. 237 of 1937).

S. T. Srinivasagopalachariar and *K. P. Sarvothama Rao* for Appellants.

K. Srinivasa Rao for Respondent.

The Court delivered the following

JUDGMENT.—These Civil Miscellaneous Second Appeals arise out of two applications for restitution.

The appellants claim through one Bhandari who filed two suits O. S. Nos. 236 and 237 of 1937 for recovery of possession of two parcels of land which he alleged were held on chalgeni or terminable leases by Juam Souza and Thomas Souza. The suits were decreed on the 30th August, 1938. On the 25th October, 1938, one Pedru Souza, who will hereafter be referred to as Pedru, filed O. S. No. 505 of 1938 against Bhandari praying for a declaration that the properties involved in both O. S. Nos. 236 and 237 of 1937 were his mulgeni holdings, and that the decrees in those two suits were not binding on him and praying also that Bhandari should be restrained by an injunction from executing the decrees and disturbing his possession.

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* A. A. A. O. Nos. 124 and 125 of 1947. 8th July, 1948.

In R. E. A. Nos. 786 and 787 of 1938, Bhandari applied for delivery of possession of both the properties alleging obstruction by Pedru which he sought removal of. The applications were dismissed on the ground that the suit filed by Pedru for establishing his right to those properties was still pending. O. S. No. 505 of 1938 was dismissed on the 21st of July, 1941. Relying on that dismissal Bhandari filed two fresh applications R. E. A. Nos. 495 and 496 of 1942 which were ordered under Order 21, rule 98 of the Civil Procedure Code on the 4th August, 1942. Meanwhile, Pedru filed an appeal in the Court of the Subordinate Judge of Mangalore against the decree of dismissal in O. S. No. 505 of 1938 and this appeal was allowed in his favour on the 16th of March, 1944. It is admitted that Bhandari took possession of the properties in pursuance of the orders in R. E. A. Nos. 495 and 496 of 1942. Pedru sought restitution in R. E. Ps. Nos. 356 and 357 of 1944 and they have led to the present second appeals, restitution having been ordered by both the Courts below.

Two points have been raised on behalf of the appellants by their learned counsel, Mr. Srinivasagopalachari. Firstly it is argued that as Pedru filed no suits as contemplated by Order 21, rule 103 of the Civil Procedure Code within one year of the orders dated 4th August, 1942, these orders must be regarded as conclusive and Pedru cannot put forward any title inconsistent with them. Reliance is placed in support of this argument on three decisions which I shall immediately proceed to deal with. *Krishna Rao* v. *Lakshmana Shanbhogue*[1], which is the first of the cases cited arose under the Civil Procedure Code of 1859, which contained provisions almost identical with the relevant provisions of the present Code. The defeated claimant in that case did not file a suit within one year of the claim order against him. The purchaser of the property in execution of the decree however filed a suit for recovery of possession of the property within one year from the date of the claim order. The defeated claimant was a defendant in that suit and sought to contest the order which had been passed against him. It was held that he should not be permitted to do so and it was observed that the order was and was intended to be a summary declaration of want of title in the objector which declaration would amount to a final decision of the question between the parties if the party aggrieved did not take the course indicated by the institution of a suit to supersede it. *Kumaram Uni Achan* v. *Kunhikrishnan Nair*[2] is a similar case in which also the contention was that the defeated claimant could as a defendant raise the question of title without indulging in what was described as a futility namely the formality of a fresh suit. The argument was rejected and a Bench of this Court again held that the fact that there was a pending suit regarding the title to the property and that the defendant had filed a written statement in it claiming title did not absolve him from the obligation of filing a suit under Order 21, rule 103 of the Code if he intended to contest the order under Order 21, rule 101.

It would be noticed that in both these cases there was no suit at all filed by the defeated objector and he only sought his written statement to be treated as a plaint such as is contemplated by Order 21, rule 103.

In *Palaniappa Chettiar* v. *Ramaswami Servai*[3], Venkataramana Rao, J., had to deal with a case where an objector had, even before an adverse order was passed against him, filed a suit to establish his title to the property. The learned Judge held that that was sufficiently a suit within the meaning of Order 21, rule 103 of the Code.

In the case before me the facts are quite clear. Pedru was quite vigilant and took the prudent step of filing a suit sufficiently early so that he may not be disturbed in his possession in pursuance of decrees, which as it now turns out, are not binding on him. His suit was, as already stated, dismissed in 1941. But he took the matter up to the appellate Court and the appeal which for this purpose must certainly be regarded as a continuation of the suit was pending at the time when the claim

1. (1881) I.L.R. 4 Mad. 302.
2. (1923) 75 I.C. 814.
3. (1937) 1 M.L.J. 667.

orders were passed against Pedru. It seems to me that the law does not require that he should have withdrawn that appeal and started again with fresh suits for an adjudication of the identical question involved. There would be obvious difficulties in the way of his withdrawing the appeal, because if he withdrew the appeal it could certainly be argued on the other side that the decree of the Courts below would stand confirmed. The only thing perhaps that could be suggested is he could have continued the appeal and filed fresh suits also. This again seems to me to be equally futile. In the absence of any definite decision binding on me laying down that even where there is a suit or an appeal filed by the defeated objector pending at the time when the claim order is made, it is still legally obligatory on his part to file another suit after the passing of the order, I am not prepared to hold that notwithstanding the later adjudication in Pedru's favour his title must be regarded as having been negatived by his inaction in so far as he did not file a suit within one year after the passing of the claim orders.

There is still another aspect of the matter. Assuming for a moment that the argument on behalf of the appellant must be accepted in this respect and that Pedru's title must be taken to have been negatived by the claim orders coupled with the circumstance that no suits were filed within one year thereafter, it cannot be forgotten that in the adjudication of 1944 between the same parties Pedru's title was upheld. Of two inconsistent decisions between the same parties in regard to the same matter it is well established law that the later will prevail. However the matter might have stood had there not been the judgment in A.S. No. 111 of 1943, I do not see how the Courts can avoid giving full effect to Pedru's title which is established by the adjudication in that appeal.

The second point taken on behalf of the appellants is that Pedru cannot be given possession of the lands or mesne profits or compensation for loss or destruction of trees because none of these reliefs was asked for in his suit O.S. No. 505 of 1938 and the decree in A. S. No. 111 of 1943 which arose out of that suit only gave him a declaration and injunction. The argument is that he can have restitution by execution only of those reliefs which were granted to him but he can have nothing more.

This argument, again, I am unable to accept. It is true that if regard is to be had to the strict language of section 144 of the Civil Procedure Code it is doubtful whether restitution can be granted in this case. It is, however, well-settled, and this had not been disputed by the appellants' learned counsel that the jurisdiction to grant restitution is not confined to those cases which directly fall within the strict language of section 144 and that the power and the duty of the Court to grant restitution is extensive and is not circumscribed by the wording of section 144. This has been laid down in *Jai Berhma* v. *Kedarnath Marwari*[1]. While conceding that the Court has inherent power to grant restitution Mr. Srinivasagopalachari still argued that since Pedru did not amend his memorandum of appeal and did not seek larger relief than what was actually decreed in A.S. No. 111 of 1943 he cannot be permitted to avail himself of the procedure by way of restitution. I shall briefly deal with the cases cited in support of this position. There has been, no doubt, no attempt to define with any particularity or precision the extent of the power of the Court to grant restitution as part of its inherent jurisdiction and perhaps in the nature of things it is not possible so to define it. As pointed out in *Rego* v. *Ananthamathi*[2], one rule however has been evolved, namely, that the extraordinary powers conferred by section 151 could not be invoked where the equities are evenly balanced to cover an order,

> "which only sets right one injustice by the infliction of another or as it is said robs Peter to pay Paul."

A case of that kind was the decision reported in *Rajarao* v. *Ananthanarayana Chetti*[3], where the Court refused to exercise its inherent powers of restitution as the

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1. (1922) 44 M.L.J. 735 : L.R. 49 I.A. 351 : I.L.R. 2 Pat. 10 (P.C.).
2. (1942) 1 M.L.J. 575 : I.L.R. 1942 Mad. 949.
3. (1921) 42 M.L.J. 308.

interests of innocent third parties were likely to be seriously prejudiced. In *Subbarayudu* v. *Yerram Setti Seshasani*[1], the Court exercised its inherent powers in circumstances which are somewhat significant for the purpose of the present case. A decree for money was transferred and the transferee was executing it, the transfer having been recognised notwithstanding the objection of the judgment-debtor. Meanwhile the judgment-debtor and another filed a suit for obtaining a declaration that the transfer of the decree was invalid and for an injunction restraining the transferee from executing the decree and receiving the amount which had been deposited in Court for its satisfaction. The suit passed through several vicissitudes and ultimately after a remand by the High Court a decree was made granting the declaration and the injunction asked for. The judgment-debtor then applied to recover from the transferee-decree-holder the amount which he had already withdrawn. The learned Judges felt no difficulty in ordering restitution notwithstanding that there was no prayer at any stage in the litigation which terminated in the High Court seeking a direction for payment of the amount by the transferee-decree-holder to the judgment-debtor. *Palaniappa Chettiar* v. *Ramanathan Chettiar*[2] is a similar case where also restitution in the shape of a direction for the payment of a certain sum of money was ordered notwithstanding that the person seeking restitution only obtained a decree granting a declaration and an injunction.

I do not regard as helpful the decision in *Bhimana Gowd* v. *Siddalinganna Gowd*[3], which was one of the cases particularly relied upon by Mr. Srinivasagopalachari. A claim order had been made against a certain person who thereafter filed a suit for recovery of possession of the property covered by the claim proceedings but did not ask for mesne profits. The suit was decreed and possession was obtained in pursuance of the decree. A subsequent application to recover mesne profits by way of restitution was dismissed on the ground that mesne profits could not be awarded by way of restitution. From the peculiar facts it is quite apparent that for no imaginable reason the plaintiff petitioner failed to ask for a relief which he could easily have asked for in the suit and I am unable to gather from the decision any principle which can be extended to the present case.

From the facts already stated, it is clear that the orders dated 4th August, 1942, were based on the dismissal of O.S. No. 505 of 1938. When the decree in O.S. No. 505 of 1938 was reversed in appeal it would seem as if there should be restitution as a matter of course. In my opinion, the mere fact that in the decree as drawn up in A.S. No. 111 of 1943 there is no direction for delivery of possession or for the payment of mesne profits or of compensation is no reason whatever for the Court refusing those reliefs when it considers them appropriate. It cannot be denied that these reliefs necessarily flow out of Pedru's title to the properties in question.

The judgments of the Courts below are therefore correct and must be upheld. These civil miscellaneous second appeals are dismissed with costs.

Leave refused.

V.S. *Appeals dismissed.*

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1. (1916) 30 M.L.J. 366 : I.L.R. 40 Mad. 849.
2. (1934) 67 M.L.J. 49 : I.L.R. 57 Mad. 299.
3. (1927) 27 L.W. 188.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SATYANARAYANA RAO.

Palani Ammal .. *Appellant**

v.

L. Sethurama Aiyangar .. *Respondent.*

Gramanatham *lands—Suit for recovery of possession by landholder—Plaintiffs being one of the co-owners whether a bar*—Gramanatham *land whether communal property.*

In a suit by the landholder to recover possession of some *Gramanatham* land which was occupied by the defendant sometime in 1936, the defences were (1) that the plaintiff being one of the co-owners of the inam village in which the suit property was situated was not entitled to institute the suit in ejectment; (2) that plaintiff was not owner of the land and that it was communal property and he had therefore no title to eject; and (3) that the plaintiff had no possession within 12 years prior to date of institution of suit,

Held: (1) Apart from the fact that the plaintiff was recognised as the landholder under the Madras Estates Land Act, he was entitled to institute a suit in ejectment against a trespasser.

Syed Ahmed Sahib v. *The Magnesite Syndicate, Ltd.*, (1915) 28 M.L.J. 598: I.L.R. 39 Mad. 501, relied on.

(2) *Gramanatham* is not communal property in the sense in which village thrashing floor or burning grounds or other property is communal, that is property reserved for the use of the community. Further, this particular property in an inam village not being a communal poromboke plaintiff would be entitled to sue for recovery of possession.

Chinnathambi Goundan v. *Venkatasubramania Iyer*, (1939) M.W.N. 207, relied on.

(3) The present suit having been filed within 12 years from 1936 when the defendant admittedly trespassed into the property the suit was not barred.

Appeal against the decree of the Court of the Subordinate Judge, Madura, in A.S. No. 112 of 1945 preferred against the decree of the Court of the District Munsiff, Madura, in O.S. No. 16 of 1945.

K. V. Srinivasa Ayyar for Appellant.

R. Gopalaswami Aiyangar for Respondent.

The Court delivered the following

JUDGMENT.—The defendant is the appellant. The suit out of which this second appeal arises was instituted by the landholder to recover possession of some *Gramanatham* land which was occupied by the defendant sometime in 1936. The main defence to the suit was that the plaintiff who was one of the co-owners of the inam village in which the land was situated was not entitled to institute the suit in ejectment; secondly, that the plaintiff was not the owner of the land and that it is communal property and he had, therefore, no title to eject; thirdly, that the plaintiff had no possession within 12 years prior to the date of institution of the suit. On all the questions both the Courts found in favour of the plaintiff negativing the contention of the defendant, and decreed the suit.

In this second appeal, again the same contentions were repeated. On the first question apart from the fact that the plaintiff was recognised as the landholder under the Estates Land Act, he is entitled to institute the present suit in ejectment against the defendant who was a trespasser on the finding of the Courts below as laid down by the decision of this Court in *Syed Ahmad Sahib* v. *The Magnesite Syndicate, Ltd.*[1]. The contention, therefore, that the plaintiff was not entitled to institute the suit, he being only a co-owner, is untenable.

The second contention is that the plaintiff is not the owner or at any rate is not entitled to maintain this suit in respect of *Gramanatham* lands. In view of the decision of Wadsworth, J., in *Chinnathambi Goundan* v. *Venkatasubramania Iyer*[2], this contention also seems to me untenable. *Gramanatham* is not communal property in the sense in which thrashing floor or burning grounds or other property is communal, that is property reserved for the use of the community.

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* S. A. No. 1480 of 1946. 10th January, 1949.

1. (1915) 28 M.L.J. 598: I.L.R. 39 Mad. 501. 2. (1939) M.W.N. 207.

Gramanatham if it is unoccupied is assigned from time to time by the proprietor whether it is in zamindari area or in an inam village and this practice was referred to by the learned Judge (Wadsworth, J.) in *Chinnathambi Goundan* v. *Venkatasubramania Iyer*[1]. This, if I may say so with respect, is the practice obtaining in the zamindari area and also in inam villages.

The village in which the suit site is situated is an inam village and the owners of the village (inamdars) would be entitled to all the porombokes except communal porombokes; and this not being a communal poromboke, the plaintiff would be entitled to institute the suit for recovery of possession.

As regards the third contention that the plaintiff did not establish possession within 12 years prior to the suit, the finding of both the Courts is that Karuppan Ambalam was in possession of the property from the year 1923 upto 1933 and thereafter he walked out of the building or house. The house became dilapidated and the defendant trespassed into that property in 1936. Thereafter, she rebuilt the house and continued to live. The present suit was instituted within 12 years from the date of the trespass by the defendant in 1936 and, therefore, the suit is in time. It is in evidence of the defendant's witnesses themselves that the plaintiff was planting mango trees on the site and was watering them. That could not have happened after the defendant got into the house after 1936 but must be between 1933 and 1936 and the Courts below have given sufficient reasons for holding that the defendant's possession commenced only in 1936. The plaintiff was in possession at any rate after Karuppan Ambalam walked out of the land in 1933. The decision of the Court below is correct. The second appeal fails and is dismissed with costs. No leave.

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

Karavadi Manikya Rao .. *Petitioner**

v.

Nalluri Adenna .. *Respondent.*

Trust—Tenant of trust property—Arrears of rent due from—Suit to recover by surviving trustee of three trustees—Maintainability—Trusts Act (II of 1882), sections 44 and 76.

In a suit by a surviving trustee after the death of the other co-trustees against a tenant who had taken a lease of trust property from all the trustees for arrears of rent without impleading the legal representatives of the two deceased trustees, on the question whether the surviving trustee could do so in law,

Held, that the plaintiff as the surviving trustee of three trustees was entitled to file the suit for recovery of arrears of rent, and it was not incumbent on him to implead the legal representatives of the other trustees. Further, as the particular point was not raised in the written statement the plaintiff had really no opportunity to meet the objection or rectify the pleadings which was in law under the circumstances not necessary.

Vedakannu Nadar v. *Ranganadha Mudaliar*, (1938) 2 M.L.J. 663; *Shanmugha Moopanar* v. *Subbayya Moopanar*, (1921) 42 M.L.J. 133; *Annapurnamma* v. *Akkayya*, (1912) 24 M.L.J. 333: I.L.R. 36 Mad. 544 (F.B.) and *Siluvai Muthu Mudaliar* v. *Muhammad Sahul*, (1926) 51 M.L.J. 648, distinguished.

Krishna Bhatta v. *Udayavar Srinivasan*, (1915) 32 I.C. 97 and *Raghavachariar* v. *Chakrapani Naidu*, (1932) M.W.N. 297, referred to.

Petition under section 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the District Munsiff, Ongole, dated 7th January, 1947, in S.C.S. No. 361 of 1946.

P. Satyanarayana Raju for Petitioner.

G. Venkatarama Sastri for Respondent.

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1. (1939) M.W.N. 207.

* C. R. P. No. 1060 of 1947. 14th December, 1948.

The Court delivered the following

JUDGMENT.—This petition raises really a very simple point for determination whether one trustee after the death of two co-trustees can sue a tenant, who took a land belonging to the trust on lease, for recovery of arrears of rent. The learned District Munsiff answered this question in the negative and dismissed a suit filed by the petitioner to recover Rs. 69-14-0 arrears of rent from the defendant on the ground that the two co-trustees who had joined in execution of a five years' lease on 30th June, 1939, in favour of the defendant were dead and their legal representatives had not been impleaded.

The short facts are these. The trust property in question of an unusual type, namely, a village tank 7 acres and 29½ cents, was leased out for five years to the defendant on 30th June, 1939, on a rental of Rs. 180 a year. It is common ground that the lease deed describes the plaintiff and two other executants as dharmakarthas of this cheruvu. The suit sought to recover only a balance of rent for the year ending 1944 from the defendant who is said to have cultivated with two others who had paid their share of the rent. The defendant pleaded discharge in the suit and filed two receipts which he claimed to have been given him by the brothers of the dead trustees.

The learned District Munsiff found these receipts to be not genuine and then went on to consider the legal issue of the maintainability of the suit. Nowhere in the written statement is there any allegation that the suit was not maintainable on the ground that the legal representatives of the deceased trustees were not impleaded. There is a reference in the written statement to the legal representatives of the deceased trustees being entitled to receive the balance of rent due. That was merely to implement the discharge plea put forward that this rent had been paid to the brothers of the original trustees. The learned District Munsiff held that the legal representatives of the other co-trustees had to be joined under section 45 of the Contract Act which clearly has no application. He was also guided by some observations in *Vedakannu Nadar* v. *Ranganadha Mudaliar*[1]. The facts there however were entirely different. That litigation concerned the alienation of the office of the trustee of a charitable endowment for consideration and it was held that the alienation conferred no right on the alienee and could not be of any validity after the death of the alienor and cannot prejudice the rights of his sons who should be considered to be still trustees. The learned District Munsiff relied on some observations that no suit in regard to trust properties would be maintainable by one or some of the trustees only, if the remaining trustees are not before the Court either as plaintiffs or even as defendants.

It is contended on behalf of the petitioner in the first place that this objection was not taken by the defendant in his written statement. A point of law however can be taken at any time even by the Court. It seems clear however that this point was raised by the vakil for the defendant in an acute form at the trial in the lower Court. The learned advocate here also placed reliance on *Vedakannu Nadar* v. *Ranganadha Mudaliar*[1]. He also referred me to some other decisions which are not in point. One of them *Shanmugha Moopanar* v. *Subbayya Moopanar*[2] relates to a case of living trustees who had not been impleaded in a suit for possession. Assistance has also been invoked of some decisions which laid down that joint promisees under a negotiable instrument must all join in a suit, see *Annapurnamma* v. *Akkayya*[3] and *Siluvai Muthu Mudaliar* v. *Muhammad Sahul*[4]. Co-trustees, however, are in a different position from joint promisees. The learned advocate for the petitioner relies on sections 44 and 76 of the Trusts Act by which on the death of one trustee the authority may be exercised by the continuing trustees to whom the trust property passes. In *Krishna Bhatta* v. *Udayavar Srinivasan*[5], a Bench of this Court held that on the

1. (1938) 2 M.L.J. 663.
2. (1921) 42 M.L.J. 133.
3. (1912) 24 M.L.J. 333 : I.L.R. 36 Mad. 544 (F.B.).
4. (1926) 51 M.L.J. 648.
5. (1915) 32 I.C. 97.

death of one of the trustees in the course of the suit it could be validly continued by the other three. In *Raghavachariar* v. *Chakrapani Naidu*[1], it was held that under section 44 of the Trusts Act when one of two trustees dies the other trustee is competent to file suits against the debtors of the estate. It is urged by the learned advocate that the Trusts Act does not govern religious and charitable trusts. I am not quite clear what kind of trust this tank really is. In any event, section 44 and section 76 merely reproduce principles which are ordinarily applicable under ordinary law to all kinds of trustees. The learned District Munsiff erred in applying section 45 of the Contract Act and in following decisions where the facts were entirely different. I have no hesitation in holding that the plaintiff as the surviving trustee of three trustees of this tank was entitled to file this simple suit for recovery of arrears of rent, and that it was not incumbent on him to implead the legal representatives of the other trustees. Furthermore, as the learned advocate for the petitioner points out, this point was not taken in the written statement and the plaintiff really had no opportunity of meeting this objection by impleading the legal representatives, which is in law not in the circumstances necessary. There is no evidence before us as to how the trusteeship of this tank devolves or of what nature it is. There is therefore no substance in the technical defence put forward in the suit although it succeeded before the learned District Munsiff.

The petition is allowed with costs. There will be a decree against the defendant as prayed for with costs.

K.C. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

Minor Vedachala Reddy by next friend Subramania Reddiar .. *Petitioner**

v.

Narayanaswamy Reddy .. *Respondent.*

Civil Procedure Code (V of 1908), *Order* 9, *rule* 9, *Order* 32, *rule* 1 *and Order* 33, *rule* 5 (d-1)—*Next friend of minor suing to set aside alienation by father—Previous suit by another next friend of the same minor for the same relief dismissed for default—Bar of—Desirability of some Court control over irresponsible suits by next friends.*

In a suit by a next friend under Order 32, rule 1, Civil Procedure Code, to set aside an alienation originally made by the minor's own father, the lower Court rejected the application under Order 33, rule 5 (*d*-1) on the ground that it was barred by Order 9, rule 9, Civil Procedure Code, in view of a previous suit filed on behalf of the same minor by another next friend for the same relief having been dismissed for default. In revision,

Held, that the lower Court was right in rejecting the present suit under Order 33, rule 5 (*d*-1) as being barred under Order 9, rule 9.

Lalla Sheo Churn Lal v. *Ramachandra Debey,* (1894) I.L.R. 22 Cal. 8, distinguished.

Trevelyan's Law relating to Minors, 5th edition, at page 287, referred to.

The suits under Order 32, rule 1 as it stands, are filed without any sense of responsibility. There is little or no control over these next friends who bring to Court large number of defendants as alienees in such suits. It is very desirable to exercise some Court control over next friends who file this type of suits by requiring them first to be appointed property guardian under the Guardians and Wards Act, of the minors in whose interests they purport to act.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsiff, Chingleput, in O.P. No. 18 of 1946.

K. S. Champakesa Aiyangar and *K. C. Srinivasan* for Petitioner.

K. R. Krishnaswami Ayyar and *S. P. Subrahmaniam* for Respondent.

The Court delivered the following

JUDGMENT.—The petitioner is a Hindu minor who sought to sue *in forma pauperis* by a next friend under Order 32, rule 1, Civil Procedure Code, to set aside

1. (1932) M.W.N. 297.

* C. R. P. No. 1409 of 1946. 18th November, 1948.

an alienation originally made by his own father on various grounds. The learned District Munsiff rejected his application under Order 33, rule 5 (*d*-1) on the ground that it was barred by Order 9, rule 9, Civil Procedure Code, in view of a previous suit O.S. No. 13 of 1944 filed on behalf of the same minor by another next friend for the same relief being dismissed for default. It is common ground that an application made by the next friend to set aside that order of dismissal was also dismissed. The minor's father is not made a party to the present suit and is said to be dead. It is not known and no one can inform me whether he was alive during the pendency of O.S. No. 13 of 1944. That fact is not really material.

It is urged on behalf of the petitioner that it is open to another next friend to file a suit on the ground of the first next friend's gross negligence or fraud even during the minor's minority. But no decision has been placed before me in India where such a suit by another next friend has been permitted. My attention has been drawn to Trevelyan's Law relating to Minors, fifth edition, at page 287, where without any authority in Indian or any other case-law, it is observed that it is not necessary that the minor should wait until he attains majority before taking proceedings to get rid of the consequences of his next friend's or guardian's fraud or negligence and that proceedings can be taken on his behalf by another next friend. The application of that *dictum* to this type of suit brought on behalf of Hindu minors to set aside alienation made by their *de jure* and natural guardians, their fathers, is extremely difficult to appreciate or define. The only decision placed before the lower Court, *Lalla Sheo Churn Lal* v. *Ramachandra Debey*[1] and quite rightly rejected by the learned District Munsiff as inapplicable, concerned a case where a minor after attaining majority filed a suit alleging gross negligence on the part of a next friend, who had allowed a suit to be dismissed while he was a minor. There is, as the lower Court has observed, no prayer even in the present suit to set aside the previous decree on the ground of the previous next friend's gross negligence. I have no hesitation in confirming the learned District Munsiff's order rejecting the present plaint under Order 33, rule 5 (*d*-1) as being barred under Order 9, rule 9, Civil Procedure Code.

In the present case the learned advocate for the petitioner is unable even to tell me in what way the present next friend is related to the minor nor does such relationship even appear on the face of the plaint. He is not even able to say how the previous next friend in O.S. No. 13 of 1944 was related to the minor or whether the father was alive during the pendency of that suit. These suits filed by next friends on behalf of Hindu minors against their own fathers who when alive, generally, are impleaded as defendant 1, more often than not remaining *ex parte* and being behind the suit itself constitute a grave problem in speculative litigation. I should like to express my considered opinion that these suits by next friends who can crop up under the provisions of Order 32, rule 1, Civil Procedure Code, as it stands are often filed without any sense of responsibility. There is little or no control over these next friends who can bring to Court a large number of defendants as alienees in these suits. It seems very desirable to exercise some Court control over next friends who file this type of suits by requiring them first to be appointed property guardian under the Guardians and Wards Act, of the minors in whose interests they purport to act. This will result in some Court control over such litigation and would also I think be in the real interests of the minors themselves.

The present petition is dismissed with costs.

K.C. *Petition dismissed.*

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1. (1894) I.L.R. 22 Cal. 8.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

Parattakath Mayan and others .. *Appellants**

v.

Palakkotanteakatte Mammad Kunhi .. *Respondent.*

Evidence Act (I of 1872), section 92—Applies only as between parties to an instrument, but not between one of the parties and a third party—Plea of discharge not hit though an agreement to give a discharge in future may be.

Under section 92 of the Evidence Act the prohibition with reference to the proof of an oral agreement applies only as between the parties to an instrument or representatives in interest and not between one of the parties to an instrument and a third party. Though an agreement to give a discharge in future may, if it is oral, be hit by the section, there is nothing in the section to preclude evidence being let it, in proof of an oral agreement which is otherwise valid and enforceable and in pursuance of which an amount somewhat less than the amount due under the mortgage was accepted by the mortgagee in full discharge of the mortgage.

Maung Kyin v, *Ma Shwe La*, (1917) 33 M.L.J. 648 : L.R. 44 I.A. 236: I.L.R. 45 Cal. 320 (P.C.) and *Krishnaswami Rao* v. *Srinivasa Desikan*, (1937) 71 M.L.J. 850, referred to.

Appeal against the decree of the Court of the Subordinate Judge, Tellicherry, dated 20th April, 1945, in A.S. No. 44 of 1945 preferred against the decree of the Court of the District Munsiff, Taliparamba, in O.S. No. 905 of 1943.

A. Achuthan Nambiar for Appellants.

B. Pocker for Respondent.

The Court delivered the following

JUDGMENT.—The defendants are the appellants. The respondent instituted the suit out of which this second appeal arises for a perpetual injunction restraining the defendants from interfering with his possession of the plaint properties in any manner. He also prayed in the alternative that if the defendants were found to be in possession of any of the items of the property a decree for possession and mesne profits should also be granted in his favour. The defendants raised the plea that the plaintiff had no title to the property.

In order to appreciate the contention of the defendants it is necessary to state a few facts. The property in suit originally belonged to the first appellant Parattakath Mayan. He assigned the properties to his wife. Subsequently the wife died and it is alleged that the first appellant and appellants 2 to 5 his children became entitled to the property as the heirs of his deceased wife. In 1926 the first appellant as guardian of the minor children executed a kanom deed Ex. P-5 for a sum of Rs. 3,900 in favour of one Assan. Under this deed the mortgagee was entitled to be in possession and enjoyment of the properties. As a result of certain transactions, the details of which are not relevant for the purpose of this second appeal, the plaintiff that is the respondent in the second appeal, became entitled to the interest of the kanomdar. He instituted the suit on the allegation that the defendants-appellants were attempting to trespass on the property and that they should be prevented.

The main plea of the defendants to this suit is contained in paragraph 3 of the written statement, the substance of which is that after the kanom was created in favour of Assan under an arrangement with the kanomdar the first defendant himself was holding the property in his possession and was paying to Assan the balance of the collections remaining in his hands after meeting the expenses towards the amount of interest under the kanom deed, the interest thereon being 10 per cent. per annum. This arrangement was acted upon and there was according to the defendants a final settlement of accounts on the 11th April, 1928, in respect of the value of pepper supplied to Assan during the years 1926-27 and 1927-28. On looking into the accounts it was found that a sum of Rs. 1,850-4-7 was repayable to the first defendant and that by an agreement between the parties this amount was to be adjusted

* Second Appeal No. 230 of 1946. 3rd December, 1948.

against the amount payable to the said Assan's nephew Mammad under the kanom kuzhikkanam deed executed in his favour by the first defendant's father. Thus according to the plea of the defendants the entire amount due under the kanom deed was fully discharged and ever since the properties were held in undisputed possession and enjoyment of the first defendant along with defendants 2, 3, 4 and 5.

In the suit several issues were framed by the learned District Munsiff; but the suit was disposed of on the preliminary ground that the defendants were not entitled to let in evidence to prove the arrangement pleaded by them in paragraph 3 of the written statement. This plea, it was said, amounted to a variation of the terms of the mortgage and was therefore hit by section 92 of the Evidence Act. This contention urged on behalf of the plaintiff was accepted by the learned District Munsiff and also by the learned Subordinate Judge on appeal and the plaintiff's suit was decreed without any trial.

In this second appeal the only question for consideration is whether the Courts below were justified in shutting out the oral and documentry evidence which the defendants wanted to adduce to establish the arrangement pleaded by them in paragraph 3 of the written statement. The fundamental mistake committed by the Courts below was to find that the first defendant was also an executant of the kanom deed Ex. P-5. Ex. P-5 was executed on behalf of defendants 2 to 5 who were then minors by the first defendant as guardian. He did not join in the execution of the deed in his individual capacity. The arrangement pleaded in paragraph 3 was in my view between the first defendant himself and Assan the kanomdar. It is not as contended by the learned advocate for the respondent an arrangement entered into by the first defendant both for himself and also on behalf of his minor children. Under section 92 of the Evidence Act the prohibition with reference to the proof of an oral agreement applies only as between parties to the instrument or representatives in interest and not between one of the parties to the instrument and a third party. The language of the section itself is clear and the Privy Council in *Maung Kyin* v. *Ma Shwe La*[1], decided this question and pointed out that the section in terms applies only as between parties to the instrument or their representatives in interest and not between a party to the instrument and a stranger. In my opinion the arrangement of the discharge pleaded is also admissible on another ground, as it does not contradict, vary, add to or subtract from any terms of the mortgage. The mortgagor, it has been held, is entitled to establish by oral evidence discharge of a mortgage though he may be precluded from pleading an agreement to discharge which is executory in its nature. An agreement to give a discharge in future may be, if it is oral, hit by section 92 but there is nothing in section 92 of the Evidence Act to preclude evidence being let in in proof of an oral agreement which is otherwise valid and enforceable and in pursuance of which an amount somewhat less than the amount due under the mortgage was accepted by the mortgagee in full discharge of the mortgage. The cases on the point have been considered by Varadachariar and Horwill, JJ., in *Krishnaswami Rao* v. *Srinivasa Desikan*[2]. In the present case what was pleaded was a discharge and not an executory contract to pay the amount in future. No doubt the discharge was as pleaded in the written statement in pursuance of an arrangement which was acted upon and accepted by both sides as discharging the mortgage debt by reason of the payments made by the first defendant in pursuance of the arrangement. On this ground also I think that the view of the Courts below that the defendants are not entitled to prove the arrangement pleaded in paragraph 3 of the written statement is erroneous.

Of course as the suit was not tried, I should not be understood as having expressed any opinion on the truth or otherwise of the plea taken by the defendants in their written statement.

In the result the appeal is allowed and the decrees and judgments of the Courts below are discharged and the suit is remanded for retrial in the light of this

1. (1917) 33 M.L.J. 648 : L.R. 44 I.A. 236 : I.L.R. 45 Cal. 320 (P.C.).
2. (1937) 71 M.L.J. 850.

judgment. The appellant is entitled to a refund of the court-fee in this and in the lower appellate Court. The costs of all Courts will follow and abide the result of the trial of the suit in the trial Court. No leave.

V.P.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAGESA SASTRI.

Kayambu Servai .. *Appellant**

v.

Karuppiah Servai and others .. *Respondents.*

Water rights—Suit for injunction restraining defendants from using water in a tank—Plaintiff must establish probable prospective damage.

In a suit for an injunction restraining the defendant from using the water in a tank for irrigation of their lands, the plaintiff must not only show that his proprietary right has been invaded, but also show that he suffered some damage or at least establish that probable prospective damage will ensue.

Where there is enough water to supply the needs of all mamool wet lands in the ayacut in the suit village and sufficient surplus water for irrigation of the defendant's lands, it cannot be said that the plaintiff has established a right to an injunction against the defendants.

Appeal against the decree of the Court of the Subordinate Judge, Sivaganga, in A.S. No. 51 of 1945 preferred against the decree of the Court of the District Munsiff, Manamadura, in O.S. No. 237 of 1942.

V. Ramaswami Aiyar for Appellant.

R. Subrahmania Ayyar, R. M. Halasyam and *T. Krishna Rao* for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff is the appellant before me. He filed a suit for an injunction against defendants 2 to 6 restraining them from taking water from Panikkananthal tank to their lands situated in the village of Kulanthapuri. He also wanted an injunction directing the defendants to restore a part of a channel which they were alleged to have destroyed and also an injunction restraining them from interfering with the plaintiff's taking water to his wet lands in Panikkananthal village through the channel A, A-1 to A-8. He claimed another relief about the defendants having put up a pipe at a point " S " in the tank but both the Courts have found against the plaintiff in connection with that matter and the second appeal does not deal with this point. The learned District Munsiff found all the other points in favour of the plaintiff and decreed the suit. On appeal by defendants 2 to 6 the Subordinate Judge reversed the finding of the trial Court and dismissed the suit. The plaintiff has preferred this second appeal.

The findings of fact come to by the appellate Court are these : The lands of the defendants though in the village of Kulanthapuri were permitted to take water from Panikkananthal village and the defendants have been accordingly taking water for over 15 years. Those lands have been converted into nanja lands and *pattas* have been also issued to them treating them as *nanja* lands even from 1928 onwards. The allegation that the defendants destroyed a portion of the channel A, A-1 to A-8 is found to be untrue and the further case of the plaintiff during trial, that subsequent to the institution of the suit they destroyed some other portions of the said channel is also found to be untrue. The appellate Court found that only about 3 acres of plaintiff's lands were nanja lands and the rest were only *punja* lands. It is further found that so far as the plaintiff's lands are concerned, only a part of it was originally mamool *nanja* and the rest has been converted into *nanja* only from about 1935. The appellate Judge has also found accepting the evidence of D.Ws. 2 and 4 that there is enough water in the tank for the cultivation of all the mamool *nanja* lands in the ayacut of the village and for the cultivation of defendants' lands in question.

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* Second Appeal No. 547 of 1946. 10th January, 1949.

In second appeal these findings are accepted but it is argued that even so the judgment of the appellate Court is not correct. The argument is based on the decision in *Ramachandra* v. *Narayanaswami*[1] and *Nynappa Servai* v. *Veeran*[2]. Mr. Ramaswami Iyer the learned advocate for the appellant argues that the plaintiff's rights are in the nature of proprietary rights and it is not open to the landholder to allow the use of water from the Panikkananthal tank for wet cultivation of lands in the village of Kulanthapuri. He argues that it is legally unnecessary for him to establish actual damage before he can succeed in obtaining a relief by way of injunction. It is sufficient that this proprietary right had been invaded and that must be taken to give him a cause of action irrespective of any finding as to any actual damage being caused. He argues that it is impossible to say that there may not be prospective damage in the future and it must be presumed that there would be. Actually the decision in *Ramachandra* v. *Narayanaswami*[1], on which reliance was placed was a case where there was material diminution in the supply of water caused by the alleged obstruction. In the decision in *Nynappa Servai* v. *Veeran*[2], also the right of the ryot is recognised as a proprietary right only to the extent of the customary supply of water from the tank. There also it was found as a fact that the water in the tank was not sufficient to irrigate the plaintiff's lands and the supply for irrigation of other lands must necessarily cause damage to the plaintiffs. It was only on the basis of that finding that the plaintiffs were given a decree in their favour. As pointed out in *Basavana Goud* v. *Narayana Reddi*[3], the plaintiff must prove either that damage has accrued or must necessarily accrue. The plaintiff must establish "probable prospective damage" and that the act is such as is likely to cause damage to him. In the present case that element is wanting. But it is argued that the plaintiff is also the owner of other wet lands in the ayacut of this village and in that capacity he can complain of the act of the defendants in taking water from the village tank because his rights of irrigation to the other lands in the village, that is, other than the "B" marked series of lands with reference to which the suit was filed, would be affected. But this is not the case referred to by him in the plaint or during the trial. It is not open to him now to take a stand upon his ownership of other lands in the village and indeed even with reference to that, the finding of the lower appellate Court is that there is enough water to supply the needs of all the mamool wet lands in the ayacut in the suit village and that there is sufficient surplus water for irrigation of the defendants' lands. In these circumstances, the plaintiff has not established any right to an injunction as claimed by him. The second appeal accordingly fails and is dismissed with costs of the second respondent.

(Leave to appeal is refused.)

V.P.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VISWANATHA SASTRI.

Kasi *alias* Alagappa Chettiar and others .. *Appellants**

v.

Rm.A.Rm. V. Ramanathan Chettiar *alias* Sreenivasan Chettiar and another .. *Respondents.*

Partnership—Death of partner—Rights of representatives and obligations of surviving partners—Nature of relationship—Surviving partners continuing business without winding up—Right of representatives of deceased partner to profit or interest—Election to claim profit or interest—When to be made.

The obligation of a surviving partner in a dissolved firm to the representatives of a deceased partner, are not more onerous than those of a partner to his other partners in a running partnership.

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1. (1892) 2 M.L.J. 279 : I.L.R. 16 Mad. 333.
2. (1908) I.L.R. 32 Mad. 423.
3. (1930) 61 M.L.J. 563 : I.L.R. 54 Mad. 793.

*Appeal No. 455 of 1946. 17th December, 1948.

A partner though an agent is, in no sense, a trustee for his co-partner. He has no higher duty than to deal fairly and honestly with him. He is bound to indemnify his co-partners for any loss caused by his fraud and is liable in the absence of a contract to the contrary, to account to them for profits earned by him by use of the firm's property or by carrying on a competing business. If he clandestinely secures a personal profit to himself in a partnership transaction, he must share the profit with the other partners. He is not in the position of an insurer or a guarantor of his other partners. He is under no positive duty to make or earn a profit or avert a loss in the conduct of the partnership business. All that the law imposes on him is an obligation of good faith and all that is required of him is that he must not act in a manner antagonistic or prejudicial to the interests of the firm. Each partner being entitled to manage and act, in the absence of a provision to the contrary in the articles, no one partner can be considered to be a trustee for the others.

After dissolution, the partnership continues only for the purpose of winding up the business, realising the assets, discharging liabilities and adjusting the rights of the partners. The authority, rights and obligations of the partners continue only for this limited purpose. On a dissolution by the death of a partner the representative of the deceased partner is entitled to call upon the surviving partners to account for the deceased partner's share as it stood on his death and to have his claim satisfied out of the assets of the dissolved partnership after discharging all liabilities incurred before dissolution and such only of the liabilities incurred thereafter by the surviving partners, as are incidental to and necessary for the winding up of the business. The surviving partners have the right and duty to realise the partnership property and in this sense and for this purpose, they hold a fiduciary relationship towards the deceased partner's representative as regards his interest in the partnership property.

The claim of the representative of a deceased partner must be for profits alone or interest alone. A mixed claim is inadmissible and there cannot be a claim for profits for part of the time over which the dealings of the surviving partners extended and interest as to the other part.

The right to profits and the right to interest are governed by the same principles. Interest is payable only on the amount of the share of a retiring or a deceased partner, actually used or employed by the surviving partner in continuing the business after dissolution and not on the full value of the entire share.

A final election to claim either profits or interest could be postponed until the accounts of the business subsequent to the retirement (or death of a partner) have been taken.

Appeal against the decree of the Court of the Subordinate Judge, Devakottai, dated 20th August, 1946, in O.S. No. 84 of 1942.

K. Bashyam and *S. Venkatesa Aiyangar* for Appellants.

T. M. Krishnaswami Aiyar and *S. Thiagaraja Aiyar* for Respondents.

The Judgment of the Court was delivered by

Viswanatha Sastri, J.—This is an appeal by the defendants from the preliminary decree in O.S. No. 84 of 1942, on the file of the Court of the Subordinate Judge of Devakottai. The suit was instituted on 9th September, 1939, in that Court but subsequently transferred to the Court of the Subordinate Judge of Ramnad and again re-transferred to the Court of the Subordinate Judge of Devakottai and numbered as above. The plaintiffs prayed for the taking of the accounts of a partnership which stood dissolved on 23rd May, 1927, by the death of a partner whose interest had devolved on them. The appeal is mainly directed against the directions contained in the judgment and decree of the Court below as regards the taking of the accounts of the dissolved firm.

The parties to the suit are Nattukottai Chetties, well known indigenous bankers of South India, mostly resident in the districts of Madura and Ramnad, whose business activities however extend to Burma, Ceylon and the Federated Malay States. They carry on money-lending business abroad, mostly through agents, with their *oor kadai* or headquarters in their native place. The usual practice is for an agent to serve for a term of three years under a salary chit fixing his remuneration for the said period. At the end of the three years' period or earlier, if for any reason, the agency is terminated, the retiring agent closes the account and prepares an *ainthogai* or balance sheet. The retiring and the incoming agents settle the valuation of the outstandings and the other assets, with the approval of their principal, and the incoming agent takes them over at that valuation and conducts the business, collects the moneys lent by his predecessor and lends out moneys to borrowers who are, for the most part, owners of agricultural lands and plantations in and around the place where the money-lending businessis carried on. In many cases these Nattukottai Chetti money-lenders are obliged to realise

their outstandings only by taking a conveyance of lands belonging to their debtors. The lands so acquired by way of realistion are often treated as an asset of the money-lending business and the income derived there from is also carried into the accounts of the business and forms part of the profits. Sometimes lands are also acquired as an investment. The value of the lands fluctuates according to the current price of paddy, rubber or other produce grown on the lands. In consequence of the Japanese occupation of Burma and other parts of South-east Asia, during the last war, and the subsequent developments in those countries, landed properties situated there and owned by Indian Nationals have lost much of their value and attractiveness, as is apparent from the course of this litigation.

In the year 1916 Valliappa Chettiar the father of the first plaintiff and Alagappa Chettiar, the father of the first defendant started a money-lending business in partnership with a capital of Rs. 25,100. The said business was carried on at a place called Theinzig in Burma, under the *vilasam* (name and style) of Rm.P. Alagappa's share in the partnership was Re. 0-10-9 and Valliappa's share was Re. 0-5-3 out of a total sixteen annas. Alagappa died in 1925, but his sons Narayana, the father of the third defendant and Kasi *alias* Alagappa, the first defendant, took his place in the partnership and the business was carried on as before though, for legal purposes, it was a fresh partnership. Valliappa died on 23rd May, 1927, leaving behind him his widow and an only son, Ramanathan *alias* Srinivasan, then a minor and now a major, but throughout a deaf, dumb and mentally defective person. After the death of Valliappa, the business was attended to by Narayana, the first defendant's elder brother, till he died in 1936. Whether the business was carried on after the 23rd May, 1927, by Narayana or whether it was merely wound up by him, is one of the points in dispute between the parties. Ramaswami Chetti was an agent of the Rm. P. firm during 1916 to 1919. Valliappa himself managed the business from 1919 to 1922. Ramaswami went out as agent again in 1922 and looked after the business till 1925. Valliappa again took charge of the business from 1925 till September, 1926, when he left Burma for good and Ramaswami was employed as the local agent thereafter. Ramaswami continued to attend to the business from December, 1926, till October, 1932. Valliappa died, as above-stated, on 23rd May, 1927, leaving a will and purporting to appoint an agnatic relation of his, by name Venkatachala Chetti, and another person, by name Lakshmanan Chetti, as the executors of his will. Lakshmana does not appear to have functioned as an executor though Venkatachala professed to act as such on a few occasions.

The present suit was instituted by Ramanathan *alias* Srinivasan, the son of Valliappa, acting through a next friend, as the first plaintiff, Meyyammai Achi *alias* Sigappi Achi, brother's widow (since deceased) of Valliappa as the second plaintiff, and her adopted son as the third plaintiff, for the taking of the accounts of the dissolved firm of Rm.P. at Theinzig and incidental reliefs. The second and third plaintiffs claim to be entitled to a moiety of Valliappa's interest in the partnership by reason of a compromise in O.S. No. 14 of 1939 on the file of the Court of the Subordinate Judge of Devakottai, entered into between the present plaintiffs *inter se*. The first defendant in the suit is the second son of Alagappa, the second defendant being the son of the first defendant. The third defendant is the son of Narayana, the first defendant's elder brother, who died in 1936. It is common ground that the Rm.P. firm stood dissolved on 23rd May, 1927. It may here be stated that the first defendant and his elder brother Narayana had an extensive money-lending business of their own at Rangoon with their own *vilasam* of Rm.P. and they also started their own separate money-lending business at Theinzig with the Rm.P. *vilasam*, in the latter half of 1930, in the premises of the dissolved Rm.P. firm. In addition to their share in the nett assets of the Rm.P. firm as on 23rd May, 1927, the date of its dissolution, the plaintiffs claimed an account of the "profits and interest", alleged to have been earned by the first defendant and Narayana, by continuing to carry on the money-lending business with the property and assets of the dissolved firm.

The defendants admitted the partnership and its dissolution as alleged by the plaintiffs, but pleaded that no fresh business was done after the death of Valliappa in May, 1927, except so far as it was necessary for and incidental to, the winding up of the dissolved firm's affaris and no portion of the assets of the dissolved firm nor any of its facilities, had been used by them for their own business started in 1930. They stated that some of the outstandings of the dissolved firm were taken over by them for their full value and carried into their individual business in 1930 with the consent of Venkatachala, the executor under the will of Valliappa, as well as the agent of his widow, who herself was the natural guardian of the first plaintiff. They further alleged that the liabilities of the firm on the date of its dissolution exceeded its assets. They also pleaded that the suit which was brought in 1939 was barred by limitation by reason of the existence of the executor Venkatachala who was competent to give a discharge. This last plea of the defendants was, however, negatived by this Court in its judgment in Appeal No. 132 of 1943, the ground of decision being that the properties were joint family properties, which Valliappa had no right to dispose of by will and that Venkatachala was not, therefore, a validly appointed executor.

Several issues were framed in the suit and the Court below passed a preliminary decree on 21st December, 1942, declaring that the partnership stood dissolved on 23rd May, 1927, declaring the proportionate shares of the several parties and directing the defendants to render an account. Issues 7 to 14 were, however, reserved for consideration " at the time of the passing of the final decree." It would be seen from a perusal of these issues extracted in paragraph 2 of the judgment now under appeal, that many of the issues so reserved for consideration, should have been determined by the trial Court before the passing of the preliminary decree. Its omission so to decide them has resulted in an incomplete report of the Commissioner appointed to take accounts. His report is dated 31st January, 1944. The report having been found to be unacceptable to the Court below, it has now passed a fresh preliminary decree dated 20th August, 1946, giving fresh directions for taking the accounts of the dissolved firm of Rm. P. and it is against this decree that the present appeal has been preferred by the defendants.

The findings of the Court below on the matters in controversy between the parties may be summarised as follows: The accounts have to be taken on the basis of the dissolution of the Rm. P. firm on 23rd May, 1927. Instead of winding up the affairs of the firm, the surviving partners, namely, the first defendant and his brother, Narayana, continued to carry on the money-lending business after May, 1927, on a larger scale than before. The continuance of the business was with the moneys and assets of the dissolved firm as well as moneys advanced by the surviving partners out of their individual shop at Rangoon. Such continuance of the business was not authorised by the plaintiffs or any one legally competent to act on their behalf. Venkatachala, though interested in the plaintiffs as a relation, did not in fact and could not, in law, have authorised the continuance of the business and was not fully conversant with the state of the business after 1927 though he was in a position to know generally that business was being carried on. By continuing the business instead of winding it up, the defendants had committed a breach of their fiduciary duty to the representatives of their deceased partner and by utilising the assets of the dissolved firm for continuing the old business and for their own individual Rm. P. business at Theinzig, they had made themselves liable to render a special account on the footing of wilful default. The plaintiffs had a right either to claim their share of the profits earned by the subsequent conduct of the business with the assets of the dissolved firm or interest at 6 per cent. on their entire share of the assets of the dissolved firm from the date of its dissolution. The plaintiffs had not elected to take a share of the profits in their plaint and were therefore entitled to claim interest at 6 per cent. or at the *nadapu* rate, whichever was less, such interest to be calculated on the value of their share of the entire partnership assets as they stood on 23rd

May, 1927, in addition to their proper share of such assets. The Court also held that, wherever fresh advances by way of loans had been made to the old customers of the firm after the dissolution, subsequent payments made by the debtors should be appropriated in their entirety to the debts of the old firm which must be treated as realised to that extent in cash. With reference to the lands that had been acquired by the firm before 1927, the defendants were found to have taken them over at a valuation and debited themselves with such value in the accounts of the firm and credited their *oor kadai* account. They were therefore held liable to account for the market value of the said lands at the rate prevailing in 1928 where they took over the lands. With regard to the garden and the buildings in which the firm was doing business, the Court held that the defendants who started their own individual business in the same premises in 1930 were liable to account to the plaintiffs for the full value of those properties as it stood in 1930, subject to a small deduction by way of occupation rent in respect of the business relating to the winding up of the dissolved firm.

Mr. Bhashyam, the learned advocate for the appellants, challenges the correctness of these findings of the Court below. He does not dispute that there was a dissolution of the partnership by the death of Valliappa Chettiar on 23rd May, 1927. He, however, contends that the business of the firm was only wound up by the surviving partner Narayana in the usual manner and no fresh business was carried on after the dissolution of the firm. He states that the Courts below, in arriving at a finding adverse to the defendants on this point, has not kept in view the following circumstances. The Rm. P. firm carried on a widespread money-lending business which it was not possible to close down in a short time without incurring heavy loss and the winding up had therefore to be done gradually. In order to realise the old outstandings, fresh advances had to be made to customers in many cases and security taken. In other cases lands had to be purchased by way of realisation of outstandings and fresh sums had to be advanced to the old debtors to enable them to discharge their dues to the firm and to other creditors as well. Nattukottai Chetti principals conduct their business of money-lending in foreign parts through agents on whom they have to rely. The agent Ramaswami who had been selected by Valliappa himself for carrying on the business of the Rm. P. firm at Theinzig was left in charge of the winding up of the firm after the death of Valliappa, and he managed the affairs of the firm according to the usual course of business and he did his best in the circumstances, to gradually wind up the business. The surviving partners themselves were residents in British India and could only exercise some sort of general control or supervision from here. Mr. Bhashyam further contends that Venkatachalam Chetti, the executor appointed by the will of Valliappa, functioned as such and he was also the agent of Valliappa's widow who was the natural guardian of her son, the first plaintiff. Venkatachala was looking after the interests of the plaintiffs and acquainting himself with the way in which the affairs of Rm. P. firm were managed by the agent Ramaswami Chetti after May 1927. He refers to the correspondence between Venkatachala and Ramaswami evidenced by Ex. D-33 (*a*) (9-5-1928); D-43 (*a*) (20-6-1928); D-43 (*b*) (17-7-1928); D-43 (*f*) (20-2-1929); D-8 (*a*) (12-12-1928); D-43 (*j*) (27-8-1929); D-43 (*m*) (18-12-1929); D-43 (*n*) (1-4-1930); and D-43 (*o*) (17-4-1930). Mr. Bhashyam contends that though fresh loans were advanced and properties were acquired after May 1927, they were all incidental to and necessary for an advantageous winding up of the firm and did not constitute a continuation of the business of the firm by the surviving partners after its dissolution. The winding up was practically complete by the end of 1930 and thereafter only small advances to cultivating tenants and old constituents were made; Venkatachala Chetti was also watching the progress of the winding up of the dissolved firm by the agent Ramaswami and corresponding with him.

Mr. Bhashyam further contends that a balance sheet [Ex. D-2 (*a*)] showing the state of affairs of the dissolved Rm. P. firm as on 16th September, 1930, was sent to and accepted by Venkatachala on behalf of the plaintiffs and Venkatachala

thereafter consented to the transfer of several *Inums* (outstandings) from the old Rm. P. firm to the " *Thanathu* " (individual) business of the defendants, started subsequently under their own *vilasam* of Rm. P., the relevant correspondence being Exs. P-29 (7-8-1930) ; P-30 (4-9-1930) ; P-31 (10-9-1930); P-32 (18-9-1930) and D-8 (*e*) (28-9-1930). According to Mr. Bhashyam there was in effect a settlement of accounts in or about September, 1930, before the individual business of the surviving partners was started at Theinzig and that the settlement was between the plaintiffs, represented by Venkatachala Chetti and the surviving partners, represented by Narayana. It is contended that it is not now open to the plaintiffs to go behind the settled accounts as disclosed by the *ainthugai* [Ex. D-2 (*a*)] (16-9-1930) and claim a rendition of accounts from the date of dissolution on 23rd May, 1927. He states that the individual business of the defendants under the *vilasam* of Rm. P. was started towards the end of 1930 and thereafter the dissolved Rm. P. firm was merely collecting the outstandings. Reliance is also placed on the subsequent correspondence between Venkatachala and Ramaswami the agent of the dissolved firm, Ex. D-8 (*i*) (25-10-1931) ; D-8 (*j*) (10-11-1931) ; D-8 (*k*) (3-12-1931) ; D-8 (*m*) (15-3-1932) and D-8 (*p*) (29-10-1932) to show that Venkatachala was acquainting himself with the affairs of the old Rm. P. firm and was requiring moneys to be remitted to the plaintiffs from the realisations of the dissolved firm. It is contended that the plaintiffs have acquiesced in and accepted the subsequent conduct of the business of the dissolved firm by the surviving partners and they have now no right to insist upon the defendants rendering an account from 23rd May, 1927. A balance sheet showing the position of the dissolved Rm. P. firm's affairs as on 12th April, 1941, is filed in the case (pages 405 to 407 of the documents) and it is contended that the plaintiffs are entitled to have an account only of the existing assets, debts and liabilities as disclosed by this balance sheet in view of their previous attitude and conduct.

We are, however, unable to accept these contentions of Mr. Bhashyam. There is clear and overwhelming evidence in the case in the shape of the accounts of the dissolved firm and the correspondence between the surviving partners and the agent of the firm to prove that the business was not only continued by the surviving partners after the death of Valliappa Chettiar, but conducted on a more extensive scale than before. An examination of the four *ainthugais* filed by the defendants for the four periods (1) from 14-11-1924 to 23-5-1927 (pages 401 to 403 of the printed records) ; (2) from 14-11-1924 to 16-9-1930 [Ex. D-2 (*a*)] (pages 121 to 124) ; (3) from 26-10-1931 to 28-10-1933 [Ex. D-2 (*c*)] (pages 348 and 349) and (4) from 13-4-1938 to 12-4-1941 (pages 405 to 407) reveals the following facts which are set out in a tabular form :

Items	1924-27	1924-30	1931-33	1938-41
Loans to constituents.	7,06,599 7 5	9,00,799 12 9 9,37,737 15 6 (correct figure on 30—6—1928)	3,17,200 3 6	65,718 2 0
Land purchases	80,011 7 6	1,02,252 3 0	4,36,738 2 0	4,73,242 11 9
House and garden purchases.	8,022 5 6	41,284 12 0	79,448 4 0	86,056 0 0
Credit to Rangoon Rm. P.	3,54,557 0 3	6,14,854 1 0	5,76,679 0 9	7,68,458 6 0
Credit to Rm. P. shop, Theinzig.	nil.	nil.	16,677 7 6	1,87,047 10 6

This statement shows that from May 1927 till the end of 1930 the surviving partners conducted the business on an extensive scale instead of winding it up. The correspondence, hereinafter referred to, would also show that the surviving partners considered themselves to be the sole proprietors of the dissolved firm and conducted the business on that footing, at any rate until 1930. Ramaswami Chettiar, the agent of the dissolved firm was writing from time to time to the surviving partners resident in India, about the keen demand for loans, good prospects of the money-lending business in Burma, the necessity for retaining the old constituents of the Rm. P. firm by making fresh advances, the desirability of preventing rivals in the business from annexing the constituents of the Rm. P. firm, the moneys he was drawing from the Rangoon shop of the surviving partners for carrying on the business of the dissolved firm at Theinzig, the loans he was granting to the constituents, the current prices of agricultural lands, the desirability of purchasing fresh lands as an investment, the purchases made by him for the dissolved firm, the details relating to the extent of the lands and the prices paid for their purchase and various other matters connected with the business of the firm. The surviving partners must have been in receipt of the accounts of the business carried on by Ramaswami Chetti, the agent of the dissolved firm, subsequent to 1927. The usual practice of Chetti agents carrying on business abroad on behalf of their principals in India, is to send periodical accounts of the business to their principals here, and presumably this practice was also observed in the present case. The surviving partners must have been in receipt of such accounts. They have also given instructions to the agent as regards the conduct of the business, the taking of security from debtors, the realisation of outstandings, the purchase of lands and other matters connected with the conduct of the business after 1927. Indeed the idea of winding up the dissolved Rm. P. firm dawned upon the surviving partners only towards the close of the year 1930 ; the gist of the voluminous correspondence between the agent Ramaswami and the surviving partners in India is, as above stated. The Court below has referred to some of the letters that passed between the surviving partners and their agent at Theinzig in paragraph 7 of the judgment and we agree with its conclusion that the correspondence shows :

" that fresh business was being done and amounts were being advanced subsequently, as a matter of course, without the slightest regard to the partnership itself having been dissolved on 23rd May, 1927, by the death of Valliappa Chettiar."

An examination of the accounts relating to the dissolved Rm. P. firm's *inums* would show that about 200 fresh loans had been advanced subsequent to 23rd May, 1927, to old constituents who had no arrears of outstanding loans payable to the dissolved firm or to fresh borrowers. In some cases, the fresh advances are of much larger sums than the outstanding loans. In other cases, considerable sums of money have been advanced as fresh loans carrying interest. An analysis of such fresh loans is given in the statement printed at pages 408 to 420 of the record. The Rm. P. firm has taken over the liability of the constituents of the Rangoon *Thanathu* (individual) shop of the surviving partners, by paying off the Rangoon shop and treating the constituents as its own debtors. The collections made by the dissolved firm have been remitted to the Rangoon shop of the defendants and moneys required for advancing fresh loans by the dissolved firm have been borrowed from the Rangoon shop, the latter acting as a sort of banker for the dissolved Rm. P. firm with the benefit of a large overdraft. Lands have been purchased not only by way of realisation of old outstandings but also by way of fresh investment. The expansion of the business of the dissolved firm resulted in a large increase of the firm's liabilities, notably only to the Rangoon shop of the defendants. It was only towards the end of 1930 that the surviving partners, faced with a fall in the price of landed properties and financial stringency, seriously thought of winding up the affairs of the Rm. P. firm.

The correspondence also shows that after May 1927, the surviving partners ignored the existence of the representatives of their deceased partner Valliappa and considered themselves free to expand the business of the dissolved firm and

acquire landed properties for the firm by way of investment. We have been taken through the relevant correspondence. The Rm. P. firm's business was money-lending and on its dissolution, the surviving partners had to wind up the business, realise the outstandings in cash as far as they could or in the shape of lands if cash was not forthcoming, discharge the liabilities of the firm and distribute the remaining assets among the partners or their representatives according to their shares. It is no doubt true that the nature of the business was such that it could not be wound up in the course of a day. It is equally true that in the course of winding up lands might have been purchased by way of realisation of outstandings. It may be that in a few cases fresh advances might have had to be made to enable collection of the outstandings by taking over the lands of the debtors. In the present case however the business activities of the surviving partners were not in the nature of a winding up, at any rate, till the latter part of 1930, but definitely amounted to an expansion and extension of the business done before dissolution. At one stage of the argument, Mr. Bhashyam went so far as to state that Ramaswami Chettiar was responsible for such business as was done after May 1927 and the surviving partners could not be fixed with liability on that score. There is, however, no room for any such suggestion. The written statement definitely states that the surviving partners wound up the affairs of the firm and such business as was done was only incidental to the winding up. The correspondence filed in the case clearly shows that Ramaswami was only acting under the instructions of the surviving partners in the conduct of the business of the dissolved firm and the surviving partners were themselves exercising close supervision and control over the conduct of the business.

In November 1928, Ramaswami, the agent, asked for instructions from the surviving partners as to whether the plaintiffs have any share or interest in the dissolved Rm. P. firm and what representation should be made to the income-tax authorities regarding the position of the plaintiffs in relation to the dissolved firm. In their reply, Ex. P-8 (*c*) of 6th December, 1928, the surviving partners evade giving a definite answer apparently thinking that they could ignore the plaintiffs altogether as persons interested in the dissolved firm. But in 1930, they found that their attitude in ignoring the existence of the plaintiffs as persons having a share in the dissolved firm had attracted a heavy income-tax liability to themselves and they profess to find fault with the agent for not including the plaintiffs as persons having a share in the Rm. P. firm (*vide* Ex. P-29, dated 7-8-1930). Rightly or wrongly, the surviving partners thought that they could conduct the business of the dissolved firm in their own way without reference to the plaintiffs and without realising the necessity for winding up the firm's affairs.

It is not as if there were any difficulties in the way of winding up the affairs of the Rm. P. firm in the years 1927 and 1928. On the other hand, the correspondance between the agent and the surviving partners would suggest that there was a keen competition among the money-lenders in Burma and borrowers were eagerly sought after in those years by Nattukottai Chetti money-lending firms. In Ex. P-12 dated 2nd June, 1927, the surviving partners wrote to the agent to keep his hold on the *inums* by advancing fresh loans if necessary and not to allow them to borrow elsewhere. The surviving partners would not have thought of starting their own money-lending business at Theinzig towards the end of the year 1930 if money-lending had then become so hazardous, risky and unprofitable as some of the defendants' witnesses would now say.

Mr. Bhashyam's further contention that the business was continued subsequent to 23rd May, 1927, by the surviving partners with the consent and approval of the plaintiffs or the executor Venkatachala, that there was a final and binding settlement of account in September, 1930, between the surviving partners and the plaintiffs and that the accounts should now be taken only for the subsequent period without re-opening the prior settlement of accounts, cannot be accepted. We have already stated that the plaintiffs had no part in the further conduct of the business after its dissolution in 1927. We have come to the conclusion that there

has been no settlement of accounts, much less a binding settlement of account between the plaintiffs and the surviving partners at any time after the dissolution of the firm. It has now been held by this Court that Venkatachala was not a duly appointed executor under the will of Valliappa (Ex. D-7 dated 6th December, 1926). Nor was he a duly appointed agent of the first plaintiff's mother, or of the other plaintiffs. It is true that, as a relation of theirs, he was taking an interest in their affairs especially as the first plaintiff was a minor and an incapacitated person, his mother and the second plaintiff were widows, unable to attend to business matters and the third plaintiff was also an infant. He was occasionally corresponding with the agent of the dissolved firm at Theinzig requiring him to make remittances to the plaintiffs for their household expenses and making some general enquiries. It was only in 1930 when the surviving partners wanted to transfer certain good *inums* from the dissolved firm to their own individual business which they subsequently opened in the premises of the dissolved Rm. P. firm, that they wanted to get the consent of Venkatachala to the said transfer as a "Willdar" or executor. After resorting to various subterfuges, the surviving partners asked their agent to send a copy of the balance sheet [Ex. D-2 (*a*)] to Venkatachala, a document which would not have enlightened him as to the rights or the real position of the plaintiffs in relation to the dissolved firm. There is no evidence that the plaintiffs were even informed of the alleged settlement. Venkatachala gave evidence that he did not manage the properties of Valliappa after his death and that, as the surviving partners refused to pay the moneys required for their subsistence by the plaintiffs, without some letter from him, he wrote letters asking for remittances to be made to the plaintiffs by the agent of the dissolved firm. Venkatachala was not a *de facto* guardian of the first plaintiff whose mother and natural guardian was alive. His interest and intervention in the affairs of the plaintiffs, such as they were, were attributable to his relationship with the family and the helpless situation in which the family was left after the death of Valliappa. We hold that the Court below was right in arriving at the conclusion that Venkatachala did not in fact and could not, in law, enter into a binding settlement of account with the surviving partners in the year 1930 and that the plaintiffs are therefore not bound by the alleged settlement of accounts. In fact, the written statement of the defendants does not allege any such settlement of account in 1930 as would operate as a bar to the taking of accounts from the date of dissolution. We therefore hold that the accounts of the dissolved Rm. P. firm have to be taken from the date of its dissolution on 23rd May, 1927. The exact basis on which accounts will have to be taken will be indicated later in the course of this judgment.

Mr. Bhashyam next contended that the business of the dissolved firm was carried on without using the assets of the partnership. His contention is that a portion of the assets consisted of lands, gardens and buildings which were simply retained without being sold and it could not be said that they were used for the further conduct of the money-lending business. The realisations of the outstandings of the dissolved firm were then and there remitted to the Rangoon Rm. P. shop of the surviving partners in reduction of the liability of the said firm to the Rangoon shop. Fresh moneys required for the conduct of the dissolved firm at Theinzig were only borrowed from the Rangoon shop of the defendants and therefore no part of the assets of the dissolved firm, could be considered to have been used for the conduct of the business after the dissolution. This argument however, is not supported by the accounts. The Rangoon Rm. P. shop of the partners functioned as bankers for the Rm. P. firm at Theinzig, both before and after its dissolution as may be seen from the balance sheets of the Rm. P. firm already referred to. Moneys realised from the constituents of the Rm. P. firm were also advanced by way of fresh loans after its dissolution and no distinction was made between the moneys drawn from the Rangoon shop of the defendants and moneys realised from the constituents of the dissolved firm. The income from the lands and gardens of the dissolved firm is also credited in the accounts. All these moneys were pooled together and from this composite fund, fresh loans were advanced by

the dissolved firm and subsequently realised either in cash or in the shape of landed properties. From the same composite source, fresh lands of considerable extent and value have been acquired by the firm after its dissolution. In these circumstances it is impossible to hold that no part of the assets of the dissolved firm was utilised for the continuance of the business after dissolution. It follows from the above discussion of the evidence that we are in agreement with the conclusion of the Court below on issues 8 to 10 and 12 and 12 (*a*).

The appellants next contend that even if these findings are correct, the Court below has misapplied the law relating to the accountability of a surviving partner to the representatives of a deceased partner. The dissolution of the Rm. P. firm having taken place in 1927, the provisions of the Indian Partnership Act which came into force in 1932 are, it is contended, inapplicable to a determination of the rights of the parties in the present case and resort must be had only to the relative provisions of the Indian Contract Act and the Trusts Act. We do not consider that either the English Partnership Act of 1890 or the Indian Partnership Act of 1932 which was modelled on the English Act, has effected any radical change in the law applicable to any of the matters in controversy in the present case (vide *Ramakrishna Aiyar* v. *Muthuswami Aiyar*[1], *Govindas* v. *Official Assignee, Madras*[2] and *Hugh Stevenson and Sons* v. *Aktiengesellschaft Fur Cartonnagen-Industrie*[3]). The discussion at the Bar has ranged over a wide field and many cases, English and Indian dealing with the rights and obligations of partners, before and after dissolution, have been cited to us. The obligations of a surviving partner in a dissolved firm, to the representatives of a deceased partner, are not more onerous than those of a partner to his other partners in a running partnership. A partner though an agent is, in no sense, a trustee for his co-partner (vide *Piddocke* v. *Burt*[4]). He has no higher duty than to deal fairly and honestly with him (section 9 of the Partnership Act). He is bound to indemnify his co-partners for any loss caused by his fraud (section 10) and is liable, in the absence of a contract to the contrary, to account to them for profits earned by him by use of the firm's property or by carrying on a competing business (section 16). If he clandestinely secures a personal profit to himself in a partnership transaction, he must share the profit with the other partners (section 88 of the Trusts Act). He is not in the position of an insurer or a guarantor of his other partners. He is under no positive duty to make or earn a profit or avert a loss in the conduct of the partnership business. All that the law imposes on him is an obligation of good faith and all that is required of him is that he must not act in a manner antagonistic or prejudicial to the interests of the firm. As the management of the partnership business is in the hands of all the partners, each of them being entitled to act in the absence of a provision to the contrary in the articles, no one partner can be considered to be a trustee for the others.

After dissolution, the partnership continues only for the purpose of winding up the business, realising the assets, discharging liabilities, and adjusting the rights of the partners. The authority, rights and obligations of the partners continue only for this limited purpose. On a dissolution by the death of a partner, the representative of the deceased partner is entitled to call upon the surviving partners to account for the deceased partner's share as it stood on his death and to have his claim satisfied out of the assets of the dissolved partnership after discharging all liabilities incurred before dissolution and such only of the liabilities incurred thereafter by the surviving partners, as are incidental to and necessary for the winding up of the business (sections 46 and 47 of the Partnership Act). The surviving partners have the right and duty to realise the partnership property and in this sense and for this purpose, they hold a fiduciary relationship towards the deceased partner's representatives as regards his interest in the partnership property (*Bourne*, In re: *Bourne* v. *Bourne*[5] and *Govindas* v. *Official Assignee, Madras*[2]). The

1. (1928) 56 M.L.J. 657 : I.L.R. 52 Mad. 672.
2. (1934) 67 M.L.J. 167: L.R. 61 I.A. 257 : I.L.R. 57 Mad. 931 (P.C.).
3. (1918) A.C. 239.
4. (1894) 1 Ch. 343.
5. (1906) 2 Ch. 427.

surviving partner's right to deal with and dispose of the assets of the dissolved firm or to incur fresh liabilities so as to bind the interests of the deceased partner, is limited to the purposes of realisation and winding up and for completing transactions begun but unfinished at the time of the dissolution (*Govindas* v. *Official Assignee, Madras*[1]). Mr. T. M. Krishnaswami Aiyar has referred us to the dictum of Lord Dunedin in *Hugh Stevenson and Sons* v. *Aktiengesellschaft Fur Cartonnagen-Industrie*[2], where His Lordship describes the position of the surviving partners as " trustees for the partners until the winding up is effected." The other learned Lords merely refer to the surviving partner as standing in a fiduciary relationship to the representatives of a deceased partner. Sir Frederick Pollock observes that the reference to the surviving partner as a " trustee " is a metaphorical and inaccurate expression (*see* the Law of Partnership, page 119). The surviving partners are not trustees for a deceased partner's representatives not liable to them otherwise than as debtors (see *Knox* v. *Gye*[3] and *Gopal Chetti* v. *Vijayaraghavachariar*[4]) though their obligation is one in the nature of a trust, to adopt the language of the heading to Chapter IX of the Indian Trusts Act of 1882.

Cases relating to trustees or executors charged with the duty of selling and realising stocks and shares and securities and distributing the proceeds among the beneficiaries or legatees, were relied on by Mr. T. M. Krishnaswami Aiyar for the position that the surviving partners also came under a similar obligation to the representatives of a deceased partner; but we are of the opinion that the analogy is apt to mislead. The surviving partners have themselves an interest in the assets of a dissolved firm and all that the law requires is that there should be no conflict between their interest and their duty to the legal representatives of the deceased partner and that they should not gain an unfair advantage over the latter. This is the principle underlying section 88 of the Trusts Act and illustration (*f*) to that section. We have not therefore thought it necessary to examine in detail cases like *Sculthorpe* v. *Tipper*[5] and *Grayburn* v. *Clarkson*[6], relating to the liability of executors and trustees charged with the duty of sale and conversion of the properties of a deceased testator, nor is it necessary to consider the difficult questions that might rise if a continuing partner is personally responsible as executor or trustee to the persons beneficially entitled to the share of a late partner. In such cases the liability which the surviving partner might incur as a trustee or executor would be more onerous than his liability as a mere partner. In this connection it must be remembered that the representatives of a deceased partner have the remedy in their own hands and after dissolution, the Court will readily interfere at their instance by an injunction or by an appointment of a receiver, to preserve and realise the partnership assets and to prevent any act of a partner which would interfere with the rights of other partners or their representatives or impede a speedy and profitable winding up. The contention of the respondents, apparently accepted by the Court below, that a surviving partner is in the position of a trustee for the representatives of a deceased partner and is bound, at his peril, to realise all the outstandings of the dissolved firm and convert all the immoveable properties of the firm into cash immediately on a dissolution and on default, to account to the representatives of the deceased partner for the full value of such assets and outstandings as they stood on the date of dissolution with interest on such value from the date of dissolution down to the date of final decree, is, we think, unsustainable. The mere inaction of the surviving partner has not been visited with such serious consequences in any of the reported cases to which our attention has been drawn.

In an ordinary winding up all that the representatives of a deceased partner can claim is, to have an account taken in the manner provided by sections 46 and 48 of the Partnership Act.

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1. (1934) 67 M.L.J. 167 : L.R. 61 I.A. 257 : I.L.R. 57 Mad. 931 (P.C.).
2. (1918) A.C. 239 at page 248.
3. (1871) L.R. 5 H.L. 656.
4. (1922) 43 M.L.J. 305 : L.R. 49 I.A. 181 : I.L.R. 45 Mad. 378 (P.C.).
5. (1871) L.R. 13 Eq. Cases 232.
6. (1868) 3 Ch. App. 605.

Various and difficult questions arise where the surviving partners, instead of winding up the firm, carry on the business with the assets and property of the dissolved firm, without any final settlement of accounts as between them and the representatives of a deceased partner. Section 37 of the Indian Partnership Act which is modelled on section 42 of the English Act, has made provision for these cases, giving a right to the deceased partner's representative, in the absence of a contract to the contrary in the partnership articles, to claim at his option,

"such share of the profits made since he ceased to be a partner as may be attributable to the use of his share of the property of the firm or interest at 6 per cent. per annum on the amount of his share in the property of the firm."

The contention of Mr. Bhashyam for the appellants is that neither the section nor the option conferred by it is applicable to the case of a dissolution before the Act came into force and that the only right of the deceased partner is to claim a share of the profits as provided in illustration (*f*) to section 88 of the Trusts Act. This contention is evidently pressed on account of the recent developments in Burma by reason of which the larger extent of landed property acquired for the Rm.P. firm after its dissolution, by the surviving partners has lost its value to a considerable extent. That apart, we think that the contention itself is untenable. A series of authorities, both English and Indian, had previously laid down the same rule as was subsequently enacted in section 42 of the English Partnership Act corresponding to section 37 of the Indian Act and under those decisions, the representatives of a deceased partner had the option to claim profits or interest (see *Vyse* v. *Foster*[1], *Ahmed Musaji Saleji* v. *Hashim Ibrahim Saleji*[2] *Veerappa Chetti* v. *Muthiah Chetti*[3], and *Ramakrishna Aiyar* v. *Muthuswami Iyer*[4].) The object of the rule is to compensate the estate of the late partner for the use of his capital by the surviving partners and the compensation might at the option of the representative of the partner, be in the shape of profits or interest. As to claiming an account of profits after dissolution, Sir Frederick Pollock in his Law of Partnership, 14th edition, at page 118 observes,

"It is a question, however, whether success in asserting claims of this kind is not in practice little more profitable than failure; for an account of profits after dissolution has seldom or never been known to produce any real benefit to the parties who obtained it."

The reason for this result is that the profits must be "attributable to the use of the deceased partner's share" of the partnership assets. Where profits have been made subsequent to dissolution, the Court has to consider how much they are due to the skill, supervision and business ability of the continuing partners and how much they are due to the use of the late partner's share of the assets and arrive at the resultant profits attributable solely to the use of such assets. It may be that a very small proportion of the profits has actually been due to the employment of the late partner's capital. It is, perhaps, to avoid these speculative and uncertain enquiries that the Courts evolved an alternative method of giving compensation in the shape of interest at a fixed rate, even before the statutes enacting the law of Partnership were passed in England and in India.

Assuming therefore that the principles recognised and emboided in section 37 of the Partnership Act, is applicable to cases of a dissolution before 1932, the further question that arises in the case is, on what basis is interest to be calculated and awarded, if the representative of a deceased partner chooses to claim interest. Mr. Bhashyam contends that the rule recognised in section 37 would not apply unless the entire share of the deceased partner in the firm's assets (consisting in this case of lands, gardens, buildings and outstandings) had been used by the surviving partners in continuing the business and if only the cash assets or a portion thereof had been so used, the rule will not apply. This contention is opposed to the reason behind the rule and is manifestly untenable. If in the case of a money-lending business the assets on the date of dissolution consist of lands purchased by the firm

1. (1874) L.R. 7 H.L. 318.
2. (1915) 29 M.L.J. 70: L.R. 42 I.A. 91: I.L.R. 42 Cal. 914 (P.C.).
3. (1929) 56 M.L.J. 776: I.L.R. 52 Mad. 509.
4. (1928) 56 M.L.J. 57: I.L.R. 52 Mad. 672.

by way of realisation and also of cash on hand and realisable outstandings, the fact that the cash assets alone are utilised in the conduct of the business after dissolution, does not render the rule inapplicable or disentitle the representatives of a deceased partner to interest on the portion of the assets so utilised in the business. Mr. T. M. Krishnaswami Aiyar on the other hand contends that if any portion of the share of a deceased partner in the firm's assets is utilised by the surviving partners for the continuance of the business after dissolution, then, the representative of the deceased partner is entitled to 6 per cent. interest not merely on the portion of the assets actually utilised but on the full value of the entire share of the deceased partner in the assets of the firm as on the date of dissolution. To give a concrete example, let us suppose a case where a firm's assets on the date of dissolution consist of lands of the value of Rs. 20 lakhs and cash and realisable outstandings to the extent of Rs. 5 lakhs, the share of the deceased partner therein being a one-fifth. If the surviving partner having a four-fifths share, continues the business utilising only a lakh of rupees out of the cash assets of the dissolved firm, he would, according to the respondents' contention, be liable to pay interest at 6 per cent. on Rs. 5 lakhs to the representatives of the deceased partner from the date of dissolution to the date of final decree. This is manifestly an unjust result, but it is argued that this is the law as laid down by Judicial decisions and recognised in section 37 of the Partnership Act.

It must be observed at the outset that section 37 of the Indian Act like section 42 of the English Act applies only where the surviving partners carry on the business with the property of the firm after dissolution, without a final settlement of accounts. If this condition is satisfied, the outgoing partner or his estate is entitled to share the profits that might be attributable to the use of the share of the outgoing partner in the firm's assets or to interest at 6 per cent. on the amount of such share. If there is a claim for profits, there must be an enquiry as to what part of the firm's assets has been so used, what use has been made of it and what is the profit attributable to such use after making the necessary allowances for the labour, skill, supervision and employment of the capital of the surviving partners (see *Manley* v. *Sartori*[1], and *Willet* v. *Blanford*[2]). Mr. T.M. Krishnaswami Aiyar contends that whatever might be the rule with reference to a claim for profits, if the representative of a deceased partner claims interest instead of profits, he is entitled to interest at six per cent. on the full value of his entire share of the partnership assets as they stood on the date of dissolution, irrespective of the actual amount or extent of those assets used by the surviving partner in continuing the business. He contends that all the partners are joint owners of all the property originally brought into the partnership stock or acquired thereafter with partnership funds. Even after dissolution, in the absence of a final settlement of accounts, and adjustments and separate allotment of the shares of the partners, each partner continues to be a joint owner with the others, of every part of the partnership assets. The representative of the deceased partner is in the same position as the deceased partner himself. Since it is not possible to predicate of any part of the partnership assets that it is the exclusive property of any partner until there has been a winding up and distribution of assets among the partners, if any part of the assets of the firm dissolved by the death of a partner is used for carrying on the business by the surviving partners, the representative of the deceased partner, it is contended, acquires a right to claim interest at 6 per cent. on the full value of the entire share of the deceased partner in the assets of the firm, as they stood on the date of the dissolution and not merely on that portion of the firm's assets found to have been actually used in the conduct of the business after dissolution. Reliance is placed by the learned advocate on *Ramakrishna Aiyar* v. *Muthuswami Iyer*[3], and particularly on the following observations of Phillips J :—

> "It is not necessary that the whole of the partnership assets should be used in making the subsequent profits, for, if any portion of the assets are so used, the retiring partner, who has a share in every

1. (1927) 1 Ch. 157 at pages 166 and 167.
2. (1842) 1 Hare 253 at 272.
3. (1928) 56 M.L.J. 657 : I.L.R. 52 Mad. 672.

portion of the partnership assets, is entitled to a similar share in the profits ; this is laid down by Romer, J., in a very recent case in *Manley* v. *Sarotri*,[1]. It is often difficult to ascertain the exact share in the profits which should be awarded, as Lord Lindley points out (in Lindley on Partnership, at page 710), and it may, therefore, be more proper in such cases to award interest on the share of the assets at the date of the dissolution."

We do not think that these observations of the learned Judge support the proposition advanced by Mr. T. M. Krishnaswami Aiyar. The actual decision in that case was that when a partner retires from the firm and the business is thereafter carried on by the surviving partner with its capital or assets, without any final settlement of accounts as between them and the outgoing partner, then, he, in the absence of an agreement to the contrary, is entitled, at his option, either to claim a share of the profits made with the use of his share of the partnership assets since the dissolution of the firm by his retirement or to interest and that the retiring partner is not bound to make his election as to whether he would claim a share of the profits or interest until the share of the profits that would fall to him has been ascertained. In other words, it was held that the retiring partner was entitled to postpone his election until the accounts of the business subsequent to his retirement have been taken. We understand the observations of the learned Judge above quoted as meaning that it is not open to the surviving partners to resist a claim for profits or interest by the retired partner on the ground that the portion of the assets of the dissolved firm used by the surviving partners in the subsequent conduct of the business was well within the limits of their own share of such assets and therefore the retiring partner's share could not be considered to have been used at all by them for the subsequent business. Whether the claim is for profits or for interest, the object of section 37 of the Partnership Act is to award compensation for the exclusive use of money or other assets belonging to a firm, by one or some of the partners and the measure of compensation is either the profit earned by the use of such assets or interest at 6 per cent. on the amount of the assets so used, whichever is more advantageous to the partner who did not continue to carry on the business after dissolution. The amount due to the retiring partner or the estate of a deceased partner out of the firm's assets not paid over to him or his estate, but utilised by the surviving partners for continuing the business, is treated as a loan by the former to the latter, and interest is awarded thereon, though, in fact, there was no contract for a loan and payment of interest.

It has been assumed by text writers and in decisions of authority, that the right to profits and the right to interest are governed by the same principles and that interest is payable only on the amount of the share of a retiring or a deceased partner, actually used or employed by the surviving partner in continuing the business after dissolution (see Pollock on the Law of Partnership, 14th edition, page 118 and Lindley on Partnership 10th edition, pages 695 and 696.) At page 739 of Lindley on Partnership (10th edition), it is observed as follows :

"Where an executor improperly employs the assets of the testator in a business carried on by himself he is chargeable at the option of the persons beneficially interested in the estate of the deceased, either with the sum employed and interest thereon at 5 per cent. or with the sum employed and the profits made by its employment."

The rule embodied in section 37 of the Partnership Act is only a branch of a well recognised equitable doctrine that if a trustee mixes the trust fund with his own moneys and employs both in a trade of his own, the *cestui que trust* may either claim a proportionate share of the profits or interest on the amount of the trust funds so employed (see *Docker* v. *Somes*[2], and *Vyse* v. *Foster*.[3] Lord Sumner in delivering the judgment of the Judicial Committe in *Ahmed Musaji Saleji* v. *Hashim Ebrahim Saleji*[4], states the rule thus,

"It is well settled that in certain cases when, on the dissolution of a firm, one of the partners retains assets of the firm in his hands without any settlement of accounts and applies them in continuing the business for his own benefit, he may be ordered to account for these assets with interest thereon and this, apart from fraud or misconduct in the nature of fraud.'

1. (1927) 1 Ch. 157.
2. (1834) 2 Myl. and K. 655 : 39 E.R. 1095.
3. (1874) L.R. 7 H.L. 318.
4. (1915) 29 M.L.J. 70 : L.R. 42 I.A. 91 I.L.R. 42 Cal. 914 (P.C.).

In the case cited above interest at 6 per cent. was awarded on the amount taken by the surviving partner from the assets of the dissolved firm and utilised for the conduct of the business. A similar decree was made in *Veerappa Chetti* v. *Muthiah Chetti*[1], and *Bhagwandas* v. *Rivett-Carnac*[2].

The further contention of the appellants is that the plaintiffs have elected in 1930 and again in their present plaint, to claim only a share of the profits made by the dissolved firm and attributable to their share of the partnership assets and it is not open to them at the conclusion of the trial, to claim interest. We have held that there was no settlement of accounts and that the plaintiffs are not proved to have been parties to any such settlement either directly or through any person having authority to represent them at such a settlement. We have gone through the plaint and do not find any irrevocable election by the plaintiffs in favour of profits, so as to preclude them from claiming interest at the trial. Paragraph 10 of the plaint runs thus :

> "The plaintiffs claim that they are entitled to all the profits if any made by the defendants due to the using of the firm monies and other facilities of the old firm in addition to all the amounts found due to the deceased Valliappa Chettiar as on 23rd May, 1927, with subsequent interest at a fair rate."

Paragraph 22 (*g*) of the plaint prays for a decree directing

> "The defendants to pay the plaintiffs their share of the profits and assets of the firm and the amounts used by the defendants with interest at a fair rate."

The plaintffs were all along living in Karaikudi, Ramnad district, while the business was being done in Burma. All that is proved by the correspondence and the accounts is, that after the death of Valliappa Chettiar sundry sums were remitted to the plaintiffs for their family expenses by the agent of the dissolved Rm.P. firm at Theinzig pursuant to letters written by Venkatachala. The plaintiffs had no idea of the state of accounts after the death of Valliappa and no accounts were sent to them. The first plaintiff was a minor till 1936 and has always been a mentally defective person. His mother and the second plaintiff were womenfolk who had no knowledge of the firm's affairs. The third plaintiff was impleaded only during the trial as the legal representative of his adoptive mother, the second plaintiff, who died pending the suit. It is not therefore possible to say that in these circumstances the plaintiffs have definitely elected to claim profits and forego interest with full knowledge of their rights. No person can be required to elect without a clear knowledge of the funds or properties or rights between which he has to elect and election can be postponed till the accounts of the properties or funds concerned have been taken. The election made before the party has had an opportunity of ascertaining his rights and their value will not be binding or irrevocable. This very question was considered in the decision reported in *Ramakrishna Iyer* v. *Muthuswami Iyer*[3], and this Court held that a retiring partner is not bound to make his election as to wether he would claim a share of the profits made with the use of his share of the partnership assets since the date of the dissolution of the firm or interest, until the share of the profits that would fall to him has been ascertained ; in other words, his final election could be postponed, until the accounts of the business subsequent to his retirement have been taken. The plaintiffs in the present case now find that it would be more advantageous to them to take interest instead of profits and we hold that they are entitled to do so.

As regards the rate of interest, the Court below has awarded 6 per cent. or the *nadappu* rate whichever is less. Mr. Bhashyam contends that it is not obligatory on the Court to award 6 per cent. interest in a case not directly governed by section 37 of the Partnership Act. This is no doubt true, but having regard to the fact that interest at 9 per cent. was awarded in similar circumstances in *Veerappa Chetti* v. *Muthiah Chetti*[1], at 6 per cent. in *Ahmed Musaji Saleji* v. *Hashim Ebrahim Saleji*[4], and at $7\frac{1}{2}$ per cent. in *Haji Summer Sait* v. *Mahomed Hussain Sait*[5], we

1. (1929) I.L.R. 56 M.L.J. 776: 52 Mad. 509.
2. (1898) I.L.R. 23 Bom. 544 (550): L.R. 26 I.A. 32 (P.C.).
3. (1928) 56 M.L.J. 657 : I.L.R. 52 Mad. 672.
4. (1915) 29 M.L.J. 70 : L.R. 42 I.A. 91 : I.L.R. 42 Cal. 914 (P.C.).
5. (1916) 4 L.W. 521.

consider tht the rate of interest awarded by the Court below is just and proper and its discretion has been rightly exercised in the matter of awarding interest.

The law is clear that the claim of the representative of a deceased partner must be for profits alone or interest alone. A mixed claim is inadmissible and and there cannot be a claim for profits for part of the time over which the dealings extended and interest as to the other part (see *Vyse* v. *Foster*[1]). In view of the fact that the plaintiffs have now definitely elected to claim interest and abandon their right to an account of the profits, if any, made after dissolution by the surviving partners with the assets of Rm.P. firm, we do not consider it necessary to discuss the propriety or otherwise of the several dealings of the surviving partners in the course of their conduct of the business after the dissolution of the firm. They would be relevant only if an account of the profits made subsequent to dissolution has to be taken. Whether the surviving partners were justified in transferring the assets of the dissolved firm to their own private money-lending business started in Theinzig in 1930, whether they were justified in lending large amounts from their own Rangoon shop to the dissolved firm to enable it to continue and expand its business and whether they were justified in purchasing lands of considerable value and extent after the date of dissolution, are all matters, which, though considered at some length in the judgment of the Court below, are not now material in view of the plaintiffs' claim being only for interest.

The partnership stood dissolved on 23rd May, 1927, and according to our finding there has been no subsequent settlement of accounts between the plaintiffs and the surviving partners. The partnership accounts from 1926 down to the institution of the suit have been filed in Court and the genuineness of these accounts is not impeached. An account will have to be taken of the property and effects as well as of the debts and liabilities of the Rm.P. firm as they stood on 23rd May, 1927. The account must be kept open so as to let in all transactions whether by way of realisation of assets and outstandings or by way of payment of debts and discharge of liabilities occurring in the course of the actual winding up, the surviving partners retaining their authority to complete the transactions begun but unfinished on the date of dissolution and to realise the assets and winding up the affairs of the firm and no further. The accounts will have to be settled by Court in the manner laid down by section 48 of the Partnership Act and the surplus assets, if any, will have to be divided between the partners according to their respective shares. We have already held that the plaintffs are entitled to interest on so much and so much only of their share of the assets of the dissolved Rm.P. firm as has been used by the surviving partners for continuing the business after dissolution. Interest at the rate of 6 per cent. or at *nadappu* rate, whichever is lower, has been awarded by the lower Court and there is no appeal against the rate of interest fixed by the lower Court.

Mr. Bhasyam for the appellants has taken objection to the lower Court's direction for accounting on the footing of wilful default, which means that the surviving partners are liable to account for all assets and outstandings which they have neglected to collect or realise irrespective of whether they have actually collected or realised them. There is no room for holding that the defendants have been guilty of any fraud. The use by the surviving partners of the assets of a firm dissolved by the death of a partner, for the purpose of continuing the business in which they themselves own a substantial share, is not a faudulent breach of trust. The plaintffs in this case are only entitled to have the usual accounts and enquiries and not an accounting on the footing of wilful default. The plaintiffs cannot call upon the defendants to account for outstandings not actually realised, or collected by alleging that with a higher degree of diligence and care than has been exhibited by the defendants the outstandings could have been realised. In particular, the plaintffs cannot hold the defendants liable to account to them for the

1. (1874) L.R. 7 H.L. 318 (336).

cash value of the lands, gardens and buildings on the basis of the prices they would have fetched if they had been sold in 1927, on the ground that they acted improperly in neglecting to sell them soon after dissolution. The existing assets will have to be valued as they are and divided. If, however, the surviving partners had taken over the lands of the Rm. P. firm as they stood at the date of dissolution or any part of such lands at a valuation and the plaintiffs are now willing to accept the valuation at which the suriving partners took over those lands, there is no need to re-open the transaction.

Mr. Bhashyam next contended that Narayanan Chetti the elder brother of the first defendant who was managing the Rm. P. firm and Ramaswami Chetti the agent who was managing the firm's affairs on the spot are both dead and the onus is on the plaintiffs to prove specifically that they are entitled to a definite sum or sums of money from the defendants.

He referred to the decisions in *Venkatacharyulu* v. *Mohana Panda*[1] and *Apparao* v. *Subbarao*[2] and *Purushotham* v. *Ramakrishna*[3] as establishing that the legal representatives of an agent or a partner are not directly liable to render accounts or vouch them and the onus is on the plaintiffs to allege and prove their right to any specific sums that might be claimed by them. But this argument ignores the fact that the 1st defendant was an original partner when the Rm. P. firm started business in 1925 and he is one of the defendants in this suit. He is or ought to be in a position to prove what realisations or disbursements have been actually made and to render an account. Further, the plaintiffs themselves are the legal representatives of Valliappa who died on 23rd May, 1927 and are not in a position to know the exact nature of the dealings subsequent to the dissolution of the firm. The only difference in substance between the position of an agent and that of the legal representative in the matter of accountability is that the initial burden of proof in the latter case rests on the party claiming an account. It is equally the duty of the legal representative of an agent or partner, to produce all accounts and vouchers in his possession and also to pay out of the assets, the moneys due from the estate of the deceased agent or partner. In taking the accounts the Commissioner as well as the Court, will have regard to the circumstances mentioned above in arriving at a conclusion on the merits of the objections raised with reference to particular items in the account. We have dealt with the various contentions raised by the learned counsel on both sides in this appeal and the result is that subject to the modifications we have indicated above, the decree of the lower Court will be affirmed. As the appellants have substantially failed in this Court, they must pay the costs of the respondents in this appeal.

K.S. *Decree affirmed subject to slight modifications*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

Varrey Tulasamma .. *Appellant**

v.

Nandula Buchiramaiah .. *Respondent.*

Prescriptive right—Owners of adjacent plots—Mandatory injunction against one by the other to remove eaves—Prescriptive right to project eaves—Permanent injunction restraining one party from letting rain water on the land of the other—Proof of user.

In a suit by the plaintiff for a mandatory injunction against the defendant to direct the defendant to remove at her expense the eaves of her roof projecting into the land of the plaintiff and for a permanent injunction restraining her from allowing the rain water falling into plaintiff's land, the defendant raised the defence of prescriptive right to project the eaves.

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1. (1920) 39 M.L.J. 586: I.L.R. 44 Mad. 214.
2. (1926) 51 M.L.J. 804: I.L.R. 50 Mad. 249.
3. A.I.R. 1945 Bom. 21.

*S.A. No. 678 of 1946. 20th January, 1949.

Held, that the defendant had a right to project her eaves by possession for a period more than twelve years prior to the institution of the present suit against her and hence the mandatory injunction could not be granted against her.

Rathinavelu Mudaliar v. *Kolandavelu Pillai*, (1906) 16 M.L.J. 281 : I.L.R. 29 M. 511 followed.

Held further, that in the circumstances of the case, as the defendant had been letting rain water into plaintiff's property for over 16 years till the date of the suit and that as nearly four more years had elapsed since the the institution of the suit the case was not a fit one for the interference by the High Court and restraining of the defendant by a permanent injunction on the mere ground that she was not able to prove user for a period of twenty years.

Appeal against the decree of the Court of the Subordinate Judge, Narasapur, in A. S. No. 20 of 1945, preferred against the decree of the Court of the District Munsiff, Narasapur in O. S. No. 120 of 1944.

K. Venkatarama Raju for Appellant.

V. Parthasarathy for Respondent.

The Court delivered the following

JUDGMENT :—The defendant is the appellant. The plaintiff and the defendant are adjacent owners of house property. The plaintiff is the owner of a one-third portion of a site on the west shown in the plaint plan and the defendant is the owner of the site and the house on the east which occupies two-third portion of the site marked in the plaint plan. The plaintiff purchased the site in 1938 and the defendant purchased it in 1936. In the year 1928 when the plot was under a common owner, a house was constructed in plot B of the plaint plan with the eaves projecting into site *A* to an extent of 2 feet 6 inches along the length of the wall for about 10 yards 2 feet ; and from the eaves rain water was dropping into the site *A*. This state of affairs continued until disputes arose and the present suit was instituted by the plaintiff against the defendant for a mandatory injunction directing the defendant to remove at her expense the eaves on the western side of the house in plot *B* belonging to her and also for a permanent injunction restraining the defendant from allowing the rain water on the western side of the defendant's house from falling into the plaintiff's site.

The defendant claimed in the suit that she had acquired title to the eaves by prescription and that the plaintiff is not entitled to the injunction prayed for.

On the principle of the decision of this Court in *Rathinavelu Mudaliar* v. *Kolandavelu Pillai*[1], the trial Court held that the defendant had acquired title to the projection of the eaves by prescription as it was in existence for more than 12 years and that her right was not founded on an easement. Regarding the right to drop eaves water, the learned District Munsiff held that as the defendant was exercising the right of letting the water into the site *B* without let or hindrance by the plaintiff and his predecessors-in-title for a period of 16 years, it was not a case in which the Court should exercise its equitable jurisdiction by granting a permanent injunction restraining the defendant from letting the water into the site of the plaintiff. The result was that the plaintiff's suit was dismissed by the learned District Munsiff.

On appeal by the plaintiff, the learned Subordinate Judge reversed the decision of the District Munsiff and granted a mandatory injunction directing the removal of the eaves but refused to grant a permanent injunction asked for by the plaintiff. The decision of the learned Judge was based upon a distinction drawn by the Bombay High Court in *Dahyabhai* v. *Hiralal*[2], between the view of this Court and the view obtaining in that Court that in such cases the right could be acquired only by prescriptive easement and not ownership by adverse possession. The decision in *Rathinavelu Mudaliar* v. *Kolandavelu Pillai*[1] is a decision of a Bench of this Court and it was the plain duty of the Subordinate Judge to have followed the decision of this Court in preference to the decisions of other Courts. There is absolutely no justification for the learned Judge to have disobeyed the rule laid

1. (1906) 16 M.L.J. 281 : I.L.R. 29 Mad. 511. 2. A.I.R. 1936 Bom. 3.

down for the guidance of the Subordinate Courts that they are bound by decisions of this Court. Applying the principle of the decision in *Rathinavelu Mudaliar* v. *Kolandavelu Pillai*[1] which has been followed in this Court ever since, the only conclusion that is possible in the present case is that the defendant had acquired a right to project the eaves by possession for a period of more than 12 years and that the plaintiff is not entitled to the mandatory injunction.

As regards the permanent injunction asked for, the trial Court refused to grant it to the plaintiff even though the defendant was not able to prove user for a period of 20 years and this view of the District Munsiff was upheld even by the learned Subordinate Judge. I see no reason to interfere with the discretion exercised by the Courts below in refusing to grant the permanent injunction. The right was exercised by the defendant for over 16 years till the date of suit and nearly four years have elapsed since the institution of the suit. I do not think that in the circumstances this is a fit case in which the defendant should be restrained by the grant of a permanent injunction.

The second appeal is therefore allowed, the decision of the learned Subordinate Judge is reversed and the decree of the District Munsiff dismissing the suit is restored with costs here and in the Court below. The memorandum of cross objections is dismissed. No costs. No leave.

K.C. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL AND MR. JUSTICE GOVINDA MENON.

Vootla Viriah and others .. *Appellants**

v.

Tadepalli Subba Rao (died) and others .. *Respondents.*

Civil Procedure Code (V of 1908), *Order* 21, *rule* 58—*Person who failed in application under—Not barred from applying under Order* 21, *rule* 89, *to have the sale set aside.*

A person who has failed in an application under Order 21, rule 58 of the Civil Procedure Code can still file an application to have the sale set aside by depositing the decree amount plus the necessary poundage, etc., under Order 21, rule 89. The decision in the earlier application will not operate as *res judicata* to bar the application under Order 21, rule 89.

Dhanammal v. *Veeraraghava Reddi,* (1922) 44 M.L.J. 325, relied on.

Narasimhachari v. *Raghava Padayachi,* (1945) 2 M.L.J. 89 (F.B.), distinguished.

Appeal against the order of the Court of the Subordinate Judge, Bapatla, dated 9th October, 1946 in C. M. P. No. 460 of 1944 in O. S. No. 77 of 1910, District Court, Kistna.

V. Subramanyam for Appellant.

N. Subramanyam. A. Raghaviah and *G. Venkatarama Sastri* for Respondents.

The Judgment of the Court was delivered by

Govinda Menon, J.—This appeal arises out of the dismissal of an application under Order 21, rule 89, Civil Procedure Code filed by the appellants herein, before the lower Court for setting aside a sale in which the contesting respondents 7 and 8 were the purchasers of certain items of property sold in execution of the decree in O. S. No. 77 of 1910 on the file of the District Court of Kistna. The learned Subordinate Judge of Baptala held that the appellants as petitioners in the Court below did not have any interest in the property sold so as to entitle them to apply under the provisions of Order 21, rule 89, and dismissed the application.

A few facts have to be stated in order that the position may be understood clearly. The properties which are the subject matter of the sale belonged to one Nawab Hassanali Khan Bahadur and were sold by him under Ex. P-1 dated 5th

1. (1906) 16 M.L.J. 281 : I.L.R. 29 Mad. 511.

*A.A.O. No. 587 of 1946. 15th December, 1948.

February, 1920 to the first appellant and the father of the second appellant herein for a sum of Rs. 45,000; but prior to that, there was a suit against this Nawab Hassanali Khan Bahadur and others (O. S. No. 77 of 1910) in which the plaintiff obtained a decree for a sum of money against him. In execution of that decree, the decree-holder attached these properties whereupon the first appellant and the father of the second appellant filed an application under Order 21, rule 58, stating that the property should not be attached because the judgment-debtors had no saleable interest in the property. The executing Court allowed the claim, whereupon the decree-holder filed O. S. No. 8 of 1924 on the file of the lower Court for a declaration that the suit properties were liable to be attached in execution of his decree. The trial Court dismissed that suit, but the same was taken on appeal to this Court (A. S. No. 131 of 1926) and was disposed of by a Bench of this Court on 4th April, 1929 (Ex. D-5) by which the decree of the lower Court dismissing the suit was set aside, and it was held that the decree-holder plaintiff was entitled to a declaration that the sale deed Ex. P-1 dated 5th February, 1920 was not binding against him. Thereafter the decree-holder continued the execution proceedings in which the properties were sold and respondents 8 and 9 in the lower Court, who are the contesting respondents here, purchased them. After that, the present appellants consisting of one of the original purchasers under Ex. P-1 and a son of the second purchaser, as well as the alienees from them of different portions of the property deposited the amount and applied to the lower Court for setting aside the sale under Order 21, rule 89, Civil Procedure Code.

Various contentions were raised before the learned Subordinate Judge of which the contention whether the different petitioners acquired any right by the sale deed, Ex. P-1 in the various items was decided in favour of the petitioner. But the lower Court on an interpretation of the decision of this Court mentioned above as well as certain orders made in execution proceedings in certain other suits came to the conclusion that the petitioners appellants had no saleable interest in the property in order to enable them to file a petition for setting aside the sale. The question therefore for decision is whether the petitioners have any saleable interest or not. The learned Judge construed Ex. D-5, as a decision which estopped the petitioners from contending that they had any right or interest in the attached property. The decision of the learned Judge on this point cannot be supported. In *Dhanammal* v. *Veeraraghava Naidu*[1] Spencer and Venkatasubba Rao, JJ., have laid down that where on an application under Order 21, rule 89 to set aside an execution sale on payment of the prescribed amount, it was found that the applicant had already unsuccessfully applied to stop the sale on payment of the decree amount and had also put in a claim petition under Order 21, rule 58 which had been dismissed, the proceedings under Order 21, rule 58 which had been dismissed, did not bar the application for setting aside the sale under Order 21, rule 89. Spencer, J., at page 327 observes as follows:

> "The effect of the dismissal of the petitioner's claim petition was not to decide finally that the petitioner had no interest to ask that the sale should be set aside on payment of the decree amount *plus* five per cent into Court but only to decide that she had no right to have the attachment raised. These are two very different things. The first (that under rule 89) may imply the existence of an interest of a judgment debtor owning the property sold or an interest derived from the same source as the owners of an interest paramount to the judgment-debtor's; the second (that under rule 58) implies the existence of a right independent from and antagonistic to the judgment-debtor's. It is impossible to conceive how the dismissal of the claim petition could operate as *res judica* to prevent the admission of an application to pay the decree amount and get the property released after the sale."

Venkatasubba Rao, J., also came to the same conclusion but expressed the further opinion that Order 21, rule 89 should be liberally construed and a restricted interpretation should not be put upon the words of that rule. This decision, so far as we are aware, has not been dissented from in this Court, and it applies directly to the facts of the present case.

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1. (1922) 44 M.L.J. 325.

Mr. N. Subrahmanyam for the auction purchaser respondent contends on the authority of *Narasimhachari* v. *Raghava Padayachi*[1], that it is not open to the petitioners to contend that they have any interest in the property in order to enable them to have the sale set aside. In our opinion, the Full Bench decision mentioned above has no application to the facts of the present case. What was held therein was that a decision under Order 21, rules 58 and 63 became conclusive in so far as the parties thereto were alone concerned. It is conclusive between the parties to the suit or their legal representatives so far as the execution of the particular decree is concerned; but where the property is sold in execution proceedings arising out of an entirely different decree the claimant will not be precluded from setting up his title against a stranger purchaser. It is difficult to see how this decision has any bearing so far as the facts herein are concerned. The decree in O. S. No. 8 of 1924 by this Court as a result of which the decree-holder obtained a declaration that Ex. P-1 was not binding so far as his decree was concerned cannot be questioned by the appellants here; but it is a different matter to say that by that decree the appellants have been held to have no interest whatever in the suit property. It may be that the interest may not be sufficient to be put forward as a shield against the decree-holder's claim, and that was the reason why the properties were attached and sold in execution of the decree. The word "interest" in Order 21, rule 89 has got a very wide import and should be construed very liberally as Venkatasubba Rao, J., observed in the case above-mentioned. Any inchoate right which a party may have over a property may be sufficient "interest" to enable him to apply under Order 21, rule 89. We see from Mulla's Code of Civil Procedure that the learned author has quoted the decision in *Dhanammal* v. *Veeraraghava Reddi*[2] with approval and states that a person who has failed in an application under Order 21, rules 58 and 63 is still enabled to file an application to have the sale set aside by depositing the decree amount plus the necessary poundage etc., under Order 21, rule 89. The other decision cited by Mr. N. Subramanyam, *Gopalakrishnayya* v. *Sanjeeva Reddi*[3] has also, in our opinion, no application to the present case.

We are therefore of opinion that the order of the learned Subordinate Judge dismissing the application is incorrect.

The appeal is therefore allowed with costs payable by respondents 7 and 8, and the petition is remanded to the lower Court for setting aside the sale, if the proper amount has been deposited within the time allowed.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SUBBA RAO AND MR. JUSTICE PANCHAPAKESA AYYAR.

M. V. P. Paramanandaswami *alias* Pichumuthu Pillai .. *Appellant**

v.

A. K. Shanmugham Pillai .. *Respondent.*

Civil Procedure Code (V of 1908), section 51—Suit by sons of judgment-debtor for setting aside dismissal of their claim petition—Consent order that property should not be sold till disposal of suit—Grant of time to judgment-debtor for payment—Failure to pay—Arrest—Propriety.

Where there was a consent order that the property should not be sold till the disposal of a suit by the sons of the judgment-debtor for setting aside the order dismissing their claim petitions and it was not shown that the judgment-debtor had other property, an order for arrest for failure to pay the decree-debt within the time granted for that purpose cannot be passed. In the circumstances, it cannot be said that the judgment-debtor was shown to have the means to pay the amount of the decree and refused or neglected to pay the same.

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1. (1945) 2 M.L.J. 89 (F.B.).
2. (1922) 44 M.L.J. 325.
3. (1919) 38 M.L.J. 228.

*A.A.O. No. 508 of 1948. 19th January, 1949.
(C.R.P. No. 513 of 1948 converted into appeal against order).

It is impossible to say that when time was taken for payment of the amount the judgment-debtor either expressly or impliedly admitted that he was liable to be arrested in case the amount was not paid. Accordingly the judgment-debtor is not estopped from raising the plea that he has not sufficient means to pay the amount of the decree in showing why he should not be arrested.

Appeal against the order of the Court of the Subordinate Judge, Tirunelveli, dated 17th March, 1948, in R. E. P. No. 138 of 1947 in O. S. No. 72 of 1946.

N. C. Raghavachar for Appellant.

S. Ramachandra Aiyar for Respondent.

The Judgment of the Court was delivered by

Subba Rao, J.—This is an appeal against the order of the lower Court directing the arrest of the appellant in execution of the decree in O. S. No. 72 of 1946, on the file of the Court of the Subordinate Judge of Tinnevelly. The respondent obtained a decree in the above suit against the appellant for a sum of about Rs. 5,800. In execution of the decree the properties of the judgment-debtor were attached. His sons filed a claim petition. It was dismissed. The sons then filed O. S. No. 22 of 1947 for setting aside the order on the claim petition and for a declaration that the properties belonged to them. In that suit on 24th July, 1947, a consent order was passed to the effect that on the plaintiffs depositing into Court a sum of Rs. 300 the suit properties should not be sold till the disposal of the suit. On 18th December, 1947, the decree-holder filed another E. P. No. 138 of 1947 for the arrest of the judgment-debtor. On 17th February, 1948, one month's time was granted to the judgment-debtor for paying the decree amount by alienating the attached properties. It appears that the judgment-debtor did not pay the amount within the time granted. Subsequently the learned Subordinate Judge passed an order dated 17th March, 1948, directing the arrest of the judgment-debtor. The main reason given by the learned Judge for the arrest was that in his view the appellant was in possession of sufficient means to satisfy the decree.

The judgment-debtor has preferred an appeal against that order.

The learned counsel for the appellant contended that the executing Court had no jurisdiction to direct his arrest as the conditions laid down under section 51, Civil Procedure Code had not been complied with. The relevant provisions of section 51 reads as follows :

"Provided that where the decree is for the payment of money execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court, for reasons recorded in writing is satisfied—

(*b*) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same."

It is conceded that apart from the properties which are the subject-matter of O. S. No. 22 of 1947 the appellant does neither own nor is in possession of other immovable properties. So far as the subject-matter of the suit is concerned, as we have already stated, there was a consent order in and by which the properties could not be sold pending the disposal of that suit. The learned counsel for the respondent argues that in spite of the consent order the appellant could alienate the properties by private treaty. Though theoretically he might do so, it is impossible to expect that any person would buy those properties. In the circumstances we hold that the judgment-debtor is not shown to have the means to pay the amount of the decree and refused or neglected to pay the same.

The learned counsel for the respondent argues that the appellant is estopped from raising the plea that he has not sufficient means to pay the amount of the decree. He relied upon a consent order passed in E.P. No. 138 of 1947. Under that order one month's time was given to the decree-holder for alienating the attached properties. The argument is that as he has taken time from the Court for the purposes of alienating the properties and discharging the decree debt he must be, deemed to have impliedly admitted that otherwise he would be liable to be arrested. In support of this argument the learned advocate relied upon an unreported

judgment in *R. Srinivasa Ayyar* v. *Nagore Darga*[1]. The facts of that case are different, and in our view they have no application to the case before us. In that case two months' time was granted to the judgment-debtor for the payment of the amount on an affidavit filed by him to the effect that he would pay the amount of the decree if two months' time was granted. He did not pay the amount. Then execution was taken to bring the properties to sale. It was held that the judgment-debtor having agreed to pay the amount and thereby accepted the executability of the decree, he was precluded from contending that the decree was not executable. The learned advocate also relied upon another judgment reported in *Bartlam* v. *Evans*[2]. In that case there was an *ex parte* decree. The judgment-debtor took time to pay the amount; within the time so taken he applied for setting aside the *ex parte* decree. The learned Judge held, applying the principle of approbation and reprobation that the judgment-debtor could not ask for setting aside the *ex parte* decree. The principle is very clearly stated at page 213 of that judgment:

"In answer to the appeal of the defendant he stayed his hand, and in my opinion it is not possible for the defendant, having obtained this advantage on the basis that he did not dispute the validity of the judgment, now to come forward and ask the Court to set it aside upon the plea that he has a defence on the merits or that there are facts entitling him to defend."

Scott, L.J., at page 217 states this principle in a different manner, but to the same effect:

"Another way of looking at the question is to treat it as an intance of the rule that a party cannot both approbate and reprobate, and to hold accordingly that a defendant cannot accept a judgment as final and binding and thereafter seek to set it aside as not binding."

But in this case the said principle has no application. It is impossible to say that when a month's time was taken for payment of the amount the judgment-debtor either expressly or impliedly admitted that he was liable to be arrested in case the amount was not paid. In the cases cited before us, when time was taken for payment of the money it was obvious that the judgment-debtor who took time admitted that he was liable to pay the amount under the decree and thereby admitted that there was an executable and valid decree. We therefore cannot accept the argument of the learned counsel for the respondent on this point either.

In the result the appeal is allowed. In the circumstances there will be no order for costs.

K.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SATYANARAYANA RAO, AND MR. JUSTICE PANCHAPAGESA SASTRI.

Dunna Venkata Rao .. *Appellant.**

v.

Sree Rajah Saheb Meharban I Dostan Sree Rajah Rao Venkatakumaramahipathi Surya Rao Bahadur Garu and another .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 21, *rule* 57 (*as amended in Madras*)—*Rejection of unnumbered execution petition on default in re-presenting with sale papers—Effect on attachment before judgment—Order of rejection not saying that attachment will cease—Effect—Alienee of property—How far bound by orders in the execution proceedings.*

By an agreement dated 5th May, 1935, *X* agreed to mortgage his house to a co-operative society which demanded additional security from him. The society obtained an award in respect of the amount due to it against *X* on 21st July, 1937. In pursuance of this award the properties of *X* were brought to sale and were purchased by *Y*. With a view to get that sale set aside *X* raised funds by mortgaging the house to *A* by a mortgage dated 20th August, 1937. The amount was paid by *A* to the society and the sale was consequently set aside on 30th August, 1937.

Meanwhile *Y* instituted a suit against *X* for the recovery of an amount which it was alleged had been misappropriated by *X* as a karnam of one of the villages belonging to *Y* (a Zamindar) and *X*'s house was attached before judgment on the 15th of October, 1936, and the suit was decreed, on the

1. S. A. No. 622 of 1937.
2. (1936) 1 K.B. 202.

*Second Appeal No. 1082 of 1946. 3rd November, 1948.

24th September, 1937. On the 26th October, 1938 *Y* filed an execution petition which was un-numbered for bringing the attached house to sale and for leave to set off. That petition was returned on the 29th October, 1938, for filing the sale papers and the encumbrance certificates, granting two weeks' time. It was re-presented by *Y* on the 12th November, 1938, with a prayer to grant a further week's time, as the encumbrance certificate which was applied for was not received by then. By an order of 15th November, 1938, the petition was rejected by the Court. *Y* filed a second execution petition in 1939 for bringing the property to sale and after receiving notice *X* objected to the sale on the ground that the attachment before judgment made in the suit had come to an end under Order 21, rule 57, Civil Procedure Code by reason of dismissal for default of the first execution petition and that a fresh attachment was necessary before a sale could be ordered. The Court held on 23rd August, 1939 that the prior petition being un-numbered had no legal existence and its dismissal had not the consequence of terminating the attachment. The order was confirmed on appeal. In pursuance of the execution petition however the sale was not effected and the proceedings terminated. Meanwhile *A* obtained preliminary and final decrees on the basis of the mortgage in his favour in 1939 and brought the hypotheca to sale and purchased it himself on 30th January, 1940 and obtained delivery of possession in 1943.

In 1942, *Y* filed a third execution application to bring the suit house to sale in execution of his decree. *A* intervened with a claim petition objecting to the sale of the property on the ground that with the rejection of the first execution petition the attachment before judgment had ceased and that *A* had acquired a good title by reason of his purchase. That application was dismissed and the property was sold and *Y* purchased it in Court auction. *A* thereupon filed a suit for setting aside the summary order rejecting his claim. The suit was allowed by the District Munsiff, but on appeal, the decision was reversed by the Subordinate Judge. On second appeal,

Held: (1) the order rejecting the first execution petition must be treated as one of dismissal. The un-numbered petition cannot be said to be one which had no legal existence and the effect of the dismissal of that petition will be that the attachment before judgment ceased. The language of Order 21, rule 57 (Madras) does not make it a condition precedent for the termination of the attachment that the Court should make an order that the attachment ceased. It merely directs the Court to state the consequences of the dismissal, that is, the termination of the attachment. It is the dismissal by reason of the decree-holder's default that brings about the termination of the attachment and the Court is merely directed to state in the order that consequence. If the Court omitted to state so, it would not prevent the attachment from coming to an end.

For the determination of the attachment in cases not covered by the proviso to rule 57, ordinarily an order of the Court would be necessary and the omission to state whether the attachment continues or ceases, would probably result in the continuance of the attachment.

(2) As the proceedings (second execution petition filed by *Y*) in which the subsistence of the attachment was established between *Y* and *X*, were initiated subsequent to the transfer in favour of *A*, *A* would not be bound by that decision. The principle of *lis pendens* was not applicable to the facts of the case. *Venkatachalapathi Rao* v. *Venkatappayya*, (1931) 62 M.L..J. 302 : I.L.R. 55 Mad. 495 distinguished.

If there were to be a fresh execution proceeding the adjudication in the earlier execution proceedings would not bind the purchaser unless he was made a party to it. *A* is not therefore bound by the decision in the second execution petition and acquired a good title under his purchase.

Appeal against the decree of the Court of the Subordinate Judge Coconada, in A.S. No. 137 of 1945 presented against the decree of the Court of the District Munsiff, Peddapuram in O.S. No. 182 of 1943.

P. Somasundaram for Appellant.

Ch. Raghava Rao for Respondents.

The judgment of the Court was delivered by

Satyanarayana Rao, J.—This second appeal was referred by me to be heard by a Bench as it raised two important questions, one relating to the interpretation of Order 21, rule 57, Civil Procedure Code as amended by this Court and the other concerning the effect of a prior execution order on the title of the plaintiff.

The subject matter of this second appeal is a house which once belonged to the second defendant. On 15th June, 1930, the second defendant obtained a loan from the Co-operative Society, Vuppada, giving some properties of his as security. The Society subsequently discovered that the security was insufficient and demanded the second defendant to give further security. By an agreement dated 5th of May, 1935, the second defendant agreed to mortgage the suit house to the said society. The society obtained an award in respect of the amount due to it against the second defendant, on the 21st of July, 1937. In pursuance of this award the properties of the second defendant were brought to sale and were purchased by the first defendant, the Maharajah of Pithapuram. With a view to get that sale set aside, the

second defendant raised funds by mortgaging the suit house to the plaintiff by a mortgage dated 20th of August, 1937, (Ex. P. 1). The amount was paid by the plaintiff to the Co-operative Society, and the sale was consequently set aside on 30th of August, 1937. While these proceedings were going on, the first defendant instituted O.S. No. 429 of 1935 on the file of the District Munsiff's Court, Peddapuram against the second defendant who was a karnam of one of the villages comprised in the estate of the first defendant for the recovery of an amount which it was alleged the second defendant misappropriated. The suit house was attached before judgment on the 15th of October, 1936, and the suit was decreed on the 24th of September, 1937. On the 26th of October, 1938, the first defendant filed an execution petition which was un-numbered and which may be described as E. P. No. 1 for bringing the suit house which was attached before judgment to sale in pursuance of the attachment already effected and also for leave to set off under Order 21, rule 72. That petition was returned on the 29th of October, 1938, for filing the sale papers and the encumbrance certificate granting two weeks' time. It was re-presented by the decree-holder, the first defendant, on the 12th of November, 1938, with a prayer to grant a further week's time, as the encumbrance certificate which was applied for was not received by then. By an order of 15th November, 1938, the petition was rejected by the Court. The order was as follows : "Petitioner had ample time even after filing the E.P. Rejected." In 1939, the decree-holder filed a second execution petition, E. P. No. 37 of 1939, for bringing the property to sale. After receiving notice, the judgment-debtor, the second defendant, objected to the sale on the ground that the attachment before judgment made in the suit came to an end under Order 21, rule 57, Civil Procedure Code and that a fresh attachment was necessary before a sale could be ordered. His contention was that the first execution petition was dismissed for default of the decree-holder and that therefore the attachment came to an end under Order 21, rule 57. The matter was considered by the same District Munsiff who passed the order on the first execution petition. He was of opinion that the first execution application had no legal existence as it was not numbered and was not admitted, and therefore, the rejection of that application had not the consequence of terminating the attachment under Order 21, rule 57. The order of the District Munsiff is dated 23rd of August, 1939 (Ex. D. 1). There was an appeal against that order by the judgment-debtor to the Subordinate Judge of Coconada (A.S. No. 100 of 1939). He confirmed the order of the learned District Munsiff substantially for the same reasons (Ex. D. 2). In pursuance of that E.P. however, the sale was not effected and the proceedings terminated.

The plaintiff obtained preliminary and final mortgage decrees on the basis of the mortgage in his favour (Ex. P. 1) in 1939 in O.S. No. 32 of 1939, or District Munsiff's Court, Peddapuram, and brought the hypotheca to sale and purchased it himself on 30th of January, 1940. He obtained a sale certificate dated 12th March, 1940, and obtained delivery of possession also in 1943.

In 1942, the first defendant filed a third execution application to bring the suit house to sale in pursuance of the decree in O.S. No. 429 of 1935. The plaintiff who became the purchaser of the property in pursuance of his mortgage decree intervened with a claim petition, E.A. No. 922 of 1940 objecting to the sale of the property on the ground that with the rejection of the first E.P. the attachment before judgment had ceased,that the mortgage in his favour was valid and that he had acquired a good title to the property by virtue of the Court auction purchase. This application was dismissed on the 18th of July, 1942. In pursuance of the third execution petition the suit house was sold and the first defendant purchased it in Court auction on the 17th of November, 1942. The plaintiff was therefore obliged to institute the suit out of which this second appeal arises for setting aside the summary order dated 18th July, 1942, passed on E.A. No. 922 of 1940 in O.S. No. 429 of 1935, District Munsiff's Court, Peddapuram. The main contention of the plaintiff was that the attachment before judgment ceased with the rejection of the first E.P. and that he had acquired a good and valid title and that the first

defendant under his purchase acquired no rights. The learned District Munsiff upheld the contentions of the plaintiff and decreed the suit. On appeal the learned Subordinate Judge of Coconada reversed the decision of the District Munsiff and dismissed the plaintiff's suit. The learned Subordinate Judge was of opinion that the attachment before judgment did not cease by reason of the order dated 15th of November, 1938, on the first E.P. (Ex. P. 3), and that the plaintiff was also further bound by the decision of the learned District Munsiff in Ex. D. 1, which was affirmed on appeal by the Subordinate Judge in Ex. D. 2, though the plaintiff was not a party to those proceedings. The plaintiff preferred this second appeal against the decision of the learned Subordinate Judge.

Two questions arise for consideration in this second appeal. The first is whether the order in Ex. P. 3 dated 15th November, 1938, had the legal effect of putting an end to the attachment. If the attachment had ceased, the mortgage in favour of the plaintiff would be valid, and he acquires a good title under his purchase. If, on the other hand, the attachment continued, the plaintiff's rights under his purchase have to yield to the rights of the first defendant acquired by him in the execution sale in O.S. No. 429 of 1935 by reason of section 64, Civil Procedure Code. The second question is whether the plaintiff was bound by the order passed by the District Munsiff in the second E.P. holding that the attachment continued, which was confirmed by the Subordinate Judge even though the plaintiff was not a party to those proceedings.

On the first question we are of opinion that the view of the learned District Munsiff is correct and that the attachment terminated on the 15th of November, 1938. The contentions raised before us turned mainly on the construction of Order 21, rule 57 as amended by this Court in the year 1936.

In the Civil Procedure Code of 1882 (Act IV of 1882) there was no provision similar to Order 21, rule 57. Considerable difficulty was experienced in interpreting orders of Courts passed on execution petitions "striking off execution proceedings", or "removing proceedings from the file" or "lodging" them. There was considerable doubt whether such orders had the effect of putting an end to the attachment. There was no justification, it was felt, for such orders under any of the provisions of the Code. In order to put a stop to the practice of making such orders the Code of 1908 for the first time introduced the new rule, Order 21, rule 57 which is in these terms:

"When any property has been attached in execution of the decree but by reason of the decree-holder's default the Court is unable to proceed further with the application in execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease."

The rule gave an option to the Court, when by reason of the decree-holder's default it was unable to proceed with the further execution either to adjourn the proceedings or dismiss. If there was a dismissal of the application the attachment automatically ceased. Though in terms the rule does not apply to cases where there was an attachment before judgment, as such attachment is not strictly in execution of a decree, a Full Bench of this Court in *Meyyappa Chettiar* v. *Chidambaram Chettiar*[1], held that the expression "property attached in execution" in Order 21, rule 57, Civil Procedure Code included also property attached before judgment, when there was a decree in the suit which was followed by an execution petition for bringing the property attached to sale, and that the dismissal of such application would carry with it the penal consequences provided in Order 21, rule 57. This was also the view of Bombay and some other Courts, though the High Courts of Allahabad, Calcutta and Patna disagreed with that view. Under this rule it is not every dismissal that would terminate the attachment but only a dismissal for a decree-holder's default. The "default" contemplated was not merely one of default in appearance or in payment of process fee or production of documents but included also the failure to do what a decree-holder was bound to do, in order to enable the

1. (1923) 46 M.L.J. 415 : I.L.R. 47 Mad. 483 (F.B.).

Court to proceed further with the application for execution. When once the Court dismisses the application for default of the decree-holder the Court has no power to continue the attachment as it would be opposed to the mandatory provision in the rule that on the dismissal of such application the attachment shall cease. See *Namunna Bibi* v. *Rosha Miah*[1], *Dildar Husain* v. *Sheo Narain*[2], and *Vijayadas Hanumantdas* v. *Shekharappa Anantappa*[3]. With a view to clarify the rule further this High Court and the other High Courts under the rule making power have altered the provisions of this rule in different ways. In 1936 this High Court substituted for the rule as contained in the Code of 1908, the following rule as rule 57:

"(1) Where any property has been attached in execution of a decree and the Court hearing the execution application either dismisses it or adjourns the proceedings to a future date, it shall state whether the attachment continues or ceases: Provided that when the Court dismisses such an application by reason of the decreeholder's default the order shall state that the attachment do cease."

There is also a sub-clause (2) to the rule which has been added by this Court but as it is not relevant for the purpose of the present discussion it need not be set out here. Under the first clause the Court hearing an execution application may either dismiss the application or adjourn it to a future date. It is obligatory on the Court to state the fact whether the attachment continues or ceases. The dismissal of the application or the adjournment of it is not confined in this clause to the default of the decree-holder as under the old rule. An execution Court may dismiss the execution application for other reasons than the default of the decree-holder; as for example, where an execution was stayed by a superior Court or under Act IV of 1938, or execution could not be proceeded with for want of bidders on the date of the sale. Under the proviso, however, while the Court dismisses an application by reason of the decree-holder's default it is obligatory on the part of the Court to state that the attachment will cease. This is practically what was provided for in the rule which was replaced, as under that rule when an application was dismissed for default of the decree-holder the attachment immediately ceased. The interpretation placed upon the old rule with reference to the expression "attached in execution of the decree" by the Full Bench in *Meyyappa Chettiar* v. *Chidambaram Chettiar*[4], and the meaning of the word "default" as interpreted by the decisions under the old rule would equally apply to the substituted rule.

With this background we have to examine and consider the effect of the order passed by the District Munsiff on the first E.P. on the 15th November, 1938 (Ex. P. 3). The appellant contends that as the petition was rejected for default of the decree-holder as he failed to furnish the sale papers and the encumbrance certificate it must be deemed to be a "dismissal" under the proviso to clause (1) of Order 21, rule 57, the present case being governed by the Madras Amendment of 1936. The respondent contends firstly that the rejection was really under Order 21, rule 17 and therefore it must be taken that the first execution petition had no legal existence and the order was inconsequential; secondly, even if the petition was one in accordance with law and had legal existence the expression "reject" in the context would not amount to a dismissal carrying with it the consequence of the cessation of the attachment but only an adjournment of the application; thirdly that really there was no default on the part of the decree-holder, and that the order of the District Munsiff was not justified in the circumstances, and that it was open to us in these proceedings to canvass the correctness of that order. Fourthly it was urged, that in any event, as the Court did not pass an order stating that the attachment do cease as contemplated by the rule, the dismissal had not the consequence of terminating the attachment. In other words, this contention really amounts to saying that the attachment would terminate only after the Court passes an order terminating it; otherwise not. The passing of the order by the Court terminating the attachment was a condition precedent according to the respondent the fulfilment of which alone would put an end to the attachment. The order in Ex. P. 3

1. (1911) I.L.R. 38 Cal. 482.
2. (1918) 41 All. 157.
3. I.L.R. 1941 Bom. 652.
4. (1923) 46 M.L.J. 415 : I.L.R. 47 Mad. 483 (F.B.).

no doubt after giving a reason for rejecting uses the word "reject" instead of "dismiss."

There is no question in the present case of the petition not satisfying the requirements of rules 11 to 13 of Order 21, Civil Procedure Code. If an application complied with the provisions of rules 11 to 13 of Order 21 but did not comply with an order passed under rule 14, it has now been held by the Privy Council in *Govindprasad* v. *Pawankumar*[1], that the application was nevertheless one in accordance with law as rule 14 was merely permissive unlike rules 11 to 13 which were mandatory. There is no question in the present case of not complying with any order passed under rule 14. The application complied with the provisions of rules 11 to 14. Therefore it cannot be said that the Court rejected the application under rule 17 of Order 21, Civil Procedure Code. No doubt the application was not numbered and was not registered. This is of no consequence in determining whether the order was final or not, provided there was a judicial determination of the petition by the Court as finally decided by the Full Bench in *Seshagirirao* v. *Subbaramireddi*[2]. The learned District Munsiff who passed the order in Ex. D-1 and the learned Subordinate Judge who confirmed it in appeal in Ex. D-2 did not base their decision on the interpretation of the language of the Order but on the ground that the petition was unnumbered and was not registered, and therefore it was a rejection within the meaning of Order 21, rule 17. Their conclusion was that the petition had no legal existence. This view is clearly erroneous for two reasons : firstly because the first execution application complied with all the requirements of the Code in rules 11 to 14 of Order 21, and secondly because if once there was an execution petition which was in accordance with law and a judicial order was passed thereon, the mere fact that it was unnumbered and unregistered would not affect its legal existence. The contention therefore that the order of rejection on the first execution petition was not a legal order cannot be accepted. This is the main ground on which the learned Subordinate Judge reversed the decision of the District Munsiff.

It is not open to us to canvass the correctness or otherwise of the order of the learned District Munsiff in rejecting the application. The order has become final, and it is not open to the respondent to attack its correctness in a collateral proceeding, as was pointed out by Varadachariar, J., even in the very decision which was relied on very strongly by the respondent, *viz.*, the decision in *Sathappa Chettiar* v. *Chockalingam Chettiar*[3]. If there is any ambiguity in the order, it is however open to us, to consider whether the order amounts to one of dismissal notwithstanding the use of the word "reject". The learned District Munsiff has given a judicial reason for rejecting the application, namely, non-production of the sale papers and the encumbrance certificate, though the decree-holder had ample opportunity to produce them. He therefore considered it as a case of default. There are no indications in the order to show that the learned District Munsiff did not treat it as a case of default. If so much is granted, can the word "reject" be interpreted as meaning "adjourn", as contended by Mr. Raghava Rao for the respondent? If this contention were to be accepted, the order would run as follows :

"The petitioner had ample time even after filing the E.P. Adjourn."

It is difficult to accept the contention that the District Munsiff intended to adjourn the petition even though the petitioner had ample time even after filing the E.P. to get the sale papers and the encumbrance certificate. The only reasonable order that could be passed and must have been intended to be passed by the learned District Munsiff was that the decree-holder ought not to be given further indulgence and that the petition should be dismissed. We see no reason to accept this contention of Mr. Raghava Rao. The order therefore must be treated as one of dismissal.

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1. (1943) 2 M.L.J. 121 : I.L.R. 1943 Nag. 669 (P.C.).
2. (1945) 1 M.L.J. 270 : I.L.R. 1945 Mad. 684 (F.B.).
3. (1940) M.W.N. 69.

Would the fact that the Court did not state that the attachment do cease prevent the dismissal of the petition from operating to terminate the attachment? The rule apparently assumed that the Court would do its duty in following the clear and mandatory directions contained in it. If the directions are followed, the Court is bound to state the consequence of dismissal for default of the decree-holder. Some of the High Courts in the rule they framed clearly stated that the attachment would cease if the Court omitted to give any direction. It would have been better if some such clause were also added by this Court, but in our opinion the fact that the Court failed in carrying out its duty would not prevent the cessation of the attachment. The language of the clause clearly does not make it a condition precedent for the termination of the attachment that the Court should make an order. It merely directs the Court to state the consequence of the dismissal, that is, the termination of the attachment. It is the dismissal by reason of the decree-holder's default that brings about the termination of the attachment, and the Court is merely directed to state in the other that consequence. If the Court omitted to state so, it would not prevent the attachment from coming to an end. It may be a difficult question to answer as to what should happen if the Court omits to state whether the attachment continues or ceases when the application is dismissed or adjourned as contemplated in the body of the clause. An attachment, it has to be mentioned, does not otherwise cease unless there was a satisfaction or adjustment of a decree or sale of the property or a decree was set aside or attachment was withdrawn or abandoned, and in the case of attachment before judgment the suit was dismissed. For the determination of the attachment in cases not covered by the proviso, ordinarily an order of the Court would be necessary, and the omission to state whether the attachment continues or ceases would probably result in the continuance of the attachment; but when by reason of the decree-holder's default the application was dismissed, the attachment undoubtedly ceases whether there was or was not an order of the Court stating the consequence. That is the effect of the clause.

The decision in *Sathappa Chettiar* v. *Chockalingam Chettiar*[1], on which strong reliance was placed by Mr. Raghava Rao does not help him in any of his contentions. In that case the petition was rejected for defects of the kind contemplated in rule 17 of Order 21. There was therefore no execution petition in accordance with law. All that that decision lays down is that in interpreting rule 57 which in terms applies to a case where on a petition which was ultimately dismissed an attachment had taken place, the words of the rule must be applied with caution in the case of an application filed after the decree to bring to sale property which was attached before judgment, and that where an order passed on such application was ambiguous in its terms the Court in order to consider whether the order was one of dismissal or not was entitled to take into consideration the circumstances leading to the order. As the case was one in which the petition was rejected for defects of the kind contemplated by Order 21, rule 17, the learned Judges held that the disposal of the application in that particular case was not one of dismissal within the meaning of Order 21, rule 57 and had not the effect of terminating the attachment. The decision was explained by the Full Bench in *Seshagirirao* v. *Subbaramireddi*[2] in the same manner. The decision of Venkatasubba Rao, J., in *Krishna Aiyangar* v. *Mohidin Sahib Rowther*[3] was also cited to show that it was open to the Court in a later proceeding to go into the question whether an earlier execution application was dismissed for default or not. We do not think however that this case is an authority for the position contended for. All that the case decided was where the Court dismissed an execution application and passed an order terminating the attachment behind the back of the decree-holder and without giving him an opportunity to be heard it was not a judicial order at all so as to bring about the penal consequences contemplated by Order 21, rule 57. If the decree-holder were given an opportunity at the time the order was made it would have been perfectly open to

1. (1940) M.W.N. 69.
2. (1945) 1 M.L.J. 270 : I.L.R. 1945 Mad. 684 (F.B.).
3. (1934) 40 L.W. 263.

him to show that there was no negligence on his part and that it was a proper case for adjourning it and not for dismissing it. The termination of the attachment by the Court without giving the decree-holder an opportunity to be heard was according to the learned Judge invalid and had no legal effect. We have therefore no hesitation in holding that the order on the first execution petition was one of dismissal for default of the decree-holder and that by reason of the dismissal the attachment of the property came to an end. The result is the mortgage in favour of the plaintiff was valid, and he had acquired a good title under the purchase in execution of the mortgage decree.

We have next to consider the contention urged on behalf of the respondent that the plaintiff is bound by the order passed by the District Munsiff in the second execution petition that the attachment had subsisted, which order was confirmed on appeal by the learned Subordinate Judge (*vide* Exs. D-1 and D-2). The plaintiff was not a party to those proceedings, and he acquired rights under the mortgage long before the commencement of the proceedings. The mortgage is dated 20th of August, 1937. The attachment before judgment was on 15th October, 1936. The first execution petition was filed on 26th October, 1938, and the second in the year 1939. If the attachment remained in force, under section 64, Civil Procedure Code, it would have been open to the first defendant to contend that the transfer by the second defendant in favour of the plaintiff after the attachment would not affect his rights under the attachment. As the proceedings in which the subsistence of the attachment was established between the decree-holder and the judgment-debtor were initiated subsequent to the transfer in favour of the plaintiff, under ordinary circumstances the plaintiff would not be bound by the adjudication between the decree-holder and the judgment-debtor. This principle is not disputed, and indeed could not be disputed by Mr. Raghava Rao, the learned advocate for the respondent, in view of a long catena of decisions which had established the principle. The decisions are collected by Mullah in his commentary on section 11, Civil Procedure Code, under the heading

> " The title by which the parties in the subsequent suit claimed must have arisen subsequently to the commencement of the former suit."

The contention however urged on behalf of the respondent was that notwithstanding the prior transfer by the judgment-debtor in favour of the plaintiff, the plaintiff transferee would be bound by an adjudication against the transferor, and that the transferor continued to represent the transferee also. At a later stage of the arguments Mr. Raghava Rao restricted the scope of his contention by confining it to execution proceedings, the modified contention being that when once a property was attached, and an alienation was made by the judgment-debtor after such attachment, the result of all proceedings taken by or against the judgment-debtor would equally bind such alienee. In support of this argument strong reliance was placed by him upon the decision of a Bench of this Court reported in *Venkatachalapathirao* v. *Venkatappayya*[1]. It is necessary therefore to examine that decision to see whether there is any support in that decision for the position contended for by Mr. Raghava Rao. The facts of that case are somewhat complicated, but when once the facts are clearly understood, there is no difficulty in understanding the principle of that decision. One Venkatachalapathi obtained a money decree in O.S. No. 38 of 1912 on the file of the District Munsiff's Court, Narasapur, against Venkataramanayya on 30th September, 1913. In execution of that decree an order for attachment of the judgment-debtor's property was passed on the 14th March, 1914. In the meantime the judgment-debtor preferred an appeal against the decree and obtained an interim order for stay of execution from the appellate Court on 13th March, 1914. The order granting interim stay was received by the District Munsiff on the 16th March, 1914. The attachment of the property was effected in accordance with Order 21, rule 54 on the 17th March, 1914. The interim order granting stay was vacated on 15th April, 1914, as the judgment-debtor failed to furnish security as directed by the appellate Court. On 27th May, 1914, the

1. (1931) 62 M.L.J. 302 : I.L.R. 55 Mad. 495.

judgment-debtor sold the property attached to certain Gadiraju people. On 6th of October, 1914, the judgment-debtor filed an application under section 47, Civil Procedure Code, in the execution proceedings alleging that the attachment of the property on 17th March, 1914, was *ultra vires* and illegal, and that the property could not be sold. The District Munsiff overruled the contention of the decree-holder that there was a valid attachment and directed the attachment to be raised and quashed all further proceedings. That order was confirmed on appeal by the Subordinate Judge. During the pendency of the appeal the judgment-debtor died, and his widow was brought on record as his legal representative.

Against the order of the learned Subordinate Judge the decree-holder preferred a civil miscellaneous second appeal to the High Court which was disposed of by a Full Bench in *Venkatachalapathirao* v. *Kameswaramma*[1]. The Full Bench held,

"Where subsequent to an interim order for stay of execution made by an appellate Court without notice to the decree-holder, but before its communication to the Court of first instance, an order of attachment is made by the latter Court, the order of attachment is not void and ineffectual as having been made without jurisdiction, but is legally valid (and that) the order is effective only from the time it is communicated to the first Court."

After the Full Bench answered the question referred to it in the manner stated above the case came for final disposal before the Division Bench, and the Division Bench allowed the civil miscellaneous second appeal, dismissed the petition of the judgment-debtor filed under section 47, Civil Procedure Code and restored the attachment which was raised by the District Munsiff.

On the 26th of August, 1918, the Gadiraju people filed a claim petition under Order 21, rule 58, Civil Procedure Code, on the basis of their purchase to raise the attachment on the ground that there was no valid attachment of the properties on the date of their purchase. This petition was opposed by the decree-holder and was dismissed on 31st October, 1919. The vendees thereafter instituted the suit O.S. No. 142 of 1920, under Order 21, rule 63 for setting aside the summary order dated 31st October, 1919. The questions raised in the suit were whether there was a valid attachment of the properties and whether the question was not *res judicata* by reason of the order passed by the High Court in the civil miscellaneous second appeal. The suit was dismissed by the District Munsiff and the Subordinate Judge on appeal. A second appeal to this Court was preferred by the vendee which came for hearing before Devadoss, J. He held that as the attachment was effected after the communication of the order to the District Munsiff's Court the attachment was invalid and that the decision of the High Court did not bind the vendees. The decision of Devadoss, J., is reported in *Venkatappayya* v. *Venkatachalapathirao*[2]. Against this decision there was a Letters Patent Appeal which came for hearing before Reilly and Anantakrishna Ayyar, JJ. and they reversed the decision of Devadoss, J., and restored the decree of the District Munsiff dismissing the suit. The decision of the learned Judges is *Venkatachalapathi Rao* v. *Venkatappayya*[3].

The main ground on which the decision proceeded was that the purchasers, the Gadiraju people, were bound by the orders in the execution proceedings either on the doctrine of *lis pendens* or as persons who with knowledge of the proceedings purchased the property subject to the result of those proceedings. It is difficult to follow the view of the learned Judges that the doctrine of *lis pendens* applies to such a situation. The attachment of property does not create either a charge or a lien in favour of the attaching decree-holder and does not create any interest in immoveable property. It merely gives to the attaching decree-holder the right recognised in section 64, Civil Procedure Code. The very foundation of the doctrine of *lis pendens* is a dispute in respect of a right to immoveable property. As this essential requisite is wanting in proceedings in which a property is attached, Mr. Raghava Rao, the learned advocate for the respondent, rightly conceded that he could not sustain the position that the principle of *lis pendens* applied to the facts of that case or the

1. (1917) 33 M.L.J. 515 : I.L.R. 41 Mad. 151 (F.B.).
2. A.I.R. 1927 Mad. 450.
3. (1931) 62 M.L.J. 302 : I.L.R. 55 Mad. 495.

present. If that was the only point on which that decision rested it would have necessitated a reference to a Full Bench of the present case, as it is not open to us to differ from a Division Bench; but that case is distinguishable from the facts of the present case in that the learned Judges confined the principle of the binding nature of the result of execution proceedings either on the principle of doctrine of *lis pendens* or otherwise, only to the particular execution proceeding during the pendency of which the property was transferred by the judgment-debtor notwithstanding the attachment of the said property in those proceedings. This is made clear in the judgment itself. At page 502 the learned Judges state the principle in these words:

"In our opinion, when proceedings by way of attachment of immoveable property in execution of a money decree have been taken by the executing Court *in an execution application* filed by the decree-holder, any question that might be raised whether the proceedings taken by the Court did amount to a valid attachment or not is one that falls to be decided by the Court in the execution department; any stranger purchasing the property from the judgment-debtor in those circumstances would only take the property subject to the Court's decision as to the effect of the proceedings actually taken before his purchase. Such purchaser would be bound by the Court's decision of the question in the execution department though he was not a party to the same. To hold otherwise would be to impair the rights of the decree-holder and to enable the judgment-debtor to set at naught decisions of Courts competent to adjudicate on the rights of parties, and give the go-by to the principle of law giving finality to decisions of Courts in matters properly before them.

The present is not a case where the proceeding pending before the Court is only an execution application to attach property. Further proceedings by way of actual attachment had taken place; and proceedings by way of attachment of the properties in dispute took place in a Court of competent jurisdiction; it was when those proceedings were pending that the present plaintiffs purchased those properties from the judgment-debtor; *prima facie* they must be taken to have purchased them subject to the result of those proceedings. The principle of the doctrine of *lis pendens* would apply to such a case. If for any reason the proceedings that were had relating to the properties in question prior to the plaintiffs' purchase should prove abortive and infructuous, and *the decree-holder had to take entirely fresh execution proceedings after the plaintiffs' purchase*, then there would be force in the respondents' contention that such fresh execution proceedings would not be binding on them unless they were made parties to the same."

The last sentence in the above quotation makes it quite clear that if there were to be a fresh execution proceeding the adjudication in the earlier execution proceedings would not bind the purchaser unless he was made a party to it. It is unnecessary for us to consider whether even in the same execution proceedings if an order was passed against the judgment-debtor after he had parted with his interests in the property which was attached, the purchaser would be bound by such an order. It is enough for the purpose of the decision of this case to point out that in the present case the execution proceedings in which the decision in Exs. D-1 and D-2 was given were initiated long after the plaintiff obtained his mortgage. The plaintiff therefore would not be bound by the order in Exs. D-1 and D-2 and the principle of the decision does not apply.

Mr. Raghava Rao drew our attention to the decisions in *Narayanaswami Naick* v. *Seshappier*[1] and *Seetharaman* v. *Chidambaram*[2], which held that an alienee of the property after attachment was a representative of the judgment-debtor within the meaning of section 47, Civil Procedure Code. That is a proposition which cannot be disputed, but it does not help the respondent. Nobody doubts that in certain events a transferee from a judgment-debtor after attachment may be a "representative" of the judgment-debtor within the meaning of section 47, but the question is whether he is bound by an adjudication against the judgment-debtor made in a proceeding initiated after the transfer in his favour was effected. We therefore disagree with the learned Subordinate Judge in his view that the plaintiff was bound by the decision in the second execution petition.

The result is that the decision of the learned Subordinate Judge on both the points is erroneous and must be set aside. The appeal is therefore allowed, the decree of the Subordinate Judge is set aside and that of the District Munsiff restored with costs here and in the Court below.

K.S. —— *Appeal allowed.*

1. (1907) 17 M.L.J. 321. 2. (1932) 63 M.L.J. 941.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

P. Rm. Athimuthu Nadar .. *Petitioner**

v.

K. C. K. Subramania Nadar .. *Respondent.*

*Court-fees—Two suits—Plaintiff in one sued as defendant in the other on the same transaction—Proper court-fees paid in the two suits on the respective plaint claims—Set-off in the written statement in one suit—*Ad valorem *court-fee—If can be required to be paid—Civil Procedure Code (V of* 1908), *Order* 8, *rule* 6.

Two suits between the same parties for recovery of moneys paid on dealings between them was filed. In one suit, the petitioner-plaintiff claimed a certain amount after adjusting the amount claimed by the defendant-respondent in another suit, almost simultaneously filed by him as plaintiff against the petitioner here. The proper court-fee had been paid by the petitioner for his plaint in his own suit. On the question whether the petitioner as defendant in the other suit should pay *ad valorem* court-fee for the set-off raised by him in defence in his written statement,

Held, that in the circumstances the written statement in the other suit by the petitioner should not be deemed a set-off requiring *ad valorem* court-fee, especially when sufficient court-fees in the two suits had been paid by the respective plaintiffs on their plaints.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Tuticorin, dated 2nd April, 1948 and made in O.S. No. 2 of 1948.

The Court delivered the following

JUDGMENT.—This revision petition raises an unusual question of court-fee, one without precedent in my own experience and as regards which there is no decided case. The petitioner is the defendant in O.S. No. 2 of 1948 filed in the Sub-Court, Tuticorin, by the respondent as plaintiff to recover Rs. 20,804-9-6 on alleged advances made from time to time. This suit was filed on 6th January, 1948. The petitioner on 5th January, 1948, as plaintiff filed another suit O.S. No. 3 of 1948 against the respondent to recover Rs. 3,166 from him on dealings after adjusting Rs. 20,000 advanced by the respondent to him. This suit was numbered as O.S. No. 3 of 1948. It may be taken that both the plaints were under simultaneous preparation and it cannot be really said that one was filed in advance of the other. In O.S. No. 2 of 1948, the written statement filed by the petitioner is on the same lines as his plaint in O.S. No. 3 of 1948. The learned Subordinate Judge, however, accepted a strenuous contention made on behalf of the respondent that it was a set-off and directed the petitioner to pay *ad valorem* court-fee on Rs. 20,804-9-6 on his written statement in O.S. No. 2 of 1948.

The learned Subordinate Judge seems to have been very doubtful about this set-off. In one part of his order he called it " a sort of a set-off." He also observed that nowhere in the written statement in O.S. No. 2 of 1948 was there any clear allegation that there was an agreement on the part of the plaintiff to adjust the commission due to the defendant towards dealings by the latter for the benefit of the former. As I understand the written statement it admits the advances made by the respondent and at the same time alleges inter-related transactions in grain by which the respondent-plaintiff arranged for his grain to be deposited with the petitioner and sold by him on which petitioner was to be paid fixed commission. There is a clear averment in the written statement in paragraph 5 that there was an agreement that

> " the commission due to the plaintiff should be settled and adjusted as part of the said financial dealings when they were finally settled."

I have also called for and perused the plaint in the petitioner's suit O.S. No. 3 of 1948 where there is a further averment that he had maintained a mutual, open and current account showing the advances he had taken from the respondent and also all these transactions in grain on his behalf. It is extremely difficult to hold in the circumstances that the written statement petitioner filed in O.S. No. 2 of 1948 is a set-off on which a separate court-fee is payable.

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* C. R. P. No. 711 of 1948. 14th December, 1948.

Under Order 8, rule 6, the written statement in a suit shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in respect of both the original claim and the set-off. In the present case a cross-suit has been filed. The learned Government Pleader concedes that a correct court-fee has been paid on the petitioner's plaint in O.S. No. 3 of 1948, namely, *ad valorem* court-fee on Rs. 3,166. He concedes that there is no way of making the plaintiff pay any more court-fee on that plaint. But he contends for reasons which I am not able to follow that the written statement in O.S. No. 2 of 1948 is in a different category and is liable to the same court-fee as paid in the plaint in that suit. This contention if upheld would result in a rather obvious anomaly of a person being able to file a plaint which is properly valued, but if he asks for the same relief in a written statement by way of a set-off he can be compelled to pay a very much larger court-fee that on the plaint in the suit. My attention has not been drawn to any case in which a suit and a cross-suit have both been filed in which the defendant in one on the basis of his written statement which is the same as the plaint in the other suit has been called upon to pay a double court-fee. I consider in the circumstances that the learned Subordinate Judge was in error in regarding the written statement in O.S. No. 2 of 1948 as a set-off and in requiring *ad valorem* court-fee to be paid as on the plaint in that suit. Sufficient court-fee has been paid by the plaintiffs in the two suits which will be of course be tried and disposed of together.

The petition is allowed with costs which will be paid to the petitioner by the respondent. There will be no order for costs as against the Government Pleader, the indications being that this issue was raised in an acute form by the respondent's advocate in the lower Court.

K.C. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

T. R. Govindaraja Mudaliar .. *Petitioner**

v.

Saravana Mudaliar and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 6, rule 17—Leave to amend plaint by substituting fresh declaration after deficit court-fee was ordered to be paid—If can be allowed.

Where after a plaintiff was ordered to pay deficit court-fee the plaintiff applied to grant him leave to amend the plaint by substituting a prayer for declaration that he was entitled only to a lease hold interest in the land title to which was claimed absolutely by him in the original plaint, and the objection was raised that since an order had been already made on the original plaint for payment of deficit court-fee the present application for amendment should not be allowed,

Held, under Order 6, rule 17, Civil Procedure Code, the Court has sufficient power in appropriate cases to permit amendment of pleading and this power can naturally be exercised till the plaint is actually rejected. The circumstance that the amendment of the plaint was sought only after the demand for the deficit court-fee had been made cannot stand in the way of amendment being allowed if it would be otherwise proper.

Decision in C. M. P. No. 6269 of 1945 of Kuppuswami Aiyar, J. and *Midnapore Zamindari Co., Ltd.* v. *Secretary of State for India*, (1916) I.L.R. 44 Cal. 352, distinguished.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the City Civil Court, Madras, dated 27th January, 1947, in I.A. No. 29 of 1946 in unnumbered plaint.

M. Chelva Aiyangar for Petitioner.

P. Rajeswaram for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff is the petitioner. He sued for a declaration that he is the owner of the superstructure bearing door No. 68, Saravanaperumal Mudaly Street, Purasawalkam, as well as of the ground on which the super building stands and prayed for possession of both the properties.

* C. R. P. No. 1414 of 1947. 20th January, 1949.

Objection having been taken to the valuation adopted by the plaintiffs, a commissioner was appointed and on receipt of his report, the plaintiff was directed to pay deficit court-fee amounting to Rs. 202-7-0. Time till the 7th January, 1947, was given to comply with the order. The deficit court-fee was not paid by that date; instead the plaintiff applied for leave to amend the plaint by substituting a prayer for a declaration that he is entitled not to the absolute right in the land but only to a leasehold interest in it. The learned Judge in the Court below dismissed the application on the ground that an amendment of the plaint could not be granted after an order had been made for payment of deficit court-fee. In making this order, he purported to follow the decision of Kuppuswami Ayyar, J., in an unreported case in C.M.P. No. 6269 of 1945 and the decision in *Midnapore Zamindari, Co. Ltd.* v. *Secretary of State for India*[1].

I do not think that either of these decisions really applies to the facts of the present case. In C.M.P. No. 6269 of 1945 leave to amend the plaint was sought in the appellate Court before the appeal had been admitted. The situation there was that the lower Court had ceased to have seisin of the matter and the appellate Court had not acquired seisin of it. Naturally the appellate Court could grant leave to amend the plaint only after the appeal had been admitted. Kuppuswami Ayyar, J., observed :

"If after the appeal is admitted, she (petitioner) wants to have the plaint amended, then it will be open to her to file a petition which will be heard along with the appeal."

In *Midnapore Zamindari Co., Ltd.* v. *Secretary of State for India*[1], what happened was that the additional court-fee not having been paid within the time granted the plaint was rejected under Order 7, rule 11, Civil Procedure Code and leave to amend the plaint was applied for only subsequently, *i.e.*, in the appellate Court. This particular aspect of the matter is not fully brought out in the headnote. The decision in *Midnapore Zamindari, Co. Ltd.* v. *Secretary of State of India*[1], has been distinguished on this ground in another Bench decision of the same High Court reported in *Must. Saiyadunnissa* v. *Gaibandha Loan Co.*[2]. It was observed :

"But in the present case the prayer for amendment was heard actually before the order rejecting the plaint was made."

So too in the present case the prayer for amendment was made before any order rejecting the plaint had been passed. Under Order 6, rule 17, Civil Procedure Code, the Court has sufficient power in appropriate cases to permit amendment of pleading and this power can naturally be exercised till the plaint is actually rejected.

The circumstance that the amendment of the plaint was sought only after the demand of deficit court-fee had been made cannot stand in the way of the amendment being allowed if it would be otherwise proper. On this aspect of the matter, *viz.*, whether the amendment sought for is proper. I express no opinion as that will have to be decided in the lower Court.

The petition is allowed to the extent indicated above and the case remanded to the lower Court for disposal on merits. The costs of this revision petition will be costs in the petition.

K.C. *Petition allowed.*

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1. (1916) I.L.R. 44 Cal. 352.
2. A.I.R. 1937 Cal. 562.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT :—MR. P. V. RAJAMANNAR, *Officiating Chief Justice*, MR. JUSTICE HAPPELL, MR. JUSTICE GOVINDARAJACHARI, MR. JUSTICE YAHYA ALI AND MR. JUSTICE SATYANARAYANA RAO.

In the matter of the Guardians and Wards Act (VIII of 1890) and *In the matter of* the minors Mohanasundaram and others.

Rao Saheb C. P. Kuppuswami Mudaliar .. *Petitioner.**

Madras Stamp Amendment Act (VI of 1922), Schedule I-A, Articles 33 and 46—Security bond executed by guardian appointed under the Guardians and Wards Act for the due execution of his duties—Article applicable.

A guardian appointed under the provisions of the Guardians and Wards Act is appointed to an office and the security bond furnished by him for the due execution of that office and for the due accounting of moneys and for property received by him by virtue of such office would fall within Article 46 of Schedule I-A of the Madras Stamp Amendment Act of 1922, corresponding to Article 57 of Schedule I of the Indian Stamp Act and it must be stamped in accordance with that provision.

The decision in *Amirthammal* v. *Ramalinga Goundan*, (1920) 38 M.L.J. 503 : I.L.R. 43 Mad. 363 (F.B.) in so far as it held that a security bond executed by a receiver binding himself and his properties for the due discharge of his duties must be stamped under Article 40 of the Schedule I of the Indian Stamp Act is not correct and must be to that extent overruled.

Babu Rao v. *Kalavatibai*, A.I.R. 1940 Bom. 275 (S.B.) and *Dheerendranath Poddar* v. *Hemanginee Dassee*, (1935) I.L.R. 63 Cal. 173, referred to.

G. Ramakrishna Aiyar for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) on behalf of the Government.

The Judgment of the Court was delivered by

The Officiating Chief Justice.—In Original Petition No. 220 of 1947 on the Original Side of this Court, one Kuppuswami Mudaliar was appointed guardian of the person and property of four minors and he was directed to furnish security to the satisfaction of the Registrar of this Court for a sum of Rs. 30,000 for duly accounting for what he may receive in respect of the property of the minors and for otherwise complying with the orders of this Court that may be passed therein from time to time. As directed by this Order, the guardian filed a security bond offering as security certain immoveable property. The question now before this Full Bench is what is the proper stamp duty leviable on it.

On the authority of the Full Bench decision of this Court in *Amirthammal* v. *Ramalinga Goundan*[1] stamp duly calculated under Article 33 of the Madras Stamp Amendment Act of 1922 which corresponds to Article 40 of the Indian Stamp Act was demanded. But it was contended for the guardian that the proper article applicable would be Article 46 of the Madras Act corresponding to Article 57 of the Indian Stamp Act. The matter was heard by Kunhi Raman, J., who, after consideration of the decision of the Full Bench and other decisions cited before him, was inclined to take the view that the opinion expressed by the Full Bench in *Amirthammal* v. *Ramalinga Goundan*[1] needed re-consideration.

Article 33 of the Madras Act corresponding to Article 40 of the Indian Stamp Act provides for a mortgage deed not being an agreement relating to deposit of title deeds, pawn or pledge, bottomry bond, mortgage of a crop, respondentia bond, or security bond. Article 46 of the Madras Act corresponding to Article 57 of the Indian Stamp Act provides for a security bond or mortgage deed executed by way of security for the due execution of an office, or to account for money or other property received by virtue thereof or executed by a surety to secure the due performance of a contract.

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* O. P. No. 220 of 1947. 22nd March, 1948.

1. (1920) 38 M.L.J. 503 : I.L.R. 43 Mad. 363 (F.B.).

It was not disputed before us that the bond in question would be a mortgage deed within the definition of section 2 (17) of the Indian Stamp Act. But it was contended on behalf of the guardian that the document fell directly within the scope of Article 46 because it was a mortgage deed executed by way of security for the due execution of the office of guardian and to account for money and other property received by virtue of that office. It cannot be doubted that a guardian appointed by Court under the provisions of the Guardians and Wards Act is appointed to an office. Two provisions in the Guardians and Wards Act are, in our opinion, conclusive in the matter. Section 20 (1) says :

"A guardian stands in a fiduciary relation to his ward, and, save as provided by the will or other instrument, if any, by which he was appointed, or by this Act, he must not make any profit out of his office."

Section 40 (1) is as follows :

"If a guardian appointed or declared by the Court desires to resign his office, he may apply to the Court to be discharged."

If, therefore, the guardian appointed by the Court holds an office, the security bond furnished by him for the due execution of that office and for the due accounting of moneys and for property received by him by virtue of such office would fall within Article 46 of the Madras Act (Article 57 of the Indian Stamp Act). In *Baburao* v. *Kalavatibai*[1], a Special Bench of the Bombay High Court consisting of Beaumont, C.J., Divatia and Macklin, JJ., held that a bond given under the Guardians and Wards Act by a person as guardian of the estate of a minor in accordance with an order of Court fell under Article 57 of the Schedule I of the Stamp Act.

In *Amirthammal* v. *Ramalinga Goundan*[2], the question whether the security bond which was the subject-matter of that decision fell under Article 40 or under Article 57 of Schedule I of the Stamp Act really did not arise. In that case, the plaintiff in a small cause suit was appointed receiver to collect a debt due to the judgment-debtor and for the due performance of the duties as such receiver the plaintiff executed a security bond in favour of the District Munsiff offering immoveable property as security. The District Munsiff held that the instrument was a bond chargeable only with a court-fee of eight annas but the Sub-Registrar to whom the Munsiff forwarded the document for registration was of the opinion that the instrument was liable to a general stamp duty in addition to being chargeable with court-fee. On behalf of the Government, the learned Government Pleader in that case contended that the document fell under Article 57 as well as Article 40 (*b*) of the Stamp Act and hence stamp duty was payable both under the Court-Fees Act and the Stamp Act. The judgment of the Court which was delivered by Wallis, C.J., dealt only with this aspect of the question, namely, whether the document was chargeable both under the provisions of the Court-Fees Act and the Stamp Act. It was held that the bond must be stamped under both. But the learned Chief Justice further observed that so far as the Indian Stamp Act was concerned, the document would be chargeable under Article 40 of Schedule I of the Stamp Act because it came within the definition of a mortgage in that Act. One important fact which must be borne in mind in following the judgment in that case is that the document was to secure a sum of Rs. 150 and the stamp duty payable either under Article 40 or under Article 57 was the same. It was not therefore necessary for the learned Judges to examine the question which of the two articles was the proper article to be applied to the bond before them. The security bond in that case was executed by a person for the due performance of the duties of a receiver appointed by the Court. Clearly the bond fell within Article 57. In a recent decision of the Calcutta High Court in *Dheerendranath Poddar* v. *Hemanginee Dassee*[3], it was held that the security bond executed by a receiver for the due execution of his office fell under Article 57 of Schedule I of the Indian Stamp Act. There can be no doubt that a security bond executed by a receiver for the due performance of his duties as receiver would be a bond for the due execution of an office. In our opinion, the decision in *Amirthammal* v. *Ramalinga Goundan*[2], in so far as it held

1. A.I.R. 1940 Bom. 275 (S.B.).
2. (1920) 38 M.L.J. 503 : I.L.R. 43 Mad. 363 (F.B.).
3. (1935) I.L.R. 63 Cal. 173.

that a security bond executed by a receiver binding himself and his properties for the due discharge of his duties must be stamped under Article 40 of Schedule I of the Stamp Act is not correct and must be to that extent overruled.

In the present case, we hold that the bond falls directly under Article 46 of the Madras Stamp Amendment Act corresponding to Article 57 of the Indian Stamp Act and it must be stamped in accordance with that provision.

V.S. ——— *Reference answered.*

[THE FEDERAL COURT OF INDIA.]

PRESENT :—H. J. KANIA, *Chief Justice,* S. FAZL ALI, M. PATANJALI SASTRI, MEHR CHAND MAHAJAN AND B. K. MUKHERJEA, JJ.

[Appeal under section 205 of the Government of India Act, 1935, from the High Court of Judicature at Bombay[1].]

A. H. Wadia, as Agent of the Gwalior Durbar .. *Appellant**

v.

The Commissioner of Income-tax, Bombay .. *Respondent.*

Government Trading Taxation Act (III of 1926), *section* 2 (1) (*a*) *and* (*b*)—*If covers case of income which is deemed to arise under Income-tax Act—Income-tax Act (XI of* 1922), *section* 42 (1)—*If* ultra vires *the Indian Legislature as being extra-territorial in operation—Money advanced in Indian State on mortgage of debentures over property in British India—Receipt of interest in Indian State—Liability to taxation—Advance on mortgages in British India by Indian State—Suits and decrees on mortgages and properties mortgaged bought in execution by the Indian State—Income from such properties—Liability to taxation—Income from shares taken in lieu of money advanced by the Indian State—Liability to taxation—Right of an Indian State to claim refund under sections* 48 *and* 49-*B.*

It cannot be said that the Government Trading Taxation Act of 1926 does not cover the case of income which is deemed to accrue under the provisions of the Income-tax Act. Section 2 (1) (*a*) and (*b*) of the Act clearly show that once the income is shown to have arisen in respect of the trade or business and any operation connected therewith, the same was to be treated as if it was the income of a company and liable to be taxed in the same manner and to the same extent as a company in like circumstances should be liable to be taxed under the Income-tax Act. It is not necessary that the trading or business should be in British India. It is sufficient if the State is trading or doing business.

Further the extent of the liability to taxation is not limited to what it was under the Income-tax Act of 1922 when the Government Trading Taxation Act was passed.

The Gwalior Durbar advanced at Gwalior large sums to a company in British India (the shares of which were either owned by the Durbar or its nominees) on the mortgage of debentures over property in British India and the interest was payable at Gwalior. The amount of such loan was brought into British India and utilised for the purpose of its business in British India. On a question whether the income received by way of interest at Gwalior was assessable under the provisions of the Income-tax Act read with the Government Trading Taxation Act, 1926, it was contended that inasmuch as section 42 (1) of the Income-tax Act seeks to make a foreigner liable in respect of income earned outside British India it was extra-territorial and *ultra vires* the Indian Legislature.

Held, by the Full Bench (Patanjali Sastri, J., dissenting), as the heads of income mentioned in section 42 (1) show a real connection between the person sought to be taxed and India the legislation is within the powers of the Indian Legislature. Once such a connection is held to exist it is unnecessary to ascertain the extent of the connection for that is a matter of policy to be considered by the Legislature. The source from which the income accrues to the lender is known to be going into India in cash or in kind and this incident is an integral part of the money-lending transaction. In the circumstances the Gwalior Durbar is liable to be taxed.

Per *Kania, C. J.*—Having regard to the fact that the Indian Legislature is supreme within the ambit of the Legislative heads mentioned in the Government of India Act, 1935, the Court cannot consider the question of section 42 (1) being *ultra vires.* The aspect of it affecting persons who are beyond the jurisdiction of the Municipal Courts cannot be considered sufficient by the Court to hold it *ultra vires.* The Municipal Courts are bound to enforce the law. The contention that it is *ultra vires* cannot be entertained by this Court.

Fazl Ali, J.—I share the opinion expressed by Sastri, J., with regard to the illusory character of the so-called nexus or territorial connection if the case is to be brought under the impugned clause. But I do not wish to pursue the matter further because in my opinion the earlier part of section 42 is sufficient to cover the case.

Patanjali Sastri, J.—The only territorial connection set forth in the impugned portion of section 42 (1) is the bringing of the borrowed money into British India and the purpose for which it is used

1. (1947) 49 Bom.L.R. 633.

* C.A. No. II of 1947. 24th November, 1948.

is the taxation of the interest received abroad by the non-resident lender. To my mind, there is no relevant and sufficient nexus between bringing the borrowed money into British India and the receipt abroad of the interest sought to be taxed. The tax is laid upon income which has no necessary relation with the territorial connection set forth in the impugned provision which is hence *ultra vires* the Indian Legislature.

Mahajan, J.—I cannot subscribe to the view that the nexus conferring jurisdiction to legislate in the case in question, is illusory, and that there is no connection of this country with the interest payable to a foreigner outside India.

Mukherji, J.—The transaction in substance would be lending money at interest in British India, though ostensibly the loan is advanced outside its limits. Looked at from this point of view, the impugned clause does really proceed on the basis of a territorial nexus existing between taxing State and the person in respect of the income that is sought to be taxed. The clause in section 42 (1) which makes taxable the income or profits arising out of money lent and brought into British India in cash or in kind, is not *ultra vires* the Indian Legislature.

On the question whether income from mortgaged properties in British India bought in Court auction in execution of mortgage decrees by the Gwalior Durbar which had advanced the mortgage loans in the course of its money-lending business is liable to taxation under the provisions of the Government Trading Taxation Act read with the Income-tax Act,

Held, that as the burden of proof is not on the Durbar to establish that the properties had been taken out of the money-lending business, in the absence of a finding that they form part of the trading assets of the Durbar, the assessment cannot be upheld. Mere purchase of property out of the capital, once employed in money-lending does not necessarily make that property part of the money-lending business of a person, without further proof of the treatment of that property as part of the business.

Income from shares taken by the Gwalior Durbar in lieu of money advanced in the course of its money-lending business in British India has to be regarded as income from assets pertaining to the money-lending business and as such liable to taxation.

No refund is permissible under the law unless the claim is brought under section 48 of the Act. The Gwalior Durbar as a ' State ' does not come within the category of persons mentioned in section 48 and so would not be entitled to a refund in respect of income-tax alleged to be deemed to have been paid by it as a shareholder in respect of dividends received by it.

Sir Jamshedji Kanga, Senior Advocate, Federal Court (*R. J. Kolah* and *S. Pritam Singh Safeer*, Advocates, Federal Court, with him) instructed by *Ranjit Singh Narula*, Agent, for Appellant.

Sir Noshirwan P. Engineer, Advocate-General of India (*G. N. Joshi*, Advocate, Federal Court, with him) instructed by *P. A. Mehta*, Agent, for Respondent.

The Court delivered the following Judgments :—

KANIA, C.J.—The appellant is the agent of the Gwalior Durbar. The Durbar was participating in various trade and business operations, in and outside the Gwalior State for many years. The record shows that those activities in any event existed in 1924 when the predecessor of the present Maharaja was on the throne. That Maharaja had appointed Mr. F. E. Dinshaw as his agent in Bombay for his trade or business operations. The record shows that money was advanced as loan and also on the security of immoveable properties. The Gwalior Durbar as such has not been treated as an assessee under the Indian Income-tax Act but in respect of certain trading and business operations of the Durbar the Indian Income-tax authorities sought to make the Durbar liable under the Government Trading Taxation Act (III of 1926). Section 2 of that Act, which alone is material for the present case, runs as follows :

" 2. (1) Where a trade or business of any kind is carried on by or on behalf of the Government of any part of His Majesty's Dominions, exclusive of British India, that Government shall, in respect of the trade or business and of all operations connected therewith, all property occupied in British India and all goods owned in British India for the purposes thereof, and all income arising in connection therewith, be liable—

(*a*) to taxation under the Indian Income-tax Act, 1922, in the same manner and to the same extent as in the like case a company would be liable,

(*b*) to all other taxation for the time being in force in British India in the same manner as in the like case any other person would be liable.

(2) For the purposes of the levy and collection of income-tax under the Indian Income-tax Act, 1922, in accordance with the provisions of sub-section (1), any Government to which that sub-section applies shall be deemed to be a company within the meaning of that Act, and the provisions of that Act shall apply accordingly."

The Maharaja died in about 1925 and a Council of Regency was appointed, presumably as the present Maharaja was a minor at the time. Till his death Mr. F. E. Dinshaw continued to act as the agent of the Durbar. Thereafter the present appellant was appointed the agent of the Durbar.

In response to notices issued under the Income-tax Act Mr. Dinshaw and thereafter the present appellant submitted returns to the Income-tax authorities in Bombay from year to year. The disputes between the parties in the present appeal relate to the assessment of the Durbar for the assessment year 1939-40. Being dissatisfied with the assessment order of the Income-tax officer the appellant filed an appeal to the Appellate Assistant Commissioner, Income-tax, Bombay. Being dissatisfied with the order of the Appellate Assistant Commissioner the appellant asked for a reference to elicit the opinion of the High Court on certain questions. That application was made in 1940. The Income-tax Commissioner made a reference to the Court on the 17th of October, 1946. We are unable to find any, much less satisfactory, reasons for this deplorable delay. As will be noticed hereafter, this delay has contributed largely to the difficulties of the High Court and of this Court in satisfactorily disposing of the matter. The statement of facts in the letter of reference is far from satisfactory, is scrappy and leaves the Court to find out relevant facts from different papers, if it can do so. These defects were noticed by the High Court and adversely criticised in the judgment of that Court. We endorse the observations of the High Court in this respect.

The six questions submitted for the opinion of the High Court were in these terms:

"(1) Whether in the circumstances of this case the interest of Rs. 2,49,726 received by the Durbar on the loan advanced to the Provident Investment Co., Ltd., is assessable under the provisions of the Indian Income-tax Act read with the Government Trading Taxation Act (III of 1926).

(2) Whether the sum of Rs. 3,57,112 received by the Durbar out of the managing agency commission paid by the Tata Iron and Steel Co., Ltd., to Tata Sons, Ltd., is assessable under the provisions of Indian Income-tax Act read with the Government Trading Taxation Act (III of 1926).

(3) Whether the income derived from the property situated in Bombay and other places in British India purchased by the Durbar at execution sales in enforcement of mortgage decrees against mortgagors who had failed to pay the amounts advanced to them in course of the money-lending business of the Durbar, is income arising in connection with the said business within the meaning of section 2 of the Government Trading Taxation Act and whether the income arising from such property is liable to assessment under the provisions of the Indian Income-tax Act read with the Government Trading Taxation Act (III of 1926).

(4) Whether the dividend of Rs. 1,88,030 received by the Durbar from the Sir Shapurji Bharucha Mills, Ltd., is taxable in the circumstances of this case under the provisions of the Indian Income-tax Act read with the Government Trading Taxation Act (III of 1926).

(5) Whether the dividend of Rs. 83,447 received by the Durbar from the C. P. Cement Co., Ltd., is taxable in the circumstances of this case under the provisions of the Indian Income-tax Act read with the Government Trading Taxation Act (III of 1926), and

(6) Whether the Durbar is entitled under the provisions of the Income-tax Act read with the Government Trading Taxation Act (III of 1926) to a refund under section 48 (1) or a set off under section 18 (5) of the Income-tax Act of income-tax alleged to be deemed under section 49-B thereof to have been paid by it as a shareholder in respect of the dividend received by it during the previous year."

The High Court of Bombay answered all the six questions against the appellant. It also granted a certificate under section 205 (1) of the Government of India Act, 1935. The appellant has therefore filed this appeal. The appellant asked for leave to argue the other questions also and leave having been granted all the questions were fully argued before us.

The material facts, as set out in the reference made by the Commissioner, on the first question are these. A company styled the Provident Investment Co., Ltd., was incorporated in British India in 1927 with headquarters in Bombay. It was practically a one-man company as all the shares were either owned by the Gwalior Durbar or its nominees. In 1933, the Durbar advanced to this Company a loan of Rs. 50 lacs on the security of its first mortgage debentures of an equal nominal value. The loan was advanced at Gwalior; the interest was

payable there and the debentures were also deposited there. Admittedly the Provident Investment Co., Ltd., brought the borrowed money into British India and utilised it for the purpose of its business in British India. The interest on the loan, received by the Durbar for the accounting year, amounted to Rs. 2,59,726. It was receivable and actually received at Gwalior.

On these facts it was contended on behalf of the appellant that the income did not accrue to the Durbar in British India and was therefore not liable to Indian income-tax. It was first argued that on the terms of section 2 (1) of the Government Trading Taxation Act (III of 1926) only income which arose in British India in respect of trade or business and operations connected therewith was liable to tax. It was next contended that income which was deemed to accrue under the provisions of the Indian Income-tax Act was not covered by this Act, which alone was the basis for taxing the Durbar. I am unable to accept these contentions. I see no justification for reading the words " in British India " after the words " all income arising . . . . . . " in section 2 (1) of the Government Trading Taxation Act. A similar contention, to read the same words after " trade or business " in the same section, was rejected by the Judicial Committee in *The Patiala State Bank* v. *The Commissioner of Income-tax, Bombay*[1]. Sections 2 (1) (*a*) and (*b*) of the Trading Act clearly show that once the income was shown to have arisen in respect of the trade or business and any operation connected therewith, the same was to be treated as if it was the income of a company and liable to be taxed in the same manner and to the same extent as a company in like circumstances would be liable to be taxed under the Indian Income-tax Act. As held in the *Patiala Bank case*[1], it was not necessary that the trading or business should be in British India. It is sufficient if the State is trading or doing business. To the limited extent mentioned in section 2 of the Government Trading Taxation Act, such trading States are to be considered a company for income-tax purposes, irrespective of the other definition of a company in the Income-tax Act. Therefore, if the income of a company would be liable to be taxed on the ground that the income was deemed to have accrued to the Company under the Income-tax Act, the income of the Durbar, in the like case, would be similarly liable to tax, if it arose out of the trading or business operations of the Durbar.

The further contention that section 2 (1) (*a*) of the Trading Act only made the machinery sections of the Income-tax Act applicable to the Durbar, is also unsound. The words used in the section are not merely " in the same manner " but also " and to the same extent." Section 2 (2) of the Trading Act refers to the machinery sections and makes provision for the levy and collection of income-tax from the Durbar.

It was next argued that the Government Trading Taxation Act (III of 1926) should be construed as covering only income which was liable to tax under the Income-tax Act as it existed in 1922. Although in that Act in addition to income which had actually accrued, the expression " deemed to accrue " was used in the charging section, the subsequent expansion of that expression, so as to cover other classes of income mentioned in section 42 (1) of the Income-tax Amendment Act of 1939, could not make the Durbar's income, which was not liable to tax under the Income-tax Act of 1922, taxable. It was argued that in effect it was an attempt to amend the Government Trading Taxation Act (III of 1926). I am unable to accept this argument because the Government Trading Taxation Act puts the Durbar in the same position as a company in like case would be dealt with under the Income-tax Act, 1922. The taxation is under the Indian Income-tax Act of 1922 and the Amendment of 1939 is an amendment of that Act. In my opinion the Amending Act of 1939 is clearly applicable in respect of the assessment for 1939-40, because the only question is how and to what extent a company will be assessed for the year 1939-40.

The Income-tax authorities have sought to assess this income, on the ground that the same is deemed to have accrued to the Durbar under section 42 (1) of

1. (1943) 2 M.L.J. 565 : (1943) L.R. 70 I.A. 202 : 11 I.T.R. 617 : 1944 F.L.J. 163.

the Indian Income-tax Act. Inasmuch as the section sought to make a foreigner liable in respect of income earned outside India, it was contended on behalf of the appellant that section 42 (1) was extra-territorial and *ultra vires* the Indian Legislature. It is found that the Gwalior Durbar has been carrying on a large trading and money-lending business in British India and has in fact very substantial income accruing therefrom in British India. If the Durbar having such activities gives a loan at interest outside British India, on the mortgage of debentures which cover property in British India, and the amount of such loan is brought into British India, the question is whether the interest on the loan should be considered income deemed to have accrued to the Durbar in British India. The Appellate Assistant Commissioner has found that this loan was a part of the operations of the Durbar connected with its money-lending business. That finding is relevant to be considered in deciding the question before us. I do not propose to discuss in abstract the question which may arise in respect of a complete foreigner having an isolated transaction of loan in foreign country and receiving interest on the loan in foreign country and in respect of property which is not situate within India. The question has to be answered on the facts found in the present case and my opinion and conclusion are on those facts.

The respondent's reply is twofold. It was first argued that the impugned provisions were not extra-territorial in their operation. It was next argued that even if they should be found to operate to a certain extent extra-territorially, that would be no ground to hold them invalid, by the municipal Courts. I shall deal with these contentions separately.

Section 42 (1) of the Indian Income-tax Act mentions income arising under specified circumstances under four heads. It brings within the ambit of the charging section (section 4) income accruing or arising whether directly or indirectly in the following cases :

(*a*) when arising through or from any business connection in British India ;

(*b*) when arising through or from any property in British India ;

(*c*) when arising through or from any estate or source of income from British India ; and

(*d*) when arising from any money lent at interest and brought into British India in cash or in kind.

On a scrutiny of the four heads mentioned above it is clear that there is some connection between the person earning income in that way and British India, in each case. In the first it is the business connection, in the second it is the property, in the third it is the estate or source and in the last it is the money brought in cash or in kind out of which the interest or income arose. Each of these is capable of falling under the expression "Taxes on income" and item 54 (List I of Schedule VII) in the Government of India Act, 1935, in my opinion, is wide enough to cover each of these heads. In his judgment in the Bombay High Court in *Wallace Bros. Co., Ltd.* v. *The Income-tax Commissioner of Bombay*[1], Sir John Beaumont, C.J., stated as follows :

> "There is clearly no provision in the Government of India Act which says that any extra-territorial legislation shall be outside the powers of the Indian Legislature."

He quoted with approval the observations of Mr. Justice Dixon in *Colonial Gas Association, Ltd.* v. *Federal Commissioner of Taxation*[2], to the following effect :

> "To derive income from a country involves the person deriving it in a territorial connection with the country sufficient to support the validity of an exercise of the power in respect of the person as distinguished from the income."

In *Wanganui Rangitikei Electric Power Board* v. *Australian Mutual Provident Society*[3], Dixon, J., said :

> "So long as the statute selected some fact or circumstance which provided some relation or connection with New South Wales and adopted this as the ground of its interference, the validity of an enactment would not be open to challenge."

1. (1943) 11 I.T.R. 559 at 575 : I.L.R. 1944 Bom. 43 : 1944 F.L.J. 13.
2. (1934) 51 Com.L.R. 172 at 187.
3. (1934) 50 Com.L.R. 581 at 600.

In the *Broken Hill South case*[1], Latham, C.J., said that the case was perhaps an extreme one but at page 361 he accepted in any event the observation of Rich, J., in his dissenting judgment in the above case to the following effect :

" I do not deny that once any connection with New South Wales appears, the Legislature of that State may make that connection the occasion or subject of the imposition of a liability."

But he added :

" The connection with New South Wales must be a real one and the liability sought to be imposed must be pertinent to that connection."

Dixon, J., in the same case at page 375 observed :

" If a connection exists, it is for the Legislature to decide how far it should go in the exercise of its powers. As in other matters of jurisdiction or authority, courts must be exact in distinguishing between ascertaining that the circumstances over which the power extends exist and examining the mode in which the power has been exercised. No doubt there must be some relevance to the circumstances in the exercise of the power. But it is of no importance upon the question of validity that the liability imposed is, or may be, altogether disproportionate to the territorial connection."

In *The Governor-General-in-Council* v. *Raleigh Investment Co., Ltd.*[2], Sir Patrick Spens, C.J., after citing the above passages with approval observed as follows :

" If some connection exists the Legislature is not compelled to measure the taxation by the degree of benefit received in particular cases by the tax-payer. This affects the policy and not the validity of the legislation."

In my opinion, these cases lay down the correct principles to determine whether the legislation in question is extra-territorial or not. All the four heads of income mentioned in section 42 (1) show a real connection between the person receiving income under the particular head and India. Once such connection is held to exist it is unnecessary to ascertain the extent of the connection. In *Wallace Bros. Co., Ltd.* v. *The Commissioner of Income-tax, Bombay City and Bombay Suburban District*[3], their Lordships of the Privy Council after referring to *Croft* v. *Dunphy*[4], observed as follows :

" The point of the reference is emphatically not to seek a pattern to which a due exercise of the power must conform. The object is to ascertain the general conception involved in the words used in the enabling Act. * * * The resulting general conception as to the scope of income-tax is that given a sufficient territorial connection between the person sought to be charged and the country seeking to tax him income-tax may properly extend to that person in respect of his foreign income."

* * * * * *

" The result is that the validity of the legislation in question depends on the sufficiency, for the purpose for which it is used, of the territorial connection set forth in the impugned portion of the statutory test. Their Lordships propose to confine themselves to that short point and do not propose to lay down any general formula defining what territorial connection is necessary."

The Commissioner of Income-tax has found that as the money lent was brought by the company into British India the income therefrom is deemed to accrue or arise in British India by virtue of section 42 (1) of the Indian Income-tax Act. Evidently he has relied on the fourth sub-head of section 42 for his conclusion. The exact words used in the section are :

" arising from any money lent at interest *and* brought into British India in cash or in kind." (The italics are mine.)

In my opinion it is proper to read this as one head and as indicating one composite transaction. The interest must be the result of the loan of money and the money must be brought into British India in cash or in kind. Reading it in that way, the incident of bringing the money into British India in cash or in kind to the knowledge of the lender and borrower is an integral part of the transaction. After the money is brought into India, how it is used by the borrower, to my mind, is an irrelevant question. The short question to be decided is whether income arising out of a transaction with these incidents establishes some real territorial connection

1. (1937) 56 Com.L.R. 337.
2. (1944) 1 M.L.J. 477: (1944) F.C.R. 229 at 253 : 1944 F.L.J. 131.
3. (1948) 2 M.L.J. 62 : L.R. 75 I.A. 86 : (1948) F.C.R. 1 (P.C.).
4. (1933) A.C. 156.

between the person and British India or not. In my opinion the answer is in the affirmative because the source, *i.e.*, the source from which the income accrues to the lender is known to be going into British India in cash or in kind and this incident is an integral part of the money-lending transaction. As mentioned above, the extent of the connection, if it is real, is not relevant to be discussed in considering the validity of the legislation. That is a matter of policy to be considered by the Legislature.

Although in stating his opinion the Commissioner has relied on the last sub-head of income mentioned in section 42 (1), it may be noted that in the question submitted for the Court's opinion the reference is not limited to that sub-head only. The question is broad enough to cover any of the four heads of income mentioned in section 42 (1). In his judgment under appeal, Stone, C.J., in the Bombay High Court has referred to the business connection of this transaction in British India. In my opinion all the four sub-heads of income mentioned in section 42 (1) show a real connection between the person sought to be taxed and India and therefore the legislation is within the powers of the Indian Legislature. The contention of the appellant that section 42 (1) is extra-territorial in its operation and is therefore invalid, fails.

In the view I have taken it is unnecessary to discuss in detail the second contention of the respondent against the legislation being *ultra vires* although in my opinion it is well founded. Generally, States can legislate effectively only for their own territories but for purposes of taxation and similar matters, a State makes laws designed to operate beyond its territorial limits. In the case of a sovereign Legislature like the British Parliament the question of extra-territoriality of any enactment can never be raised in the municipal Courts as a ground for challenging its validity. The legislation may offend the rules of International Law, may not be recognised by foreign Courts or there may be practical difficulties in enforcing them, but these are questions of policy with which the domestic tribunals are not concerned. This was recognised in *Ashbury* v. *Ellis*[1] and *Croft* v. *Dunphy*[2].

Having regard to the fact that the Indian Legislature is supreme within the ambit of the legislative heads mentioned in the Government of India Act, 1935, I am unable to consider that the legislation in question is *ultra vires*. As mentioned above, the aspect of it affecting persons who are beyond the jurisdiction of the municipal Courts cannot be considered sufficient for the Court to hold it *ultra vires*. The municipal Courts are bound to enforce the law. Whether after obtaining the opinion or decree the same is enforceable against the other side or not, is not a matter for the Court's consideration. The Court has only to see that the legislation is within the ambit of the powers of the Legislature. In this connection, Spens, C.J., in his judgment in *Raleigh's case*[3] pointed out that section 99 of the Government of India Act, 1935, was deliberately couched in language different from that employed in section 65 of the earlier Act of 1915 and that sub-section (1) of section 99 did not in terms exclude extra-territorial legislation nor did sub-section (2) specify exhaustively the subjects upon which such legislation was permissible. In *Wallace Bros. Co., Ltd.* v. *The Commissioner of Income-tax, Bombay City and Bombay Suburban District*[4], their Lordships of the Judicial Committee observed that the relevant power (sections 99 (1) and 100 of the Government of India Act, 1935), is a power to make laws for the whole or part of British India or any Federated State with respect to " taxes on income other than agricultural income " . . . . . Only sub-section (2) of section 99 need be particularly referred to. That sub-section provides that :

" without prejudice to the generality of the powers conferred by the preceding sub-section no Federal law shall on the ground that it would have an extra-territorial operation be invalid so far as

1. (1893) A.C. 339.
2. (1933) A.C. 156.
3. (1944) 1 M.L.J. 477 : (1944) F.C.R. 229 : 1944 F.L.J. 131.
4. (1948) 2 M.L.J. 62 : L.R. 75 I.A. 86 : (1948) F.C.R. 1 : 1948 F.L.J. 32 (P.C.).

it applies to certain persons and things. In their Lordships' view this sub-section does no more than assume that there may be some laws having extra-territorial operation validly made pursuant to sub-section (1). It is no help one way or another in determining the authorised area of taxes on income."

In my opinion, the contention of the appellant that the legislation is *ultra vires*, cannot therefore be entertained by this Court. The answer to the first question is correctly given by the High Court against the appellant.

As regards the second question, the relevant facts are these. The Gwalior Durbar did money-lending business on a fairly extensive scale. On 23rd June, 1924, Mr. Dinshaw entered into an agreement with the Tata Iron & Steel Co., Ltd., and Tata Sons, Ltd., to advance to the first named party a sum of Rupees one crore at interest and on the terms contained in the agreement. This money was of the Gwalior Durbar and Mr. Dinshaw was the agent of the Durbar at the time. One of the material terms of the agreement was that a six annas share in the remuneration of Tata Sons, Ltd., as agents of the Tata Iron & Steel Co., Ltd., was to be paid to Mr. Dinshaw, irrespective of the fact of the loan remaining due or not to the lender from the company under the agreement. Out of this Mr. Dinshaw retained a two annas share for himself and the Gwalior Durbar was to receive the balance of four annas share. The late Maharaja died some time in 1925 and it appears that the Regency Council thereafter urged that under the terms of the will of the late Maharaja this loan was not permissible. About that time the Tata Iron & Steel Co., Ltd., and Messrs. Tata Sons, Ltd., also appeared to be in a position and desirous of paying back the loan. On the loan being repaid, two fresh agreements were made on the 29th July, 1927, in substitution of the original one. Under the first of those agreements Mr. Dinshaw was to be paid in his name a two annas commission, while under the second agreement F. E. Dinshaw, Ltd., was to be paid another two annas commission. The first two annas was the reduced share of the Gwalior Durbar in the agency commission. In the accounting year, the appellant received from the executors of Mr. Dinshaw on account of this two annas share of commission a sum of Rs. 3,57,112. It is admitted that the sum was paid to the appellant as the agent of the Gwalior Durbar in British India.

On behalf of the appellant, different grounds on which the sum was paid to the appellant were urged at different times. Before us the only ground urged was that this sum was paid by the executors of Mr. Dinshaw to the appellant, not as income arising out of the trade or business of the Durbar but as compensation for breach of duty on the part of Mr. Dinshaw to lend money to the Tata Iron & Steel Co., Ltd. Reading the three agreements of 1924 and 1927 together it is clear that the effect of the second set of two agreements was to reduce the original commission of Gwalior Durbar from four annas to two annas, and the right to receive this arose under the first agreement and was a part of the loan transaction. By reason of the second agreement the rate of commission was only reduced. There appears no foundation of fact for the alleged dereliction of duty on the part of Mr. Dinshaw in giving the loan, nor is there any fact to support the contention that this was compensation paid for such alleged dereliction on the part of Mr. Dinshaw. In my opinion the conclusion of the Income-tax authorities and the High Court is correct and the contention of the appellant is rejected.

As regards question three, the Commissioner of Income-tax in his letter of reference has stated as follows :—

"During the course of Durbar's money-lending transactions in Bombay and elsewhere some of the mortgagors made default in payment of the principal and interest and the Durbar filed suits to enforce the mortgages and obtained decrees for the sale of the properties. The mortgaged properties which are all in British India were put up for sale in execution of these decrees and were purchased in Court auctions by the Durbar and the Durbar still continues to own these properties. Item C represents income from these properties."

From this recital it only appears that the original money-lending transactions consisted of advancing loans on mortgages. They had come to an end with the sale of the properties under the directions of the Court. The purchase by the

Durbar of these properties can be either a continuation of the money-lending transactions, coupled with the desire at a proper time to sell the properties and realise the amounts lent, or retaining the properties as investments, like other properties purchased by the Durbar in British India. The fact that the properties are left on the hands of the Durbar, in my opinion, leads to no conclusion one way or the other. This is not a case where a money-lender sets apart a specified sum for his business and continues to keep an account of the properties as a part of the same business. The question whether the properties so left on the hands of the Durbar form part of his money-lending business or not is a conclusion to be drawn from the evidence led before the taxing authorities. The recital of facts by the Commissioner, quoted above, overlooks his duty to determine whether these properties retain the character of assets in the money-lending business. If that is not done, the income of these properties does not come under the Government Trading Act and the Durbar is not liable. Under the circumstances of this case, I am unable to accept the view of the High Court that the burden of proof is on the Durbar to establish that the properties had been taken out of the money-lending business. In the absence of a finding by the Commissioner that these properties form part of the trading assets of the Durbar the assessment cannot be upheld and the answer of the Court should be that the Durbar is not liable in respect of the income of these properties for the year of assessment. This answer is obviously limited to the evidence adduced in this year and does not lead to any conclusion in respect of future years. The conclusion is based on the absence of a finding of fact, rather than on the existence of definite evidence one way or the other.

As regards questions four and five, the Commissioner has come to the conclusion that the shares and debentures continued to be the trading assets of the Durbar. In this connection he relied particularly on the claim made on behalf of the Durbar for business losses when the Durbar took up 75,212 shares of the Shapurji Bharucha Mills, Ltd. In the three years 1931-34 a total deduction of 28 lakhs in the assessment of those years was permitted by the Income-tax authorities on this ground. The assessee appears to have conceded that the items mentioned in questions four and five stood on the same footing and therefore there was evidence before the Commissioner on which he could come to the conclusion that the shares and debentures mentioned in these questions retained the character of business assets. The Commissioner further relied on the fact that in the previous year the appellant had applied to make a reference to the Court in respect of the income derived from these shares and debentures, but withdrew his application. This does not of course operate as an estoppel against the appellant, but is a fact which I do not think the Commissioner was bound to exclude from his consideration. Having regard to this conclusion of the Commissioner, for which there was certainly evidence, I do not think that the Court is justified in disturbing the finding and the answers to the two questions must be against the appellant.

Question six : From the judgment of the High Court it is not clear if the change in the wording of section 49 of the Income-tax Act introduced by the Amending Act of 1939 was noticed. There is no difference however in the result. The amended section 49 (B) only purported to state that the income-tax charged to the company was to be deemed as paid on behalf of the shareholder. That is not a section under which any claim could be made by the appellant. His claim must rest on the applicability of section 48 to him. Under the Government Trading Taxation Act (III of 1926) the Durbar has not become an assessee or an individual liable to tax under the Income-tax generally. Only to a limited extent and for a limited purpose it is made liable to taxation. By that enactment, for the purpose of income-tax generally, the legal position of the Durbar is not altered in respect of the rest of its income. It may be noted that in respect of the immoveable properties owned by the Durbar in British India (other than those covered by question 3) income has accrued to the Durbar in British India. The Income-tax Officer has not taxed that income. If the Durbar was an individual or company under section 48, it would be also an individual or company under sections 3 and 4 of the Income-tax Act and

there would be no justification to exclude the State generally from liability to tax. I agree with the line of reasoning adopted by the High Court for its conclusion on this question and the answer to the question must therefore be against the Durbar.

The result is that except for the variation in answer to question (3), the appeal fails and is dismissed. The appellant to pay three-fourths of the costs of the appeal of the respondent.

FAZL ALI, J.—I have nothing to add to what My Lord the Chief Justice has said on questions (2) to (6), but I wish to express as briefly as I can my own views on question (1). That question has been framed in these words :—

"Whether in the circumstances of this case the interest of Rs. 2,49,726 received by the Durbar on the loan advanced to the Provident Investment Co., Ltd., is assessable under the provisions of the Indian Income-tax Act read with the Government Trading Taxation Act (III of 1926)."

On the question so framed, we are not called upon to express an opinion on any abstract point of law dissociated from the facts of the particular case before us. On the other hand, we are called upon to apply the existing law to the facts of the case. It is to be noted that no specific section of the Indian Income-tax Act is mentioned in the question, but we are simply required to state whether the assessee is liable under the provisions of the Indian Income-tax Act read with the Government Trading Taxation Act, to taxation, in the circumstances of the case.

Our first duty then is to ascertain the facts of the case, and, for this purpose, we have to look at the admitted facts and the findings arrived at by the final income-tax authority. The admitted facts are stated by the Commissioner of Income-tax in his letter of reference in these words—

"A company styled the Provident Investment Co., Ltd., was incorporated in British India in 1927 with headquarters in Bombay, with 4,968 shares of Rs. 1,000 each. It is practically a one man company as all the shares are either owned by the Gwalior Durbar or its nominee. In 1933 the Durbar advanced this Company a loan of Rs. 50 lakhs on the security of its first mortgage debentures of an equal nominal value. The loan was advanced at Gwalior. The interest was payable there and the debentures also were deposited there. But admittedly the Company brought the borrowed money to British India and utilised it for the purposes of its business in British India. The interest on the loan received by the Durbar for the year amounted to Rs. 2,59,728 referred in item (A) above. The interest was receivable and actually received at Gwalior."

These facts are to be read with the findings set out in the appellate Order of the Assistant Commissioner of Income-tax, which are to the following effect :—

"It is admitted that the Durbar carried on banking business and this so because the Durbar has a lot of surplus money to invest and earn interest. The loan advanced in this case is part of operations connected with that money-lending business. Hence the income therefrom is liable to be taxed."

These findings are re-iterated in the Commissioner's letter of reference in these words—

"The Durbar admittedly carried on money-lending business and the transaction in question, namely, the loan of Rs. 50 lakhs to the Provident Investment Co., Ltd., was a part of that business or an operation connected with that business."

The learned Chief Justice of the Bombay High Court who delivered the leading judgment in the present case when it was before that High Court, after reciting the facts of the case, has referred to the crucial finding in these words—

"In addition to these facts, there is the further finding of fact, that this loan of Rs. 50 lakhs formed part of the operations connected with the money-lending business of the Durbar. So that it comes to this, that the income belonged to or was connected with the Gwalior Durbar's money-lending business in British India, but accrued or arose to it outside British India."

It may be stated here that it has been admitted throughout the proceedings that the Gwalior Durbar has been carrying on money-lending business in British India through its agent, Mr. Wadia. That fact was stated in ground (5) of the Memorandum of Appeal to the Assistant Commissioner, and it is also stated in the Order of the Assistant Commissioner. The point which was raised before the Appellate Assistant Commissioner was that the loan in question was a stray casual transaction and did not constitute or was not part of any money-lending business.

This contention however was negatived, and the Assistant Commissioner found that,

"the loan was part of operations connected with the money-lending business."

The question we have to decide is whether, having regard to the facts set out above, the assessee is (to quote the words used in the question framed by the Commissioner) assessable under the provisions of the Indian Income-tax Act read with the Government Trading Taxation Act (III of 1926).

That the Government Trading Taxation Act applies to the assessee, cannot be controverted and has not been controverted. That being so, the assessee is liable to taxation under the Income-tax Act, in the same manner and to the same extent as in the like case a company would be liable. In the present case, the interest on the loan which is said to represent the income was paid at Gwalior, and therefore the question arises as to whether in spite of this fact, the income is to be deemed to have accrued in British India. For this, we have to refer to section 42 of the Indian Income-tax Act, which, being a general section, would apply to a company also. Under section 42, all income, profits or gains shall be deemed to be income accruing or arising within British India, if they accrue or arise directly or indirectly in the following cases :—

(1) through or from a business connection in British India ;

(2) through or from any property in British India ;

(3) through or from any asset or source of income in British India ;

(4) through or from any money lent at interest and brought into British India ; and

(5) through or from the sale, exchange or transfer of a capital asset in British India. (This was added in 1947, and may be ignored for the purpose of this appeal, as the assessment was for a prior period.)

Prima facie, therefore, the appellant will be liable to taxation in the present case, if his case falls under either clause (1) or clause (4). From the judgment of the learned Chief Justice of the Bombay High Court, as I read it, I find that he has nowhere stressed the fact that the assessee is liable because the money was lent at interest and brought into British India. On the other hand, the first alternative stated in section 42, which relates to income accruing through or from a business connection in British India, has been throughout emphasized in his judgment. As I have already stated, the learned Chief Justice starts by saying,

"So it comes to this, that the income belonged to or was connected with the Gwalior Durbar's money-lending business in British India."

Then, dealing with the question of *ultra vires*, which was raised on behalf of the appellant in the High Court, he further stated :

"But in my opinion this is not so for as long as there is a residential or *business connection with British India*, no question of the law being extra-territorial can arise. There is a territorial connection in this case *through the nexus of the Gwalior Durbar's money-lending business carried on in British India.*"

Again after referring to certain observations of Dixon, J., in an Australian case, he added :

"That is to say, if a person is deriving income *from a business carried on in a country, he has a sufficient territorial connection with that country to prevent a law imposing a tax upon him being regarded as extra-territorial.*"

He then referred to the contention put forward on behalf of the Income-tax Department in these words,

"Mr. Setalvad contends that inasmuch as the whole basis of the liability to tax under the impugned sub-section is based on *the bulk of the assessee's income arising in British India, the sub-section would not fall within an express prohibition* against any extra-territorial legislation."

It seems to me that the learned Chief Justice has, in the treatment of the case, rightly laid stress on the crucial point in the case, *viz.*, that what brings the assessee

within the ambit of the operation of the Indian Income-tax Act is the fact that the income in question was connected with his money-lending business in British India, and the loan from which the income arose was not an isolated transaction but formed part of the operations connected with the money-lending business of the Durbar.

It is true that the Commissioner of Income-tax, in making his reference, had expressed an opinion to the following effect:

"As the money lent was brought into British India, the income therefrom is deemed to accrue or arise in British India, by virtue of section 42 (1) of the Indian Income-tax Act."

But the High Court was not bound by this opinion, and the question which was submitted to it was in general terms, without any specific reference to that part of section 42, upon which the Commissioner had based his opinion. Nevertheless, the new clause in section 42, which deals with money lent at interest and brought into British India, and which seems at first sight to furnish the easiest solution of the difficulty presented by the case, appears to have been referred to and relied on in the High Court, and Chagla, J., the other learned Judge of the Bombay High Court, does appear to have rested his decision on the ground that under this clause, the income which accrued to the assessee must be deemed to have accrued in British India. It has been strenuously argued before us that inasmuch as the case was argued in the High Court on the footing that the assessee is liable only under the new clause (money lent at interest and brought into British India), it is not open to this Court to rest its decision on any other part of section 42. No doubt, as a rule this Court will hesitate to base its decision on a point, which is raised for the first time in this Court, especially when it cannot be substantiated without further investigation, or when it amounts to springing a sudden surprise upon the litigant against whom it is raised. But the point on which I wish to lay stress, *viz.*, that the facts of the case bring it under the first clause of section 42 which deals with income accruing directly or indirectly through a business connection in British India, seems to me to rest on foundations which are well laid in the proceedings prior to the appeal to the High Court. As I have already stated, it clearly arose before the Appellate Assistant Commissioner, and also commended itself to the learned Chief Justice, if my reading of his judgment is correct. It is in my opinion not a new point, and there is no question of springing a surprise upon the appellant, because the appellant being aware of this aspect of the case, tried to contend before the Appellate Assistant Commissioner that the loan with which we are concerned, was a solitary transaction, having no connection with his money-lending business. Sir Jamshedji Kanga, who appeared for the assessee, stated in the course of his arguments, that if the decision of the case is rested on the first part of section 42, *i.e.*, if the interest to be taxed is held to be income, profit or gain accruing directly or indirectly through or from any business connection of the assessee in British India, then the question of *ultra vires* would not arise in regard to the Government Trading Taxation Act, and there was nothing further to be said in the appeal. In my opinion, the case is covered by that part of the section, and that is sufficient to dispose of the appeal. It seems to me that the fact of money being lent and brought into British India, apart from being the basis of an important clause in section 42 as it now stands, may be a very important circumstance in a particular case. It is certainly in this case a very important link in the chain of facts which may be relied upon for making the assessee liable to taxation. In the first place, all the shares in the Provident Investment Co., Ltd., are owned either by the Gwalior Durbar or its nominees. This fact by itself might be held to constitute a business connection. See *Commissioner of Income-tax, Bombay Presidency and Aden* v. *Currimbhoy Ebrahim and Sons, Ltd.*[1], where Sir George Rankin, negativing the plea of business connection in that particular case, remarked,

"It is not shown that the Nizam had at any time an interest direct or indirect in the respondent company."

1. (1935) 70 M.L.J. 247 : L.R. 63 I.A. 1 : I.L.R. 60 Bom. 172 (P.C.).

Then, there is the fact that the Gwalior Durbar has been carrying on money-lending operations in British India. Lastly, there is the finding that the lending of money and its being brought into British India are matters connected with the money-lending operations of the Durbar. These facts, in my opinion, would have been sufficient to attract the operation of section 42 (1) as it stood before it was amended in 1939, *i.e.*, before the clause,

"through or from any money lent at interest and brought into British India in cash or in kind."

was inserted. I am fully aware that our decision should not be founded on new facts, but the facts stated above are not new facts, but are facts which are to be found in the statement of the case before us.

I will now briefly deal with two main points which were urged before us on behalf of the appellant. It was contended in the first place, that section 2 of the Government Trading Taxation Act deals only with income arising in British India, and that it cannot be applied to income which does not actually arising in British India but is deemed to arise in British India, by calling in aid the fiction embodied in section 42. In my opinion, that is not a sound contention. Section 2 (1) (*a*) provides that a foreign government referred to in section 2 (1) shall be liable under the provisions of the Indian Income-tax Act, to taxation, *in the same manner and to the same extent as in the like case a company would be liable.* Therefore, a foreign government is placed on the same footing as a company. A company may be liable to taxation in respect of income arising in British India as well as income which is deemed to arise in British India. Therefore, the effect of section 2 (1) (*a*) is to make a foreign government liable also in respect of income which is deemed to arise in British India.

The other argument, which seems to be a more serious one, is that the new words introduced in section 42 in the year 1939, which stretch the section to cover all income, profits or gains from any money lent at interest and brought into British India in cash or in kind do not establish such a nexus or territorial connection between the taxing State and the assessee, as to give jurisdiction to the Indian Government to tax a foreigner or a foreign Government. This argument was advanced in a very complicated and somewhat obscure form before the High Court, as will appear from a perusal of the judgments of the learned Chief Justice and Chagla, J. But, when put in the form stated above, it appears to me to be quite an intelligible and serious contention, and I must confess that so far as this contention is concerned, I share the opinion expressed by Sastri, J., with regard to the illusory character of the so-called nexus or territorial connection, if the case is to be brought under the provision in question. The nexus or connection may appear to be a substantial one in a particular case in view of the facts of that case, but, in many cases, it may be brought down to a vanishing point. The question we have to answer is whether the words used in the new clause (which is intended to be of general application), standing by themselves are sufficient to constitute such a nexus as is contemplated by the authorities which deal with the subject. My brothers Mahajan and Mukherjee, JJ., have suggested that the lending of the money at interest and its being brought into British India should be treated as part of one transaction or scheme, and they have also observed that the new words were intended to guard against any subterfuge which might be adopted for the purpose of escaping income-tax by showing that money was lent outside British India, though, to all intents and purposes, it is money lent in British India. This may well have been the intention of the Legislature, but the bare words as they stand, are hardly sufficient to convey such a comprehensive meaning. These words, as we know, were inserted after the decision of the Privy Council in *Commissioner of Income-tax, Bombay Presidency and Aden* v. *Currimbhoy Ebrahim and Sons, Ltd.*[1], in which it was held that where a loan was an isolated transaction, there was not a business connection in British India and the lender could not be taxed. After that decision, all that appears to have been done was to pick

1. (1935) 70 M.L.J. 247 : L.R. 63 I.A. 1 : I.L.R. 60 Bom. 172 (P.C.).

up certain words which would just cover the facts of that case and make the assessee liable to tax in circumstances similar to those of that case. The choice of the words however does not seem to be very happy, because, under the new provision, there may arise a number of anomalous situations, including those where the creditor does not intend or even know that his money is to be brought into British India and when money is brought into the British India at different stages and through different channels. If the principle that some kind of tangible or intelligible nexus or territorial connection between the taxing State and the assessee is necessary in order to confer jurisdiction on the State to tax the assessee is of any importance, that principle seems to have not received adequate consideration in framing the new clause. I do not wish to pursue the matter further, because, in my opinion, the earlier part of section 42 is sufficient to cover this case. In my judgment the High Court has rightly answered the first question in the affirmative.

PATANJALI SASTRI, J.—As I agree with my learned brothers with regard to the answers which they propose to make to questions Nos. 2 to 6, I do not think it necessary to encumber this judgment with a re-statement of the facts giving rise to this reference. I will accordingly refer to them only so far as it is necessary to make intelligible what I have to say on question No. 1, as to which I have reached a different conclusion.

That question is

"whether in the circumstances of this case the interest of Rs. 2,59,726 received by the Durbar (*i.e.*, the Government of Gwalior the appellant herein) on the loan advanced to the Provident Investment Company Limited is assessable under the provisions of the Indian Income-tax Act read with the Government Trading Taxation Act (III of 1926)."

It is somewhat unfortunate that a question of law said to arise in the case should have been formulated in this unspecific form which allows of any point relating to the assessment of the sum in question being argued, the scope of the argument being limited only by the ingenuity of counsel. And the position is by no means improved when the statement of the case submitted by the referring authority also leaves the matter equally vague and indefinite. It was therefore not a matter for surprise that much of the debate at the bar was taken up with an avoidable controversy as to the precise point or points on which the referring authority intended to seek the opinion of the Court. While on the one hand it is not desirable to state the questions of law in a purely abstract form without relating them to the facts of the particular case, it is, on the other hand, embarrassing if it is left to the Court, by the use of such expressions as "in the circumstances of the case", to find out for itself which circumstance gives rise to what question and to determine generally whether the assessment is right or wrong. It should be borne in mind that the Court in such cases is not dealing with a general appeal against the assessment but is only called upon to determine specific questions of law on which its opinion is sought.

There was no dispute as to how the sum of Rs. 2,59,726 came to be included in the assessment of the appellant for the year ended 31st March, 1940. The Durbar was carrying on extensive money-lending business through its agents in British India, and in the year 1927 it formed a private company known as the Provident Investment Company, Ltd., all the shares of which were owned by the Durbar or its nominees. The Company was incorporated in British India and had its headquarters in Bombay where it was carrying on business. In 1933 the Durbar advanced to the Company a loan of Rs. 50 lakhs on the security of first mortgage debentures of an equivalent nominal value issued by the Company. The loan was advanced at Gwalior and the debentures were also delivered there to the Durbar but the amount was admittedly brought into British India and was utilised by the Company for the purposes of its business. One of the terms of the loan was that interest on the money was to be paid to the Durbar in Gwalior. The sum of Rs. 2,59,726 was accordingly received in Gwalior as interest accrued due in the previous year, that is, the year ended 31st March, 1939. It appears that there

were also other loans advanced to the Company on which a sum of Rs. 61,300 was paid as interest in the same year, but the number and extent of such loans and the circumstances in which they were advanced have not been stated because, presumably, no objection was taken to the assessment of that sum.

The question having been framed, as already stated, in vague terms, the learned Advocate-General of India sought to justify the assessment of the sum in question on various grounds. At one stage it was suggested that, on the finding of the Income-tax authorities that the Durbar was carrying on money-lending business through its agents in British India and that the loan of Rs. 50 lakhs to the Company was " a part of their business or an operation connected with that business," the interest in question accrued or arose in British India and was therefore properly assessed. This suggestion is clearly untenable as the loan was admittedly advanced in Gwalior and the interest was paid and received in Gwalior. The fact that the Durbar was carrying on money-lending business in British India cannot make the interest received in Gwalior in respect of a money-lending operation effected in Gwalior income arising or accruing in British India. The Commissioner of Income-tax in his statement of the case no doubt found that the loan in Gwalior was part of the Durbar's business operations. But that was for the purpose of bringing the case within the Government Trading Taxation Act (No. III of 1926) which brings within the net of British Indian taxation only " income arising in connection " with the business carried on by a Dominion Government. Indeed, the learned Advocate-General did not seriously press this extreme suggestion.

It was next urged with more plausibility that the sum in question was properly assessed to Indian Income-tax, as on the facts found, it could be regarded as income received " directly or indirectly through or from any business-connection in British India " within the meaning of section 42 (1) of the Indian Income-tax Act, 1922, and could therefore be " deemed to be income accruing or arising in British India " so as to fall within the charging sections 3 and 4 of the Act. This might, perhaps, have been a more fruitful line of argument for the respondent, had the foundation for the same been properly laid by elucidation of all the facts bearing on the relation between the Durbar and the Provident Invsetment Co., Ltd., in the way of business including facts relating to the loans in respect of which a sum of Rs. 61,300 was taxed as interest arising in British India. But this, as already stated, was not done, probably because it was considered unnecessary to rely on " business connection" as another limb of section 42 (1), namely, "through or from any money lent at interest and brought into British India in cash or in kind " appeared exactly to fit the facts of the case. Indeed, in submitting his opinion on the questions raised, as he was required to do under section 66 of the Act before its amendment in 1939, the Commissioner concluded this part of the case by stating,

" And as the money lent was brought by the Company into British India, the income therefrom is deemed to accrue or arise in British India by virtue of section 42 (1) of the Indian Income-tax Act."

In such circumstances, the respondent cannot, in my opinion, now seek to sustain the assessment on the ground of the supposed existence of a business-connection between the Durbar and the borrowing company, as to which, the facts have not been fully investigated nor any clear and definite finding made by the Income-tax authorities. It is significant that while both the Commissioner of Income-tax in his statement of the case and the Appellate Assistant Commissioner in his order on appeal are at pains to show that the loan advanced to the Company was part of operations connected with the money-lending business of the Durbar in order to bring the case within the Government Trading Taxation Act, 1926, neither of them uses the expression " business-connection " with which they were perfectly familiar. It is clear to my mind that they did not purport to tax the sum of Rs. 2,59,726 received from the Company as having arisen through or from a business-connection in British India, though possibly on the facts before them the assessment could have been sustained on that ground. As I read the letter of reference and the Appellate Assistant Commissioner's order, there is no finding that the Durbar derived the

income in question through any business-connection within the meaning of section 42 (1) though it would appear from the judgment of the learned Chief Justice in the High Court some reference was made to that aspect of the matter.

Learned counsel for the appellant contested the liability to assessment of this sum (Rs. 2,59,726) on two grounds. In the first place, it was urged that, on a proper construction of section 2 of the Government Trading Taxation Act, 1926, read with the Indian Income-tax Act, 1922, any income that does not actually " arise " in British India to the Government concerned could not be subjected to income-tax. Section 2 runs thus :—

" 2. (1) Where a trade or business of any kind is carried on by or on behalf of the Government of any part of His Majesty's Dominions, exclusive of British India, that Government shall, in respect of the trade or business and of all operations connected therewith, all property occupied in British India and all goods owned in British India for the purposes thereof, and all income arising in connection therewith, be liable

(a) to taxation under the Indian Income-tax Act, 1922, in the same manner and to the same extent as in the like case a company would be liable,

(b) to all other taxation for the time being in force in British India in the same manner as in the like case any other person would be liable.

(2) For the purposes of the levy and collection of income-tax under the Indian Income-tax Act, 1922, in accordance with the provisions of sub-section (1), any Government to which that sub-section applies shall be deemed to be a company within the meaning of that Act, and the provisions of that Act shall apply accordingly."

It has been decided by their Lordships of the Judicial Committee in the *Patiala State Bank Case*[1], that the section is not confined to trades or businesses carried on in British India as the words of the section are quite general in terms. Their Lordships, however, recognised that the effect of section 2 of the Government Trading Taxation Act, 1926, and sections 3 and 4 of the Indian Income-tax Act, 1922, was to make a Dominion Government carrying on business anywhere,

" liable to British Indian income-tax in respect of the income, profits and gains of that business which accrue or arise or are received in British India."

Relying on this passage and the words " all income arising in connection therewith " in section 2 (1) of the Government Trading Taxation Act, 1926, learned counsel for the appellant contended that a Dominion Government carrying on business in and outside British India cannot be made liable for the income, profits and gains which do not actually accrue or arise or are received in British India but are to be " deemed to accrue or arise or to be received " in British India. I do not think the decision of the Privy Council referred to above is an authority for this proposition. The income in dispute in that case admittedly arose in British India and no question arose as to the liability to tax of income which did not actually accrue or arise, but was to be deemed to accrue or arise, in British India by virtue of the provisions of the Indian Income-tax Act, 1922. The only question was whether section 2 of the Government Trading Taxation Act, 1926, applied to the business of the Bank although it was carried on exclusively in the State of Patiala. In the passage quoted above, their Lordships were merely emphasising that although the language used in section 2 of that Act was general, sections 3 and 4 of the Indian Income-tax Act, 1922, imported a territorial limitation on the income liable to be taxed in such cases.

Nor can I accede to the argument that the phrase " all income arising in connection therewith " control and qualify the words " to the same extent as in the like case a company would be liable ", as so to exclude the operation of those provisions of the Indian Income-tax Act, 1922, which render certain categories of income which do not actually arise but are to be deemed to arise in British India. It was urged that when the Government Trading Taxation Act, 1926, was passed, all that could have been contemplated was that only income arising in British India in connection with the trading operations of a Dominion Government should be

1. (1943) 2 M.L.J. 565 : L.R. 70 I.A. 202 : 11 I.T.R. 617 : 1944 F.L.J. 163 (P.C.).

subject to taxation and not income earned abroad. It is, however, to be observed that the Income-tax Act even in its original form made certain categories of income not strictly arising in British India chargeable to tax by providing that they shall be deemed to have accrued or arisen or to have been received in British India (section 4 (1) and section 42 (1)), though other categories of such income also, including the one now in question, namely, income derived through or from any money lent at interest and brought into British India (in cash or in kind) have since been swept in by amendments from time to time. If it was the intention of the Indian Legislature to exempt such categories of income from taxation and to tax only income actually arising in British India in the case of Dominion Governments which trade or carry on business, nothing could have been easier than to make it clear by inserting suitable words in section 2 of the Government Trading Taxation Act, 1926. As the section stands, however, the " extent " of the liability to taxation must, in my opinion, be determined with reference to the Indian Income-tax Act, 1922, without in any way being limited by the words " all income arising in connection therewith " which, like those which precede, merely indicate that the income made chargeable by section 2 should be solely derived from or connected with the trade or business carried on by the government concerned.

It was further suggested that the extent of liability to taxation should be limited to what it was under the Income-tax Act, 1922, as it stood when the Government Trading Taxation Act, 1926, was passed, and should not be widened by subsequent amendments to the Income-tax Act, more especially as Dominion Governments were not within the scope of Indian legislation, but were brought under the charge to income-tax as a result of agreement among the States concerned. I see no force in this argument. The reference to the Indian Income-tax Act, 1922, in section 2 of the Government Trading Taxation Act, 1926, must be taken to refer to the Indian Income-tax Act, 1922, as it stands amended at the time when the tax is sought to be imposed, that is to say, in the year ended 31st March, 1940, which is the year of assessment in this case. As the words " through or from any money lent at interest and brought into British India in cash or in kind " were introduced in section 42 (1) by the Amending Act (No. VII of 1939) which came into force on 1st April, 1939, the " extent " of the appellant's liability to British Indian taxation must be determined with reference to that section as so amended.

Lastly, the validity of this newly introduced provision in section 42 (1) which read with sections 3 and 4 purports to bring into the charge, by means of a statutory fiction, income derived abroad in the case of a non-resident assessee was challenged as being *ultra vires* the Indian Legislature on the ground of its extra-territorial operation. The provision clearly assumes that the money is lent abroad and the relevant interest accrues or arises or is received outside British India, and also that the person receiving it is not resident in British India ; for, otherwise, the interest would be taxable under the general provisions of the Act, and this special provision in section 42 (1) would be unnecessary. The expression,

" all income, profits or gains accruing or arising through or from any money lent at interest "

might suggest that such money should form the source from which the interest is to arise—a construction which might obviate the constitutional objection as the source would then be in British India. (See *Governor-General in Council* v. *Raleigh Investment Co., Ltd.*[1]) But such a construction would restrict the application of the provision only to those rare but possible cases where the payment of interest is dependent on the earning of profits. I think that the provision was intended to cover ordinary cases where interest is stipulated for at a specified rate per centum, whether or not any profits are earned by the utilisation of the money lent—cases such as *Commissioner of Income-tax, Bombay* v. *Currimbhoy Ibrahim and Sons*[2]—which indeed appears to have led to the introduction of these words in section 42 (1) by the Amending Act of 1939. I think that the phrase,

1. (1944) 1 M.L.J. 477 : (1944) F.C.R. 229 : 1944 F.L.J. 131.

2. (1935) 70 M.L.J. 247 : L.R. 63 I.A. 1 : I.L.R. 60 Bom. 172 (P.C.).

"arising . . . . . through or from any money lent at interest and brought into British India"

means no more than income arising from lending money at interest, provided the money is in fact brought into British India. The question is whether the enactment of such a provision is beyond the powers of the Indian Legislature. In determining this question the facts of the particular case, such as for instance, that the Durbar was carrying on business in British India and had a controlling interest in the borrowing company, must be disregarded as being irrelevant, and it must be assumed that there was no connection between the creditor who receives the interest and British India which seeks to tax the interest save that the money lent was brought by the borrower into British India.

The learned Advocate-General of India placed strong reliance on the observations in *Governor-General* v. *Raleigh Investment Co., Ltd.*[1], where, this Court, while dismissing the assessee's suit for recovery of the tax paid under protest as not maintainable, went into the merits of the case and upheld the validity of the provisions of the Indian Income-tax Act, 1922, authorising the taxation of dividends paid to a foreign company in a foreign country out of profits earned in British India. Such taxation was held to be justified according to the recognised principles of international law as the "source" of the dividend was in British India. This Court was also of opinion that, on a proper construction of section 99 of the Government of India Act, 1935, the Indian Legislature had power to enact such provisions. On appeal, however the Privy Council expressed no opinion on these points but merely confirmed the dismissal of the suit.

In the subsequent case of *Wallace Bros. & Co., Ltd.* v. *Commissioner of Income-tax, Bombay City and Bombay Suburban District*[2]. their Lordships had to consider the power of a subordinate Legislature to pass a taxing law having extra-territorial operation. The question arose whether a company incorporated in England and having its central management and control in that country was liable to pay Indian income-tax on its foreign income also because it earned the major part of its profits in British India in a business carried on through its partner. The provisions of section 4 (1) (*b*) (ii) read with section 4-A (*c*) of the Indian Income-tax Act, 1922, as amended in 1939, which have the effect of bringing into charge the foreign income of a company incorporated and having its management and control in a foreign country, provided the major portion of its income arises in British India, was impugned as being *ultra vires* the Indian Legislature. Indicating the correct approach in such cases their Lordships made the following pertinent observations :

"Their Lordships do not approach the matter on the formal lines embodied in these contentions" (which were also more or less the lines on which this Court proceeded in *Raleigh Investment Co.'s case*[1] as well as in the case then under appeal). "There is no rule of law that the territorial limits of a subordinate Legislature define the possible scope of its legislative enactments or mark the field open to its vision. The ambit of the powers possessed by a subordinate Legislature depends upon the proper construction of the statute conferring those powers. No doubt the enabling statute has to be read against the background that only a defined territory has been committed to the charge of the Legislature. Concern by a subordinate Legislature with affairs or persons outside its own territory may therefore suggest a query whether the Legislature is in truth minding its own business. It does not compel the conclusion that it is not. The enabling statute has to be fairly construed."

Their Lordships brushed aside section 99 of the Constitution Act, which this Court interpreted as conferring power of extra-territorial legislation in income-tax matters as of :

"no help one way or another in determining the authorised area of taxes on income,"

while recognising that there may be some laws having an extra-territorial operation validly made by the Indian Legislature pursuant to that section. They found the key to the solution of the problem in the true construction of the expression "taxes on income" in item 54 of List I of the Seventh Schedule to that Act in the light of the principle recognised in *Croft* v. *Dunphy*[3] that :

1. (1944) 1 M.L.J. 477 : (1944) F.C.R. 229 : L.R. 75 I.A. 86 : 1948 F.L.J. 32 (P.C.). 1944 F.L.J. 131.
2. (1948) 2 M.L.J. 62 : (1948) F.C.R. 1 :
3. (1933) A.C. 156 at 165.

"Where Parliament has conferred a power to legislate on a particular topic it is permissible and important in determining the scope and meaning of the power to have regard to what is ordinarily treated as embraced within that topic in the legislative practice of the United Kingdom."

Finding that the general conception as to the scope of income-tax legislation in England had been that a person could be charged to income-tax in respect of his foreign income if "a sufficient territorial connection" existed between the person sought to be charged and the country seeking to tax him, their Lordships laid down that the validity of such legislation in India depended on :

"the sufficiency for the purpose for which it is used of the territorial connection set forth in the impugned portion of the statutory test."

Applying the principle to the case before them, which related to a company, their Lordships held that the "statutory test" set forth in the impugned provision, namely, the derivation from British India of the major part of its income, [section 4-A (*c*)] was a territorial connection :

"at least as solid as the connection given by the place of central control."

and was therefore sufficient to justify the company being treated as liable to British Indian taxation even in respect of its foreign profits.

In view of this important pronouncement it seems no longer useful, in judging the validity of an Indian Income-tax law having elements of extra-territoriality, to enquire what are the limitations, according to international law based on the comity of nations, on the power of a subordinate Legislature or whether the Indian Legislature has full power under its constitution to make laws having extra-territorial operation. The question reduces itself simply to this : Is the territorial connection relied on in the impugned provision as justifying its extra-territorial operation sufficient for the purpose for which it is used ? The only territorial connection set forth in the impugned portion of section 42 (1) is the bringing of the borrowed money into British India and the purpose for which it is used is the taxation of the interest received abroad by the non-resident lender. To my mind, there is no relevant and sufficient nexus between bringing the borrowed money into British India and the receipt abroad of the interest sought to be taxed, for the payment of the interest would not ordinarily be dependent on the earning of profits by the utilisation of the money in British India. The tax is laid upon income which has no necessary relation with the territorial connection set forth in the impugned provision. If I may repeat an illustration which I put during argument, a financier in London lends money at interest which the borrower brings into British India and spends on the race course. If the impugned provision is upheld as valid, he would be liable to contribute to the Indian Exchequer tax on the interest received by him in London. This may be an extreme case but it serves to illustrate the illusory character of the territorial connection on the strength of which the impugned provision seeks to bring into charge the income received abroad by a non-resident foreigner.

The learned Advocate-General suggested that the words "money lent at interest and brought into British India" might be construed as referring not to two independent and unconnected acts—lending abroad and bringing into British India—but to parts of one and the same transaction the lender and the borrower both agreeing that the money should be invested in British India though ostensibly lent abroad. It was said that the object underlying the provision was to prevent evasion of tax under colour of lending money and receiving interest outside British India, though in substance the money is lent and the interest arises in British India. That may be so, but the words used are far too wide and, in my opinion, stretch the section beyond the legitimate ambit of the powers of legislation in regard to "taxes on income" granted to the Indian Legislature by the British Parliament as those powers have been authoritatively explained by their Lordships of the Judicial Committee in *Wallace Brothers & Co.'s case.*[1]

1. (1948) 2 M.L.J. 62 : (1948) F.C.R. 1 : L.R. 75 I.A. 86 : 1948 F.L.J. 32 (P.C.).

Our attention was drawn to the observations in *Raleigh Investment Co.'s case*[1] already referred to, where this Court quoted with apparent approval certain passages from judgments of the Australian High Court which would seem to suggest that, if there is any territorial connection, the State has the power to make a law, however extra-territorial its operation, the degree of such connection being a matter affecting the policy and not the validity of the law. It appears to have been recognised even in those cases that the connection must be real and relevant. It is, however, unnecessary to enter upon a detailed discussion of those cases as the decision referred to above clearly indicates the principles which should guide us in the determination of questions such as the one now before us.

I am therefore of opinion that, judged by the test indicated by their Lordships, the impugned provision is *ultra vires* the Indian Legislature, and the Durbar is in consequence not chargeable to tax in respect of the sum of Rs. 2,59,726. I would accordingly allow the appeal in regard to this sum and answer question No. 1 in the negative. On the other questions I substantially concur in the judgment of my Lord the Chief Justice.

MEHAR CHAND MAHAJAN, J.—This is an appeal, on a certificate granted by the High Court of Bombay under section 205 of the Constitution Act of 1935, from a judgment of that Court answering in favour of the respondent, the Commissioner of Income-tax, Bombay, certain questions of law referred to the High Court by him.

The constitutional question is in issue in one of the six questions answered by the High Court. Leave of the Court under section 205 (2) of the Government of India Act, 1935, was asked and granted for an appeal on other questions as well in view of their general importance, and we heard arguments on all the points that were originally referred to the High Court by the Commissioner of Income-tax.

All the questions in issue concern the liability of the Gwalior Durbar to tax. The Durbar admittedly did money-lending business and thus became chargeable to tax in India, in view of the provisions of the Government Trading Taxation Act, III of 1926, but subject to the limitations contained therein. Section 2 of that Act provides :

"2. (1) Where a trade or business of any kind is carried on by or on behalf of the Government of any part of His Majesty's Dominions, exclusive of British India, that Government shall, in respect of the trade or business and of all operations connected therewith, all property occupied in British India and all goods owned in British India for the purposes thereof, and all income arising in connection therewith, be liable—

(*a*) to taxation under the Indian Income-tax Act, 1922, in the same manner and to the same extent as in the like case a company would be liable,

(*b*) to all other taxation for the time being in force in British India in the same manner as in the like case any other person would be liable.

(2) For the purposes of the levy and collection of income-tax under the Indian Income-tax Act, 1922, in accordance with the provisions of sub-section (1), any Government to which that sub-section applies shall be deemed to be a company within the meaning of that Act, and the provisions of that Act shall apply accordingly."

It was not denied that the Durbar as an entity is within the purview of this Act. It was however contended that the scope of the section is limited to income actually arising in British India, and not to income which, under the Indian Income-tax Act, 1922, or by its amendment in 1939, is deemed to arise or accrue in British India. The validity of the amendment in the Income-tax Act bringing within the scope of the charging section interest earned out of money lent outside but brought into British India was questioned on the ground of its being extra-territorial in character.

Sections 4 (1) and 42 (1) of the Indian Income-tax Act, 1922, as these stood in 1926, read as follows :

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2. (1944) 1 M.L.J. 477 : (1944) F.C.R. 229 : 1944 F.L.J. 131.

'4 (1). Save as hereinafter provided, this Act shall apply to all income, profits or gains, as described or comprised in section 6, from whatever source derived, accruing, or arising, or received in British India, or deemed under the provisions of this Act to accrue, or arise, or to be received in British India."

" 42 (1). In the case of any person residing out of British India, all profits or gains accruing or arising, to such person, whether directly or indirectly, through or from any business connection or property in British India, shall be deemed to be income accruing or arising within British India, and shall be chargeable to income-tax in the name of the agent of any such person and such agent shall be deemed to be, for all the purposes of this Act, the assessee in respect of such income-tax.

Provided that any arrears of tax may be recovered also in accordance with the provisions of this Act from any assets of the non-resident person which are, or may at any time come, within British India."

Income deemed to arise in British India, though not actually arising, was chargeable to a certain extent under the Act. By the amendment of section 42 in the year 1939, the scope of the section was enlarged, and in that year, the amended section was in these terms :

" 42 (1). All income, profits or gains accruing or arising, whether directly or indirectly, through or from any business connection in British India, or through or from any asset or source of income in British India, or through or from any money lent at interest and brought into British India in cash or in kind, shall be deemed to be income accruing or arising within British India and where the person entitled to the income, profits or gains is not resident in British India, shall be chargeable to income-tax either in his name or in the name of his agent, and in the latter case such agent shall be deemed to be, for all the purposes of this Act, the assessee in respect of such income-tax . . . ."

Regarding the last part of the section it was said that the Indian Legislature could not legislate about the income of a foreign government arising in a foreign country, and though it has sovereign powers, it can only exercise these powers within the field open to its vision under the provisions of sections 99 and 100 of the Constitution Act.

The material facts relevant to Gwalior Durbar's liability to tax in British India, which raise the constitutional question, may best be left for consideration at a later stage, so that the question of the scope and *vires* of the section can be examined detached from the facts of the case.

By the comity of nations, sovereign rulers of States are not subject to the municipal laws of any particular country, but, by Act III of 1926, His Majesty's Dominions and territories under His Majesty's protection were made subject to payment of income-tax under certain conditions and limitations. The charging section of the Act places trading Dominions and Indian States doing trade on the same footing as companies. The extent of chargeability is the same as that of a company. For levy and collection of tax, they are deemed to be a company. In other words the effect of the section is to enlarge to a limited extent the scope of the definition of ' company ' given in the Indian Income-tax Act, and to include within its ambit Governments of Indian States and other Dominions carrying on business or trade. The effect of the section is not to add to the categories of persons liable to tax under section 4 of the Income-tax Act, but to include within one of those categories trading States and Dominion Governments carrying on trade. If this is the correct reading of the section, then the contention of the learned counsel for the Durbar that income deemed to arise in British India is outside the charging section cannot be sustained, because of the unambiguous language employed in clause (*a*) of section 2 of Act III of 1926. The Government of a State or a Dominion when trading, has the status of a company and can be taxed in like manner and to the like extent. A company can be taxed for income which is deemed to arise in British India. So can a foreign Government carrying on trade within India or elsewhere. The decisions of their Lordships of the Privy Council in *Patiala State Bank* v. *The Commissioner of Income-tax, Bombay*[1], has settled the point that section 2 of the Government Trading Taxation Act, 1926, is not confined in its operation to trade or business carried on in British India, and that, if any Indian State carries on a banking business, the income, profits and gains of that business which accrue,

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1. (1943) 2 M.L.J. 565 : L.R. 70 I.A. 202 : 11 I.T.R. 617 : 1944 F.L.J. 163 (P.C.).

arise or are received in British India would be liable to taxation under the Income-tax Act, even though the head office and all the branches of that Bank are situated in the State and banking business is not carried on in British India. The result of this decision is that the location of trade is not material, so far as the charging section of Act III of 1926 is concerned. It was not disputed that the income sought to be taxed need not always actually arise in British India, to make it liable to tax under the Indian Income-tax Act. It was however urged that, though in sections 4 and 42 of the Income-tax Act of 1922 express reference was made to income " deemed to accrue or arise," in section 2 of Act III of 1926 no mention was made of such income ; on the other hand, the scope of the section was limited to income actually arising. This argument would have force but for the language used in clause (*a*) of section 2 of the Act. The extent of the liability of the Government is the same as that of a company, and, if a company is liable to tax in respect of its artificial income, so would the Government of a State be liable when carrying on any business or trade.

The question of the validity of the impugned part of section 42 may now be considered. The approach to the decision of a question like this has been indicated by their Lordships of the Privy Council in *Wallace Brothers and Co., Ltd.* v. *The Commissioner of Income-tax, Bombay City and Bombay Suburban District*[1], in the following terms :

"There is no rule of law that the territorial limits of a subordinate Legislature define the possible scope of its legislative enactments or mark the field open to its vision. The ambit of the powers possessed by a subordinate Legislature depends upon the proper construction of the statute conferring those powers. No doubt the enabling statute has to be read against the background that only a defined territory has been committed to the charge of the Legislature. Concern by a subordinate Legislature with affairs or persons outside its own territory may therefore suggest a query whether the Legislature is in truth minding its own business. It does not compel the conclusion that it is not. The enabling statute has to be fairly construed. The relevant power (sections 99 (1) and 100 of the Government of India Act, 1935) is a power to make laws for the whole or part of British India or any Federated State with respect to " taxes on income other than agricultural income." The power to tax agricultural income is given to the Provincial Legislatures and the exception throws no light on the construction of the phrase " taxes on income." None of the other provisions of the Act affords any guidance as to the income or persons who may be subjected to tax. Only sub-section (2) of section 99 need be particularly referred to. That sub-section provides that " without prejudice to the generality of the powers conferred by the preceding sub-section no Federal Law shall, on the ground that it would have an extra-territorial operation, be invalid so far as it applied to " certain persons and things. In their Lordships' view this sub-section does no more than assume that there may be some laws having an extra-territorial operation validly made pursuant to sub-section (1). It is no help one way or another in determining the authorized area of taxes on income . . . . ."

"The resulting general conception as to the scope of income-tax is that given a sufficient territorial connection between the persons sought to be charged and the country seeking to tax him, income-tax may properly extend to that person in respect of his foreign income."

" In their Lordships' view that general conception finds a place in the phrase " taxes on income " as used in the Government of India Act, 1935. That conclusion marches with the construction which their Lordships would, without the aid of a consideration of the British legislation, have placed on the Government of India Act, 1935."

" The principle—sufficient territorial connection—not the rule giving effect to that principle—residence—is implicit in the power conferred by the Government of India Act, 1935."

" The result is that the validity of the legislation in question depends on the sufficiency for the purpose for which it is used of the territorial connection set forth in the impugned portion of the statutory test."

The rule as to territorial connection of the foreigner with the country seeking to tax him was laid down by Dixon, J., in *Wanganui Rangitikai Electric Power Board* v. *Australian Mutual Provident Society*[2], in the following terms :

" So long as the statute selected some fact or circumstances which provided some relation or connection with New South Wales and adopted this as the ground of its interference, the validity of an enactment would not be open to challenge." Rich, J., in *Broken Hill South case*[3], observed: "I do not deny that once any connection with New South Wales appears, the Legislature of that State may

1. (1948) 2 M.L.J. 62 : (1948) F.C.R. 1 : L.R. 75 I.A. 86 : 1948 F.L.J. 32 (P.C.).
2. (1944) 12 I.T.R. 277.
3. 56 Com.L.R. 337

make that connection the occasion or subject of the imposition of a liability. But the connection with New South Wales must be a real one and the liability sought to be imposed must be pertinent to that connection."

Dixon, J., in the case cited above further observed :

"If a connection exists, it is for the Legislature to decide how far it should go in the exercise of its powers. Courts must be exact in distinguishing between ascertaining that the circumstances over which the power extends exist and examining the mode in which the power has been exercised. No doubt there must be some relevance to the circumstances in the exercise of the power. But it is of no importance upon the question of validity that the liability imposed is, or may be, altogether disproportionate to the territorial connection.

If some connection exists, the Legislature is not compelled to measure the taxation by the degree of benefit received in particular cases by the taxation. This affects the policy and not the validity of the legislation."

The validity of the argument of Sir Jamshedji Kanga that the impugned part of section 42 makes liable to tax in British India foreign money paid in a foreign country to a foreigner towards payment of interest on a debt which was borrowed in foreign territory and is therefore *ultra vires* of the powers of the Indian Legislature may now be examined. The section read as a whole brings within the ambit of the charging section all income accruing or arising, whether directly or indirectly, in the following cases ; (*a*) when arising through or from any business connection in British India, (*b*) when arising through or from any property in British India, (*c*) when arising through or from any asset or source of income in British India, and (*d*) when arising from any money lent at interest and brought into British India in cash or in kind. It is the business connection in the first clause, the situation of property in British India and the existence of any asset or source of income in British India in the second and third clauses, and the bringing into British India of lent money at interest in the last clause, that is the basis of liability. The territorial connection with British India of the foreigner is presumably furnished by the different links that connect him with this country, and justify the legislation. A foreigner cannot escape liability to tax by resorting to a device or subterfuge, when, in effect, he is deriving income from a field of activity that is in India, or, where a contract of loan ostensibly made outside, is in effect made in India. By changing the venue of the contracted loan, the jurisdiction of the Indian Legislature cannot be avoided, when the real purpose is to lend money in India. The words :

"money lent at interest and brought into British India in cash or in kind"

read as a whole lead me to think that the Legislature thought that in such a situation, the loan must be treated as having been advanced in British India (the lending outside a mere formality) when actually the money had to be brought out here. To all intents and purposes, the advance is in British India. When the field in the view of the lender for his money-lending operation is India, then his *modus operandi* cannot affect the territorial connection of these operations.

Once the clause is interpreted in the manner above-mentioned, then it cannot be seriously contended that there is no sufficient territorial connection to attract the jurisdiction of the Indian Legislature to make a law for taxing interest payable on such a loan, and the argument as to *ultra vires* loses all force. It cannot be denied that when money is actually lent in India, the Indian legislature will have jurisdiction to tax interest payable on the loan. The situation is not very different when the money lent is brought into India.

It was urged that the lent money may not be used in British India, when it is brought there. It may be lost on the race-course. It may be stolen, or it may be thrown away and may not produce any income. It is said that in these situations when the lender has lost all control over, and his ownership in the money lent outside British India, no real connection could be held to exist between the lender and the country where the money is brought, particularly, when the interest on that money is payable in a foreign country. Here there is not necessarily any such nexus as to justify legislation taxing such interest. As above stated, the

assumption underlying the legislation is that when money is lent at interest and is brought into British India, it is done under an arrangement and with the object of earning profits in British India. It may be otherwise in certain cases. It is possible that the borrower, after raising the loan, may change his mind, and, after bringing the money in India, may not use it for earning a profit. Such cases are conceivable, but all legislation has to be construed in a reasonable manner and considered as dealing with a normal man and a normal situation. Normally a person who raises money at interest outside British India (when he intends to bring) and brings it in British India, it may be presumed that he does so with the object of earning profit and paying interest out of that profit. Some exceptional cases may not fall within the presumption on the basis of which the impugned clause of section 42 has been enacted. But that fact would not make the clause *ultra vires*. In my view, money lent outside British India and brought in India is almost on par with the existence of an asset in British India, or with the clause regarding business connection of a non-resident in British India. Every Legislature has power to legislate and enact laws in such a way that its revenue laws are not defeated by a subterfuge, and the impugned words in the section embody a legislation of that kind. I cannot subscribe to the view that the nexus conferring jurisdiction to legislate in the case in question, is illusory, and that there is no connection of this country with the interest payable to a foreigner outside India.

Having examined the arguments on the question of *vires*, without reference to the facts of this case, it is now convenient to examine the question referred to the High Court on the facts of this particular case. A sum of Rs. 2,59,726 is involved in this question. The facts are :

> "A company styled the Provident Investment Co., Ltd., was incorporated in British India in 1927 with headquarters in Bombay, with 4966 shares of Rs. 1,000 each. It is practically a one-man company as all the shares are either owned by the Gwalior Durbar or its nominees. In 1933 the Durbar advanced to this Company a loan of rupees fifty lakhs on the security of the first mortgage debentures of an equal nominal value. The loan was advanced at Gwalior. The interest was payable there and the debentures also were deposited there. But admittedly the Company brought the borrowed money to British India and utilised it for the purposes of its business in British India. The interest on the loan received by the Durbar for the year amounted to Rs. 2,59,726. The interest was receivable and actually received at Gwalior."

On the above statement of facts, it is difficult to dissociate the loan advanced at Gwalior from the security of debentures on property that exists in British India. The loan was a secured loan, and the giving of security cannot be treated as a different transaction from the advancing of the loan itself. The transaction in substance was a transaction of loan in British India.

In the High Court, reliance was placed for the assessability of this income on the decision of their Lordships of the Privy Council in *Patiala State Bank* v. *The Commissioner of Income-tax, Bombay*[1]. That decision however only decided that the provisions of the section of the Government Trading Taxation Act, III of 1926, were attracted to income earned in British India, even though the trading operations were conducted outside British India. That decision does not meet the whole of the argument of Sir Jamshedji Kanga in this case.

The learned Advocate-General attempted to support the answer given by the High Court on question No. 1 on two other grounds. He urged that the loan of fifty lakhs advanced to the Provident Investment Company was connected with the money-lending operations of the Durbar, and that it directly fell within the purview of Act VIII of 1926. The Assistant Commissioner of Income-tax, in deciding the appeal, did record a finding to that effect. But the learned Commissioner, in his statement of the case to the High Court, did not advert to that finding and agreed that the question as framed by the appellant, be referred to the High Court. In my view, no question of law could arise or could have been referred to the High Court on the finding of fact that the loan was a part of the money-lending operations of the Durbar and the income arose by reason of the

1. (1943) 2 M.L.J. 565 : L.R. 70 I.A. 202 : 11 I.T.R. 617 : 1944 F.L.J. 163 (P.C.).

Durbar's business connection in British India. The High Court could have declined to answer the question of law referred to it on the ground that, on the finding of fact recorded by the Assistant Commissioner of Income-tax, no question of law arose. It seems to me that the statement of facts on which the question was framed by the Commissioner is not open to question at this stage and as remarked by Sir Jamshedji Kanga, this argument amounts to laying down a thin ice for the Court for easy skating. The objection raised by the learned counsel that the line of argument adopted by the learned Advocate-General is not open in this Court has force. The proper stage to raise the point was when the Commissioner of Income-tax called upon the parties to raise objections to the statement of facts drawn up by him or at the stage of appeal in the High Court. I had the advantage of perusing the judgment just delivered by my brother, Sir Fazl Ali, and though I have considerable hesitation in disagreeing with anything that he says, I regret I have not been able to subscribe to his line of thought on this aspect of the case. My learned brother, Patanjali Sastri, gave me the privilege of perusing his judgment which has just been delivered. It took me considerable time to make up my mind before I decided to express a different opinion than his. It is unfortunate that on the first question I have to disagree with him. For the reasons given above, I consider that the High Court returned a correct answer to the first question.

The second question referred to the High Court was whether the sum of Rs. 3,57,112, received by the Durbar out of the managing-agency commission paid by the Tata Iron and Steel Co., Ltd., to Tata Sons, Ltd., is assessable under the provisions of the Indian Income-tax Act read with the Government Trading Taxation Act, III of 1926. This question arose on the following statement of facts.

"The late Mr. F. E. Dinshaw, who was the Agent of the Durbar for its money lending operations, entered into an agreement with Tata Iron and Steel Co., Ltd., to finance the Company, at a time when it was badly in need of funds, up to a total of one crore rupees, on certain terms and conditions referred to in the agreement. The interest was $1\frac{1}{2}$ per cent. over the Imperial Bank of India rate for the time being but with a minimum of $6\frac{1}{2}$ per cent. per annum. In addition to the interest, it was provided that Messrs. Tata & Sons, Ltd., who were the agents of the Tata Iron and Steel Co., Ltd., should give to Mr. Dinshaw a share of six annas in the rupee on the commission and other remuneration which, as agents, they were entitled to recover from the company. It was specifically provided that *such share should continue throughout the unexpired period of the agency, whether any monies were due to the lender by the Company or not.* Mr. Dinshaw used the Durbar money for making this loan and; out of the six anna share of the commission received by him, passed a four anna share to the Durbar and kept two-anna share to himself. When the loan came to the notice of the Council of Regency, they objected to it on the ground that it was against the provisions in the will of the late Maharaja. Luckily, the Tata Iron and Steel Co., Ltd., itself wanted to pay off the loan at that time, and Mr. Dinshaw agreed to the termination of the loan, provided, as consideration therefor, the Tata Sons, Ltd., agreed to give four-anna share in the commission as managing agents of the Tata Iron & Steel Co., Ltd. Accordingly, the loan was paid off. Fresh agreements were entered into on the 29th July, 1927, according to which the share in the commission as managing agents, payable by Tata Sons, Ltd., was reduced to four annas in the rupee. The amount payable to the Durbar was correspondingly reduced from four to two annas. The Durbar continued to receive two-anna share of the commission from Mr. Dinshaw, and, during the assessment year, the sum received by the Durbar according to the two-anna share amounted to Rs. 3,57,112."

On the above statement of facts, it is quite clear that it was by reason of the payment of the loan to Tatas out of Gwalior Durbar's money, by Mr. Dinshaw that the Durbar became not only entitled to interest on the principal sum advanced but also to commission, and this commission was to continue even if the loan was discharged. Whether Mr. Dinshaw disclosed the name of his principal or not, the fact remains that he, in the capacity of an agent, entered into this transaction, and it was on account of this transaction that he earned the commission from the Tatas out of which he gave a four-anna share to his principal. Even if he was acting against the directions of the principal in making this loan, he would still be liable under the provisions of section 216 of the Indian Contract Act, to pay to the principal all the profits that he would earn on the loan transaction, whether in the nature of interest or commission. As above stated, the discharge of the loan did not in any way affect

the earning of the commission, because, under the original agreement under which the loan was advanced this payment was to continue even in the event of the loan being repaid. The subsequent agreement entered into by Mr. Dinshaw with the Tatas after the repayment of the loan, was only a modification of the original one, and did not discharge it. The effect of the subsequent agreement was only to reduce the amount of the commission that Dinshaw was entitled to or which he had to pay to the Durbar. This was not in the nature of an agreement arrived at independently of the terms of the original document and completely dissociated from it. It was not in the nature of a new transaction or deal of Mr. Dinshaw with the Tatas. Mr. Dinshaw entered into this agreement in the same capacity in which he entered into the original one. His position was that of an agent of the Durbar for its financial operations in its inception and that relationship was not in any way altered or changed when the subsequent agreement was made. The result therefore is that the earning of the commission by the Durbar was not in any way dissociated from or independent of its money-lending operations. The agent who paid this commission to the Durbar, was employed by it for those operations, and any commission earned subsequent to the termination of the agreement still remained the income earned out of those operations and cannot be said to be income earned from any other source. In these circumstances, I am of the opinion that the High Court returned a correct answer to question No. 2.

It was urged before this Court that when the loan was repaid, the relationship of borrower and lender between the Tatas and Mr. Dinshaw as an agent for an undisclosed principal ceased and what the agent got later from the Tatas by way of commission was income earned independently of his connection with the Durbar as its agent for financial or money-lending operations in India. It was suggested that this commission may have been earned by the agent on account of his own misconduct or misbehaviour in that capacity, but it could not be said to be part of the money-lending operations of the Durbar conducted by him This argument seems to be devoid of force, in view of the clear terms of the original agreement, under which commission was payable even if the loan was terminated. The period during which the commission was payable was the period of the managing-agency which the Tata Sons, Ltd., had obtained from Tata Iron and Steel Co., Ltd. The commission was payable in India, and the income thus arose in this country and could be taxed, because it was part and parcel of the money-lending operations of the Durbar. It may be pointed out that the Durbar has been taking up different positions in respect of this matter on different occasions. Before the Commissioner of Income-tax, it took up the attitude that the commission was payable by Tata Sons, Ltd., to Mr. Dinshaw, because he agreed to cancel the loan transaction. Before the High Court, it was urged that by making the advance, Mr. Dinshaw committed a breach of duty as agent of the Durbar and that when the loan was terminated the payment of two-anna commission to the Durbar was payment in the nature of compensation or damages for breach of duty as agent. This suggestion was rightly described as 'fantastic' by Chagla, J., as the agreement on the record did not support it. The facts of the case show that Mr.Dinshaw in the capacity of an agent, advanced the Durbar's money to Tata Sons, Ltd. on certain terms, and one of the terms of the advance was the payment of the commission by them to him, part of which he, in his own turn, agreed to pay to the Durbar. So far as the Durbar was concerned, over and above the interest that it earned on its loan, by reason of Dinshaw's deal with Tatas, it also became entitled to receive a part of the agency commission. But it became entitled to it, because of the use of the Durbar's money in the money-lending transaction. Independently of the loan transaction, the Durbar would have been entitled neither to the interest nor to the commission. That being so, there is no substance in the contention raised on behalf of the Durbar that the income arising or accruing to it by way of the commission above-mentioned, is not connected with its money-lending operations. It has been rightly held by the High Court to be within the clear provisions of the Government Trading Taxation Act, III of 1926.

The third, fourth and fifth questions were treated on the same footing by the Commissioner of Income-tax, and by the High Court. I however consider that question No. 3 can more appositely be dealt with independently of questions 4 and 5.

Question 3 is in these terms :

"Whether the income derived from the property situated in Bombay and other places in British India purchased by the Durbar at execution sales in enforcement of mortgage decrees against mortgagors who had failed to pay the amounts advanced to them in course of the money lending business of the Durbar, is income arising in connection with the said business within the meaning of section 2 of the Government Trading Taxation Act and whether the income arising from such property is liable to assessment under the provisions of the Indian Income-tax Act read with the Government Trading Taxation Act, III of 1926."

The facts on which this question has been framed are these :

"During the course of the Durbar's money-lending transactions in Bombay and elsewhere, some of the mortgagors made default in payment of the principal and interest and the Durbar filed suits to enforce the mortgages and obtained decrees for the sale of the mortgaged properties. The mortgaged properties which are all in British India were put up for sale in execution of these decrees and were purchased in Court auctions by the Durbar and the Durbar still continues to own these properties."

On the facts stated, it is difficult to reach the conclusion arrived at by the High Court to the effect that the case is covered by the observations made by Sir John Beaumont, in the *Patiala State Bank case*[1], with reference to the Mussoorie properties held by that Bank. These observations were to the following effect :

"Whether the property situate at Mussoorie taken over by the Patiala State Bank from its debtor, a subject of the Patiala State, in part satisfaction of a loan advanced to him, is property occupied in British India for the purposes of its trade or business in British India within the meaning of section 2 of the Government Trading Taxation Act and whether all income arising from such property is liable to assessment by virtue of the provisions of the said Act? Substantially I think the answer to this question must be in the affirmative, but I think that the property, which has been taken over in respect of a bad debt of the banking business, is not property occupied in British India for the purposes of the business, but the income derived from such property is income arising in connection with such business and in that sense falls to be taxed."

These observations may be apposite in the case of a banking institution which uses all its income in connection with its banking business, but they have no application to the case of a Dominion Government or of the Government of a State whose business is not banking, though one of its activities may be money-lending. It was a question of fact that had to be determined in this case whether the properties after they were purchased, or their income was still a part of the assets used by the Durbar in the money-lending business. If it was found that the income of these properties was still being used in money-lending operations or any operations connected with the money-lending business, the answer to the question would obviously be against the Durbar. But, in the absence of that fiinding, and in the absence of any statement by the Commissioner to that effect in his reference order, it is difficult to presume that these properties are still part of the assets of the Durbar employed in money-lending operations or that their income has ever been used to any such operations. Chagla, J., in dealing with this question, made the following observation :

"Ordinarily to my mind these properties would continue to remain in the money-lending business as assets of that business standing to the credit of that business. It was for the assessee to show and to establish that he did something whereby he withdrew these properties from the money-lending business and constituted them an independent investment. There is nothing whatever on the record to establish that position."

With great respect to the learned Judge, it has to be observed that no such presumption can be raised under any of the provisions of law against the assessee. It may be that in determining the question of fact, under certain circumstances, an inference would be drawn under the provisions of section 114 of the Indian Evidence Act one way or the other. But no onus can be said to rest on the assessee to prove that he did some unequivocal act by which he withdrew these properties from his money-lending business and constituted them an independent

1. (1943) 2 M.L.J. 65 : L.R. 70 I.A. 202 : 11 I.T.R. 617 : 1944 F.L. 163 (P.C.).

investment. The decision of the Bombay High Court in *Himatlal Motilal and Ramanlal Lallubhai* v. *The Commissioner of Income-tax, Bombay*[1] is authority for the proposition that where in part satisfaction of a mortgage debt, the mortgagee purchases mortgage-property and sells it later on, he cannot claim the loss as an allowable business loss in the loan transaction. It was held that the loss was loss of capital invested in the purchase of the property. In that case, it was observed that once the properties were purchased by the money-lender, they became his absolute ownership. Any subsequent loss arising on re-sale of these properties was loss on capital invested in purchase of property and not invested in the money-lending business. With great respect, I am in agreement with the observations stated above. Mere ownership of properties even if purchased from a source which originally was employed in the money-lending business, does not automatically make such properties part of such business, in the absence of any finding that the income of these properties was being used in that business or that those properties were subsequently treated as stock-in-trade of that business except perhaps in the case of banking institutions. In this case, it was asserted before the income-tax authorities, that the properties were purchased in lieu of the debt, between the years 1924-35 and since their acquisition, the money-lending business ceased, that no new loan was advanced after the year 1930 and that the income was not used for money-lending purposes. This assertion of fact was not controverted by the income-tax authorities. In such a situation, it must be accepted as correct. That being so, no presumption could be raised that these properties or their income was part of the money-lending operations of the Durbar.

I have already said that the observations made in the *Patiala State Bank case*[2] lend no support to the proposition enunciated by the High Court on this question. Reference was also made to the case of *S.A.S.S. Chellappa Chettiar* v. *The Commissioner of Income-tax, Madras*[3]. In that case, the assessee carried on business as a money-lender in India, Burma and the Federated Malay States. Owing to certain of his constituents in Burma being unable to meet their obligations, the assessee received in re-payment of loans made by him to them, agricultural lands in Burma. The money which had been lent to those constituents had originally been borrowed by the assessee for the purpose of his money-lending business. The assessee admittedly carried on only one business for the year of assessment. He received the said lands in re-payment of the loans made by him not of his own volition but of necessity, there being no other method of getting payment, and therefore those lands came into his possession directly in the course of his money-lending business and represented the capital originally borrowed. The assessee did not retain and cultivate those lands of his own inclination, but, owing to the fall in the price of agricultural lands, he was in possession and preserved his capital in the only way open to him pending a return of agricultural economic conditions which would make it possible for him to realise, if not all, at least some of the capital originally lent to the borrowers, the previous owners of the said lands. On these facts, it was held that he was entitled to a deduction of the interest paid by him on so much of the capital borrowed by him for business purposes as was represented by the agricultural lands, under section 10 (2) (*iii*) of the Indian Income-tax Act, 1922.

The facts of this case bear no analogy to the facts of the present case. My brother Patanjali Sastri, who in that case represented the Commissioner of Income-tax, argued therein that the Commissioner did not question the proposition that the lands formed the assets of the business. In the present case, that is a matter that has to be determined as a question of fact and not as a matter of law. On the question of fact, all that the Commissioner has stated is that the Durbar owns these properties. He has not proceeded further to say that the Durbar is still employing these properties as assets for its money-lending business. On this statement, in my opinion,

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1. (1932) 6 I.T.C. 159.
2. (1943) 2 M.L.J. 56 : L.R. 70 I.A. 202 : 11 I.T.R. 617 : 1944 F.L.J. 163.
3. (1937) 1 M.L.J. 351 : I.L.R. 1937 Mad. 734 (F.B.).

the High Court was not justified in answering the question framed, in favour of the Commissioner of Income-tax. Mere purchase of property out of the capital once employed in money-lending does not necessarily make that property part of the money-lending business of a person, without further proof of the treatment of that property as part of the business. The result therefore is that question 3 should be answered in favour of the Durbar, and the decision of the High Court on this point reversed.

Questions 4 and 5 are in these terms :—

> " (4) Whether the dividend of Rs. 1,88,030 received by the Durbar from Sir Shapurji Bharucha Mills, Ltd., is taxable in the circumstances of this case under the provisions of the Indian Income-tax Act read with the Government Trading Taxation Act (III of 1926)."
>
> " (5) Whether the dividend of Rs. 83,447 received by the Durbar from the C. P. Cement Co., Ltd., is taxable in the circumstances of this case under the provisions of the Indian Income-tax Act read with the Government Trading Taxation Act (III of 1926)."

The High Court held that the income derived from the dividends on these shares was income arising in connection with the money-lending business of the Durbar and, in that sense, falls to be taxed. The answer given by the High Court is supported by the findings of fact recorded by the Assistant Commissioner of Income-tax. Those are to the following effect :—

> " The Durbar was doing money-lending business in Bombay, and as such advanced money to the said companies. In course of time, they were financially involved and were unable to meet their liability. A scheme of reorganization was made, under which the Durbar give up a considerable portion of their claim and took shares for the balance thereof. The Durbar gave up nearly 75 lakhs in the case of Sir Shapurji Bharucha Mills, Ltd. and took 75,212 shares of the face value of Rs. 100, in satisfaction of the debt of Rs. 75,21,200. Similarly, owing to the failure of the Central Provinces Portland Cement Co., Ltd., the Durbar accepted preference shares in the new company named C.P. Cement Company, in satisfaction of the amount due on the security of the debentures held in the C.P. Portland Cement Co., Ltd."

Both the transactions, Mr. Dinshaw contends, amount to an investment of money in shares of the companies. The shares, in his opinion, should be treated as part of the investments of the Durbar, and when money lent was converted into shares in joint stock companies, it ceased to be part of the money-lending business. It is contended that the income from the original loan was income earned from business, but when shares were taken in satisfaction of the loan, the loan ceased to exist, and the shares became an investment of the Durbar on the same footing as any other investment. Hence, income arising from such investment should not be included for purposes of super-tax. From the record of this case, I find that this question was raised before the Assistant Commissioner of Income-tax during the assessment for the income-tax year 1936-37, and was decided against the Durbar. This decision was upheld by an order of the Commissioner of Income-tax passed on the 16th June, 1938. He too definitely held that dividends amounting to Rs. 4,91,104 received in respect of 75,212 shares in the Sir Shapurji Bharucha Mills, Ltd., and 4,553 preference shares in C.P. Cement Co. should be regarded as income from assets pertaining to the money-lending business, as they were taken up in lieu of money advanced in the course of that business. The position of such income and dividends has not changed since then. In view of the fact that this view was acquiesced in by the Durbar when the Assistant Commissioner sent the papers to the Commissioner for reference to the High Court, the Assistant Commissioner is justified in treating the total amount of dividends received not as income from investment but as income from business falling under Government Trading Taxation Act.

From the conduct of the Durbar, the Assistant Commissioner of Income-tax was entitled to draw the inference that it acquiesced in the finding which was to the effect that these shares and their income were still part of the stock-in-trade used by the Durbar in its money-lending operations. There is therefore material to justify the finding, and the High Court in answering the question, was bound by it. That being so, the income charged clearly fell within the provisions of the Government Trading Taxation Act, III of 1926. Sir Jamshedji Kanga, the learned counsel

for the Durbar, urged that the investment in these shares by the Durbar stood on the same footing as the immoveable properties purchased by it, and dealt with in question No. 3. But this contention is not tenable because the statement of facts in the two cases is not the same. In the case of immoveable properties the statement ends by saying that the Durbar owns them, while in the case of shares it proceeds further and says that the dividends on these shares are still used in Durbar's money-lending operations.

The only question that now remains to be dealt with is question No. 6, which has been framed as follows :—

"(6) Whether the Durbar is entitled under the provisions of the Income-tax Act, read with the Government Trading Taxation Act, III of 1926 to a refund under section 48 (1) or a set-off under section 18 (5) of the Income-tax Act of income-tax alleged to be deemed under section 49-B thereof to have been paid by it as a shareholder in respect of the dividend received by it during the previous year."

The facts as stated in the reference are :—

"The Durbar invested large sums in shares in various public companies besides the shares in the two companies referred to in questions Nos. 4 and 5. The dividends received during the year from these companies were Rs. 11,52,359. As these were treated to be income from invesments not coming within the scope of the Government Trading Taxation Act, the Income-tax Officer did not include these in the assessment. The Durbar however claimed that it was entitled to a set-off or refund of income-tax deemed under the provisions of section 49-B to have been paid by it."

Section 49-B as it stood in the year 1939 provides :—

"Where a shareholder has received a dividend from a company which has paid income-tax imposed in British India or elsewhere, he shall be deemed, in respect of such dividend, himself to have paid the income-tax (exclusive of super-tax) paid by the company on so much of the dividend as bears to the whole the same proportion as the amount of income on which the company has paid such income-tax bears to the whole income of the company."

This section in plain terms says that where a company has paid or distributed to a shareholder any dividends, then such shareholder shall be deemed in respect of such dividends himself to have paid income-tax at the rate applicable to the total income of the company for the financial year in which the dividend has been paid, credited or distributed. In other words, though the income-tax has been paid by the company, yet, artificially, by the operation of this section, this income-tax, to the extent that it relates to the dividend received by the shareholder, is considered to have been paid by such shareholder. This affords no assistance to the Durbar as regards its claims to refund. It substitutes the shareholder for the company in respect of income-tax paid by it on the dividends distributed. In order to entitle the Durbar to a refund of income-tax paid on such dividends, the case must fall within the ambit of section 48 of the Act, which provides :—

"If any individual, Hindu undivided family, company, local authority, firm or other association of persons, or any partner of a firm or member of an association, individually satisfied the Income-tax Officer or other authorities appointed by the Central Government in this behalf that the amount of tax paid by him or on his behalf or treated as paid on his behalf for any year exceeds the amount with which he is properly chargeable under this Act for that year, he shall be entitled to a refund of any such excess."

The learned Judges of the High Court, while dealing with this question, made reference to section 49-B as amended after the year 1939. The amended section provides that only a person specified in section 3 and who is a shareholder of a company assessed to income-tax in British India or elsewhere is entitled to the benefit of the section. On the language of the amended section it was held that the Durbar, though undoubtedly, a shareholder of a company assessed to tax, was not a person specified in section 3, and, therefore, was disentitled from claiming the refund. This view of the High Court cannot be sustained because the section as it stood before its amendment did not say that "a person specified in section 3 of the Act" alone was entitled to the benefit of refund. That section simply made reference to a shareholder who had received a dividend from a company. Such a shareholder was deemed in respect of dividends to have paid the income-tax himself. The error committed in the High Court decision however does not affect the merits of the decision in any manner because, as already stated, section 49-B is not decisive of

the point. No refund is permissible under the law unless the claim is brought under section 48 of the Act. That section as it stood in the year 1939, entitled certain persons mentioned therein to the benefit of refund. The question therefore for decision is whether the Gwalior Durbar as a " State " comes within the category of persons mentioned in section 48, *i. e.*, whether the Durbar is an individual, a company or local authority or a firm or other association of persons. The learned Judges of the High Court held that the Gwalior Durbar being a State, is outside the description of persons mentioned in the above section. This answer, in my opinion, is a correct one, and nothing that Sir Jamshedji Kanga said in his arguments justifies the taking of a different view. As I visualize the situation, it is this : The Gwalior Durbar enjoys a double status. It is the Government of a State and the ruler of the State represents it. As a Sovereign State, it is outside the Indian Income-tax Act. In that capacity, it is neither an individual nor a company, nor an association of persons. The ruler as an individual is not the State, though he represents it. If he in his individual capacity earns income in British India, he as such is within the ambit of the Act. But the Government of a Dominion or of an Indian State, if it earns income in India, is outside the contemplation of the Act. Such a Government cannot be described or styled as an individual. By reason of the Government Trading Taxation Act, III of 1926, such a Government in one capacity alone, *i.e.*, when trading, has been given the status of a company, for purposes of the Indian Income-tax Act. In the capacity which it has acquired by force of the statute, it comes within one of the categories of persons mentioned in section 48 of the Act. But in that capacity alone and within the limitations and conditions mentioned in the section, it is deemed to be a company. If any dividends were received in connection with trading operations carried on by the Durbar, then, undoubtedly it would be entitled to a refund of income-tax on these dividends. The dividends on shares of companies dealt with in questions 4 and 5 would fall in this class, and the Durbar would be entitled to refund in respect of them. But the dividends involved in question No. 6 are wholly independent of the trading operations of the Durbar. These represent the income earned out of investments of the Government of Gwalior in its capacity as a State and are not chargeable to tax under any of the provisions of the Act. In the limited status of a company, it cannot claim this refund, as it bears no relation to its money-lending operations. It was however urged by Sir Jamshedji Kanga that the State of Gwalior is an individual and falls within that word used in section 48 of the Indian Income-tax Act. It is difficult to hold that the Government of a State is an individual. The word ' individual ' conveys a single person, usually a man or woman. It may be that by fiction of law, certain artificial persons may be described as individuals, but the Government of a State, even though represented by the ruler for the time being, cannot appositely be described as an individual. It is certainly a corporation sole, but corporations have been separately mentioned in the section itself. Firms, companies, associations of persons, undivided families, are categories apart from one another stated in the section, and it could not be the intention of the Legislature to bring within the purview of the word ' individual ', corporations or corporations sole. Such an interpretation of the word ' individual ' would conflict with the language employed in the Government Trading Taxation Act. Therein the trading State was given the status of a company for income-tax purposes and the status of an individual for other taxes. There would have been no necessity to confer a new status on a person who already fell within one class of persons mentioned in the Income-tax Act. In common parlance, the Government of a country can hardly be described as an individual. In my opinion, therefore, the learned Judges of the High Court rightly held that the Gwalior Durbar in its status as the Government of a State, did not fall within the ambit of section 48 of the Income-tax Act and was not entitled to a refund.

It was however urged that even persons who are not chargeable to income-tax under section 4 of the Act can claim a refund under section 48. By way of illustration, it was urged that trustees of charitable institutions are not liable to

income-tax on the income of the charity; yet, they can claim a refund of income-tax under section 48 read with section 49-B. The analogy of persons whose income is exempt from the Indian Income-tax Act was also pressed in support of the argument. Reference was also made to the case of persons who received agricultural income, which was not taxable, and yet were entitled to claim refund on dividends paid to them on shares held by them in certain companies. In my opinion, the analogies mentioned above are not relevant to the decision of the question discussed above. The cases of charitable institutions, of agricultural income, of persons whose income is not liable to income-tax, stand on an entirely different footing. All of them fall within the category of persons mentioned in sections 4 and 48 of the Act. In their case, however, the Act allows certain exemptions. It is by force of the statute that those incomes are exempt from tax. It is not independently of the statute that they are so exempt. This is the distinction between the two cases, and shows the fallacy underlying the contention of the learned counsel. But for the exemptions given in the Act, all such persons would be within the category of persons mentioned in section 4 and would be chargeable to income-tax. As the Gwalior Durbar however falls outside the contemplation of the Act and the categories of persons mentioned in sections 4 and 48 of the Act, it cannot claim the benefit of refund of income-tax, on the dividends. It must therefore be held that the question was correctly answered by the High Court.

The result therefore is that this appeal fails except on one point, *i.e.*, question No. 3. My answer on that question is in favour of the appellant, while on the other questions the answer is the same as given by the High Court. To this limited extent the appeal is allowed.

MUKERJEA, J.—I agree with my Lord the Chief Justice that this appeal should be allowed in part, only to this extent, that our answer to question No. 3 formulated by the Income-tax Commissioner of Bombay should be given in the negative and in favour of the assessee, and that in respect to all the other points the judgment appealed against should stand confirmed.

As regards questions Nos. 2 to 6 the facts have been dealt with at great length by my Lord the Chief Justice in his judgment and as I substantially concur in the reasons given by him, there is nothing material which I can profitably add. I desire, however, to say a few words expressing my own views on the points raised in connection with question No. 1 which is by far the most important question in this case and upon which the views of all my learned brothers have not been altogether uniform.

The circumstances giving rise to question No. 1 are very short. The Gwalior Durbar had admittedly been doing money-lending business in British India on a fairly extensive scale. Sometime in 1927, a company known as Provident Investment Co., Ltd., was incorporated in British India with its headquarters in Bombay and almost all the shares of this company were held by the Gwalior Durbar or its nominees. In 1933, the Durbar advanced, at Gwalior, a loan of Rs. 50 lakhs to the said company on the security of its first mortgage debentures of the face value of the same amount. The debentures were deposited at Gwalior and interest on the loan was also payable at that place. The interest received by the Durbar from the said loan during the year 1938-39 amounted to Rs. 2,59,726. This interest, as said above, was paid at Gwalior which is outside British India but it was in respect of money lent at interest and brought into British India. The question is whether this sum of money earned by the Gwalior Durbar as interest on money lent could be assessed to income-tax, under the provisions of the Income-tax Act read with the Government Trading Taxation Act of 1926?

This question was answered by the Bombay High Court adversely to the contentions of the assessee and this money was held to be taxable in the hands of the Gwalior Durbar under the provisions of the Indian Income-tax Act which are attracted by section 2 of the Government Trading Taxation Act of 1926.

The propriety of this decision was vigorously challenged by Sir Jamshedji Kanga who appeared on behalf of the appellant, and he contended in the first place that as the sum of Rs. 50 lakhs was advanced by his client to the Provident Investment Co., Ltd., at Gwalior which is outside British India, and as the interest due on the same was also received at Gwalior, it was not income arising in British India and the provisions of the Government Trading Taxation Act would not be applied to a case like this. The contention is that the language of section 2 (1) of the Act confines it to income actually "arising" in British India and does not include an income which might be "deemed to arise" in British India within the extended meaning of that expression given by the income-tax Act. I do not think that this contention can be accepted as sound. Section 2 of the Government Trading Taxation Act nowhere speaks of income arising in British India. The language of clause (*a*) of sub-section (1) of section 2 shows that no matter where the Dominion Government carries on its trade or business or earns profits thereof, its liability to assessment to income-tax in respect of such income would be the same as that of a company under the Income-tax Act doing business and earning profits in an identical manner. This is clear from the words "in the same manner and to the same extent" occurring in clause (*a*) and I am unable to agree with Sir Jamshedji Kanga that these expressions refer only to the machinery employed for purposes of assessment or to the rates at which a company could be taxed. In respect to matters coming under the Government Trading Taxation Act, a Dominion Government occupies the same position as a company and it is liable to be taxed in the same manner as a company is liable under the Income-tax Act.

In the case before us, the business in respect to the profits of which the Gwalior Durbar has been assessed to income-tax, is money-lending business, and it was undoubtedly in connection with this business that a sum of Rs. 50 lakhs was advanced to the Provident Investment Co., Ltd. It is true that the money was advanced at Gwalior and the interest payable on it was also received at that place but nevertheless it would come within the purview of the clause added to section 42 (1) of the Income-tax Act by the amendment of 1939, which makes a company liable to be taxed for income accruing or arising

"from any money lent at interest and brought into British India in cash or in kind."

Sir Jamshedji concedes that if this clause applies, his client would have no case on this point, and the position that he takes up is this, that even if the operation of this clause is not excluded by the language of section 2 of the Government Trading Taxation Act, the clause itself must be held to be inoperative as being a piece of extra-territorial legislation which is *ultra vires* the Indian Legislature.

Now as a general principle it need not be disputed that States can legislate effectively only for their own territories. But occasions do arise when for purposes of taxation, custom, defence or other matters and even for proper enforcement of its own laws, a State makes legislative provisions which are designed to operate beyond its territories. In the case of a Sovereign Legislature like the British Parliament, the question of extra-territoriality of any enactment can never be raised in the Municipal Courts as a ground for impugning its validity. The legislation may offend the rules of International Law and hence may not be recognised by foreign Courts or there may be practical difficulties in the way of enforcing the extra-territorial provisions of a taxing statute; but these are questions of policy with which the domestic tribunals are not concerned (vide *Mortensen* v. *Peters*[1]). So far as a subordinate or non-Sovereign Legislature is concerned, its powers must certainly be determined with reference to the authority granted to it by the parent Legislature and if there are territorial limitations specified in the very Act which created it, these limitations cannot be disregarded. But when there are no such limitations, the trend of modern decisions is to regard the subordinate Legislatures as being vested with as much plenary powers as the Sovereign Parlia-

1. (1906) 8 F. (J.C.) 93, 101.

ment itself. The view expressed in *Macleod* v. *Attorney-General for New South Wales*[1] that subordinate Legislatures should not be held

> "to possess extra-territorial jurisdiction unless it is conferred upon them expressly or by necessary implication"

is no longer a sound doctrine. With regard to the Dominion Parliament of Canada the law was thus laid down by Lord Macmillan in *Croft* v. *Dunphy*[2], where his Lordship referred to the cases of *The Queen* v. *Burah*[3] and *Hodge* v. *The Queen*[4], and observed as follows :

> "Once it is found that a particular topic of legislation is among those upon which the Dominion Parliament may competently legislate as being for the peace, order and good Government of Canada or as being one of the specified subjects enumerated in section 91 of the British North America Act, their Lordships see no reason to restrict the permitted scope of such legislation by any further consideration than is applicable to the legislation of a fully Sovereign State."

The position undoubtedly has been made clear with regard to Dominion Parliaments by section (3) of the Statute of Westminster, 1931, which provides that

> "the Parliament of a Dominion has full power to make laws having extra-territorial operation."

In the very recent case of *British Columbia Electric Railway Co., Ltd.* v. *The King*[5], decided by the Judicial Committee of the Privy Council, a question was raised as to whether section 9 (B), sub-section 2 (*a*) which was added to the Income War Tax Act, 1927, and which imposed an income-tax of 5 per cent. upon all non-residents in respect of all dividends received from Canadian debtors, irrespective of the currency in which the payment was made, was *ultra vires* the Canadian Legislature, by reason of extra-territoriality. The question was answered in the negative and Viscount Simon, who delivered the judgment, quoted with approval, the following passages from the judgment of Rand, J., of the Supreme Court of Canada :

> "The power of the Dominion to tax is to be interpreted as being as plenary and as ample within the limits prescribed. . . . . . as the Imperial Parliament in the plenitude of its power possessed or could bestow : *Hodge* v. *The Queen*[6]. But there is obviously a distinction between the standing of legislative enactments by a Sovereign State within its boundaries and beyond them. In an effective sense a declaration by such a Legislature that it imposes a tax upon a citizen of a foreign country toward whom there is no internationally recognised bond or relation, is beyond the territories of that State, a futile act, and it is futile for the reason that beyond them it is incapable of enforcement. Within the State however it is an obligatory rule to be enforced whenever enforcement is feasible . . . . . That the enactment of section 9 (B) is in exercise of taxing power within the jurisdiction does not, we think, admit of any doubt. . . . . There is admitted jurisdiction over an act essential to the subject-matter, *i.e.*, the act of performance of an obligation ; and these taken with the language used satisfy the taxation criteria. Legislation so enacted will be effective in and must be enforced by the Courts of this country."

Even though the Statute of Westminster was not applicable to India, it was held by this Court in *Governor-General in Council* v. *Raleigh Investment Co., Ltd.*[7], that the position and powers of the Indian Legislature were substantially the same. The fact that this point was left undecided by the Privy Council does not in my opinion detract in any way from the weight which is to be attached to a clear pronouncement of this Court. This Court further pointed out in *Raleigh's case* that section 99 of the Government of India Act, 1935, was deliberately couched in language different from that employed in section 65 of the earlier Act of 1915 ; and it was held that sub-section (1) of section 99 did not in terms exclude extra-territorial legislation, nor did sub-section (2) specify exhaustively the subjects upon which such legislation was permissible. The position has now been made clear by repealing sub-section (2) of section 99 and inserting the words "including laws having extra-territorial operation" in sub-section (1). It cannot be argued, therefore, that a statute passed by the Indian Legislature must be held to be invalid because there are extra-territorial elements in it.

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1. (1891) A.C. 455.
2. (1933) A.C. 156.
3. (1878) 3 A.C. 889.
4. (1883) 9 A.C. 117.
5. (1947) A.C. 527.
6. (1883) 9 A.C. 117.
7. (1944) F.C.R. 229, 259 : (1944) 1 M.L.J. 477 : 1944 F.L.J. 131.

Sir Jamshedji argues that even assuming that section 99 does not in terms forbid extra-territorial legislation, the provision of the Income-tax Act, which is challenged here, is not a legislative provision which really relates to a subject-matter enumerated in Schedule (VII) to the Government of India Act. Tax on income other than agricultural income is undoubtedly a subject upon which the Federal Legislature is competent to legislate, but what is said is, that the new clause in section 42 (1) of the Income-tax Act goes against the very conception of income-tax as it is recognised in the legislative practice in England. It is argued that the cardinal idea implicit in an income-tax is that there must be a territorial connection or nexus between the State imposing the tax and the person to be taxed, and this nexus being totally absent in the present case, the impugned legislative provision is *ultra vires* the Indian Legislature. The argument is seemingly attractive and it is necessary that it should be examined carefully.

I am not unmindful of the observations of Lord Macmillan in *Croft* v. *Dunphy*[1] that when a power is conferred to legislate on a particular topic it is important in determining the scope of the power to have regard to what is ordinarily treated as embraced within that topic in legislative practice and particularly in the legislative practice of the State which has conferred the power. The legislative practice in this country at the time when the Government of India Act was passed would, I think, afford very little assistance in this matter. In fact, in matters relating to taxing of non-residents or of foreign income, the Indian Legislature departed from their old policy only from the year 1939, which is much after the Government of India Act was passed. Whether the legislative practice in England is at all helpful in this connection, I will consider presently.

Now, section 42 (1) of the Income-tax Act, as it stood before the amendment of 1939, applied to income arising through or from any business connection or property in British India. Possibly with the object of bringing within the scope of taxation all income accruing primarily from British Indian sources the amendment was introduced in 1939 and income or profits "arising from any asset or source of income in British India" or "through or from any money lent at interest and brought in British India" was brought within the net of taxation. There were various other substantial changes in the Income-tax law made by the amending Act of 1939 and two of them deserve special notice for our present purpose. Section 4 (1) (*c*) of the Income-tax Act, as it stands after the amendment, provides that the total income of a person not resident in British India should include all income, profits and gains from whatever source derived, which accrue or arise or are "deemed to accrue or arise" to him in British India during the previous year: explanation 3 attached to sub-section (1) of section 4 then lays down that a dividend paid without British India shall be "deemed" to be income accruing or arising in British India to the extent to which it has been paid out of profits subjected to income-tax in British India. The other change material for our present purpose is to be found in section 4 (1) (*b*) (*ii*) read with section 4-A (*c*) of the Act. Under section 4 (1) (*b*) (*ii*), if a person is resident in British India, his total income shall include all income, profits and gains which accrue or arise to him without British India. The second part of section 4-A (*c*) provides that for purposes of the Act, a company is resident in India in any year if its income arising in British India in that year exceeds its income arising without British India in that year. The validity of both these sets of provisions was called into question on grounds of extra-territoriality in two leading cases, both of which came up before this Court in appeal and ultimately went up to the Judicial Committee and in both these cases the validity of the impugned provisions was upheld. In the case of *Governor-General in Council* v. *The Raleigh Investment Co., Ltd.*[2], the respondent company which was incorporated and had its office in England was assessed to tax and super-tax on the dividends it received from the shares it held in nine sterling companies which also were incorporated in

1. (1933) A.C. 156.
2. (1944) 6 F.C.R. 229 : (1944) 1 M.L.J. 477 : 1944 F.L.J. 131.

England but carried on business in India. The respondent paid the tax under protest and then brought a suit in the Original Side of the Calcutta High Court for a declaration that the provisions in section 4 (1) (*c*) and explanation 3 to section 4 (1) of the Income-tax Act were *ultra vires* the Indian Legislature. The Calcutta High Court decreed the suit and pronounced the provisions noted above to be void and inoperative as being an attempt on the part of the British Indian Legislature to tax persons and property which were beyond British India and not subject to its laws. This decision was reversed on appeal by this Court and it was held, not only that the suit was not maintainable by reason of section 226 of the Government of India Act, but that the impugned provisions were not *ultra vires* the Indian Legislature on grounds of extra-territoriality. It was held that there was territorial connection between the taxing State and the person to be taxed by reason of the fact that the source of dividends paid to the Raleigh Investment Co., Ltd., by the sterling companies was in British India. In coming to this conclusion the learned Judges relied upon a number of decisions by the High Court of Australia where it was held that the existence of the source of income in the territory of a particular State established sufficient territorial connection to justify the imposition of income-tax by the State. *Vide* in this connection *Nathan* v. *Federal Commissioner of Taxation*[1], and *Murray* v. *Federal Commissioner of Taxation*[2]. Quite apart from the Australian cases it seems to me that there are clear pronouncements of the highest Courts in England in support of the view that competency to tax is based not on residence alone ; it is enough that the income was derived from property in the country which imposed the tax. It was said by Lord Herschell in *Colquhoun* v. *Brooks*[3] :

> "The Income-tax Acts. . . themselves impose a territorial limit, either that from which the taxable income is derived must be situate in the United Kingdom or the person whose income is to be taxed must be resident there."

These words were quoted and applied by Lord Wrenbury in *Whitney* v. *Inland Revenue Commissioner*[4] and the principle has been reiterated in other cases since then, one of the latest pronouncements on the point being that of the Judicial Committee of the Privy Council in *Trinidad Lake Asphalt Operating Co., Ltd.* v. *Commissioners of Income-tax for Trinidad and Tobago*[5].

With regard to the other set of provisions referred to above, the question of their invalidity by reason of extra-territorial operation came up for consideration both by this Court as well as by the Privy Council in the case of *Wallace Brothers, Ltd.* v. *Commissioner of Income-tax, Bombay*[6].

In this case a company incorporated in the United Kingdom and having its management and control in that country owned a share in a firm which carried on business in Bombay. Under the terms of partnership, the company had extensive powers of management and control over the business of the firm. In a particular year, the income of the company arising in British India was over Rs. 17 lakhs, whereas its income without British India amounted to about Rs. 7 lakhs only. The company was treated as a resident of British India under the second part of section 4-A (*c*) of the Income-tax Act and assessed to tax on its total income including the sum of Rs. 7 lakhs which accrued to it out of British India. The question raised on behalf of the company was that the provisions of the Income-tax Act under which they were assessed were *ultra vires* the Indian Legislature by reason of extra-territoriality. This contention was negatived by the Bombay High Court before which the matter came up by way of reference under section 66 of the Income-tax Act and this decision was affirmed by this Court as well as by the Privy Council. The judgment of the Judicial Committee is important for our present purpose for more reasons than one. With reference to the dictum of Lord Macmillan in *Croft* v. *Dunphy*[7], referred to above, that when Parliament

1. 25 Com. L.R. 183.
2. 29 Com. L.R. 134.
3. (1889) 14 A.C. 493.
4. (1926) A.C. 37.
5. (1945) A.C. 1 : 1945 F.L.J. 94.
6. (1948) 7 F.C.R. 65 : L.R. 75 I.A. 86 : (1948) 2 M.L.J. 62 : 1948 F.L.J. 32 (P.C.).
7. (1933) A.C. 156.

has conferred a power to legislate on a particular topic it is permissible and important in determining the scope and meaning of the power to have regard to what is ordinarily treated as embraced within that topic in the legislative practice of the United Kingdom, their Lordships stated, that the point of reference is certainly not to seek a pattern to which a due exercise of the power must conform. The object is to ascertain the general conception involved in the words used in the enabling Act. The general conception as to the scope of the income-tax, according to their Lordships, is, that given a sufficient territorial connection between the person sought to be charged and the country seeking to tax him, income-tax may properly extend to the person in respect of his foreign income. This territorial connection, however, need not be of the same type as is found in British Income-tax legislation, and in case of a company which has only an economic existence, the fact that it draws the major portion of its income from a particular country for a particular year can legitimately make it a resident of that country for that year even though its central management and control are located elsewhere.

These cases though they do not directly touch the point which is now for consideration before us can be taken to have laid down definitely :

(*i*) that some sort of territorial connection or nexus between the taxing State and the person whose income is to be taxed is absolutely necessary. The connection may be slender or intimate but it must be an actual fact ; and

(*ii*) that the connection need not be of the type as is recognised in English income-tax statutes. It can be founded on residence of the person or business connection within the territory of the taxing State and the situation in a particular country of the money or property from which the taxable income is derived would be sufficient to establish a territorial connection.

I will now examine the impugned clause in section 42 (1) of the Income-tax Act and see whether it really ignores the territorial nexus which is essential in Income-tax legislation.

As has been said already, even before the amendment of 1939, all income, profits or gains arising directly or indirectly through or from any business connection in British India or through or from any property in British India could be taxed. If a foreign company carries on money-lending business in British India and earns profits by way of interest, there is no doubt that it can be validly taxed for the same, and Sir Jamshedji does not say that this clause in section 42 (1) of the Income-tax Act is in any way void or inoperative. When the Legislature made the amendment in 1939, it apparently wanted to prevent circumvention of the existing provision by persons who in substance earned interest on money lent in British India but camouflaged the transaction by advancing loan outside India, the money lent or its equivalent in kind being subsequently brought into British India. I agree with the learned Advocate-General that the words "money lent at interest and brought into British India either in cash or in kind" really contemplate different parts of one and the same transaction. To bring a case within the purview of this clause, it is not enough to show that money was advanced outside British India and then for some reason or other the borrower thought it fit to bring the money or its equivalent into British India. It must be the basic arrangement underlying the transaction that the money shall be brought into British India after it is taken by the borrower outside its territories. In such circumstances, I think, the transaction in substance would be lending money at interest in British India, though ostensibly the loan is advanced outside its limits. If this interpretation is put upon the words of the clause—and in my opinion this is the only proper interpretation that can be put upon them—there would be absolutely no difficulty in holding that the impugned clause does really proceed on the basis of a territorial nexus actually existing between the taxing State and the person in respect of the income that is sought to be taxed.

Looked at from a somewhat different standpoint, it can, I think, be said with perfect propriety, that in cases coming under this clause a nexus is established

by reason of the fact that the source of the income is situated in British India. It is true that interest payable to a creditor is quite a different thing from dividends paid to a shareholder. Dividends are paid out of the profits of a company, whereas interest on money lent has to be paid even though the borrower does not make any profit from the money borrowed by him. But the person that is taxed here is not the borrower but the lender, and so far as the latter is concerned, the source of income is the money which he lent and which in its original or converted form is actually in existence in British India.

This position, I think, receives support from some of the cases decided by the Australian High Court. In *Colonial Gas Association, Ltd.* v. *Federal Commissioner of Taxation*[1], the High Court of Australia upheld a federal income-tax imposed on interest paid or credited to persons who were not residents of Australia, on money raised by debentures of a company and used in Australia. The tax was imposed upon the company who *paid* the interest, though the company was entitled under the Act to deduct the amount paid in tax from the interest payable to the absentee debenture-holders. The intention of the Legislature was undoubtedly to tax the debenture-holders who actually received the interest, but as it was doubtful whether the Act could be enforced against them, they being non-residents, the primary liability was imposed upon the company. It was held by the High Court that the legislation was not invalid by reason of extra-territoriality and Dixon, J., in the course of his judgment observed as follows :

> "To derive income from a country involves the person deriving it in a territorial connection with the country sufficient to support the validity of an exercise of the power in respect of the person as distinguished from the income."

In *Broken Hill South, Ltd.* v. *The Commissioner of Taxation, New South Wales*[2], it was held that a foreign company in receiving interest on debentures secured by mortgage of property situated in New South Wales could be taxed by the New South Wales State for the income received as interest. In the case it appears that the foreign company was also carrying on business in New South Wales but that fact was not at all considered material by the learned Judges, whose judgment proceeded on the footing that the connection with New South Wales which was the basis of the legislation, was to be found in the fact that the money upon which interest was paid was secured upon property in New South Wales. The mortgaged property itself might not be profitable but that was not material ; if the property mortgaged was situated within the territory of a particular State, that was quite sufficient to establish the nexus.

It is well known that the scheme of the English Income-tax Statutes is essentially different from that of the Indian Income-tax law, and unless we are bound to conform to the pattern created by legislative practice in England, there can be no difficulty in holding that the territorial nexus, which is the essential ingredient in an income-tax, can be founded on facts other than those upon which the English legislation on the subject is based. My conclusion, therefore, is that the clause in section 42 (1) of the Income-tax Act, which makes taxable the income or profits arising out of money lent and brought into British India in cash or in kind, is not *ultra vires* the Indian Legislature and the contention of Sir Jamshedji on this point must fail.

It may be pointed out in this connection that question No. 1 as framed by the Income-tax Commissioner of Bombay under section 66 of the Income-tax Act, is perfectly general in its terms and does not refer to any particular clause of section 42 (1) of the Income-tax Act. On the findings of the Income-tax authorities which were accepted by the High Court of Bombay, the loan of Rs. 50 lakhs advanced by the Gwalior Durbar to the Provident Investment Company was not an isolated transaction but formed part of the money-lending business which was carried on by the Durbar in British India. On this finding, the Durbar would certainly

1. 51 Com.L.R. 172. 2. 56 Com.L.R. 337.

come within the purview of the first clause of section 42 (1) of the Income-tax Act and the interest earned by it would be liable to be assessed as income arising from business connection in British India. It is not the contention of Sir Jamshedji that the first clause in section 42 (1) of the Income-tax Act, which relates to income arising out of business connection in British India, is in any way void or inoperative. Strictly speaking, therefore, the question No. 1, as formulated by the Income-tax Commissioner, could be answered against the assessee without embarking on any discussion as to the validity of the later clause which makes taxable all income or profits arising out of money lent and brought into British India. The Commissioner of Income-tax, however, expressed his opinion on the basis of this later clause and as the point was raised and elaborately argued both in the High Court as well as before us, it is proper, I think, that we should record our definite opinion upon it.

By the Court.—On question No. 3, submitted by the Commissioner of Income-tax, Bombay, we hold that the income derived from the property situated in Bombay and other places in British India purchased by the Durbar at execution sales in enforcement of mortgage decrees against mortgagors who had failed to pay the amounts advanced to them in the course of the money-lending business of the Durbar for the assessment year 1939-40 is not income arising in connection with the said business within the meaning of section 2 of the Government Trading Taxation Act, and that the income arising from such property is not liable to assessment under the provisions of the Indian Income-tax Act read with the Government Trading Taxation Act, III of 1926. The answer to this question should therefore be in the negative, and to that extent the appeal is allowed. On questions Nos. (2), (4), (5) and (6), it is the opinion of the Court and, on question No. (1), of the majority of us, that the appeal fails. The appeal is accordingly dismissed on the said five questions.

The case is remitted to the High Court of Judicature at Bombay for effecting the necessary substitution in its judgment and decree.

The appellant shall pay to the respondent three-fourths of the costs of the appeal to this Court.

V.S. ——— *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. P. V. Rajamannar, *Chief Justice* and Mr. Justice Viswanatha Sastri.

Arunagiri Goundan .. *Appellant**

v.

Vasantharoya Goundan and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 10, rule 2—Scope—Summoning of first defendant as Court witness and examination and cross-examination of him before conclusion of evidence of first witness for plaintiff—Propriety.

Before the evidence of the first witness for the plaintiffs was concluded, the trial Judge summoned the first defendant as a Court witness and examined him on certain matters. He was again examined on a subsequent day on which date P.W. 1 was also further examined. Again on a later date the first defendant was called and further examined by Court and the plaintiffs' advocate was also permitted to put questions to him. Finally after the plaintiffs had closed their evidence the first defendant examined himself as the first witness for the defence.

Held : The Judge was not justified in following this course and Order 10, rule 2 of the Code of Civil Procedure does not contemplate such a procedure. The rule does not provide for an examination on oath. That provision was intended to be used to elucidate the matters in controversy in suit before the trial began and it is not a provision intended to be used to supersede the usual procedure to be followed at the trial.

Manmohan Das v. *Musammat Ramdei*, (1931) 35 C.W.N. 925 (P.C.), relied on.

[However as this procedure had not resulted in any miscarriage of justice the decision of the trial Court was not interfered with.]

*Appeal No. 3 of 1946. 13th December, 1948.

Appeal against the decree of the Court of the Subordinate Judge, Salem, dated 19th April, 1945, in O.S. No. 39 of 1944.

C. S. Venkatachari and *D. Ramaswami Aiyangar* for Appellant.

T. Thiagaraja Aiyar for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—This is an appeal by the first defendant in O.S. No. 39 of 1944 in the Court of the Subordinate Judge of Salem against a preliminary decree for partition passed therein. The suit was originally instituted by seventeen persons, but as the 13th plaintiff died pending suit, plaintiffs 18 to 21 were added as his legal representatives, and when the suit came up for hearing, there were twenty-one plaintiffs. There were six defendants. The suit for partition was based on the allegation that the plaintiffs and defendants were members of a joint Hindu family and the properties set out in the plaint schedule belonged to them as members of the family. The suit was contested only by defendants 1 and 3 who admitted the relationship set out in the pedigree filed along with the plaint so far as their relation-ship with plaintiffs 1 to 3 was concerned, but denied that plaintiffs 4 to 21 were related to them (defendants) in the manner set out in the pedigree. The contesting defendants further denied that even plaintiffs 1 to 3 were entitled to any relief because they were not members of a joint family along with the defendants. The learned Subordinate Judge found that plaintiffs 4 to 21 were related to the defendants as claimed by them (plaintiffs) and that the suit properties were the joint family properties of plaintiffs and defendants. He therefore passed a preliminary decree for partition in accordance with the shares to which the parties would be lawfully entitled accepting the pedigree attached to the plaint and marked as Ex. P-1 in the case. As already mentioned, the 1st defendant is the only party who has chosen to appeal against this degree.

According to the case set out in the plaint, Arunachala Goundan the grandfather of the 1st plaintiff had two brothers whose names were not known. Plaintiffs 1 to 3 and defendants 1 to 6 were the descendants of Arunachala Goundan by his only son Karia Goundan *alias* Annamalai Goundan, while plaintiffs 4 to 21 were the descendants of the two brothers of Arunachala Goundan. The properties which form the subject-matter of the suit were acquired by the members of the family by their joint exertions. In accordance with the custom which prevailed in the family, the eldest son of the eldest line always occupied the position of the manager of the family. The members of the family were all living together and as their number increased, several dwelling houses were built for them from the common fund. The proximate cause for the institution of the suit was the action of the 1st defendant in instituting O.S. No. 62 of 1942 against defendants 2 to 6 and the deceased elder brother Chinna Arunachala for a partition of the suit properties completely disregarding the claims of the entire body of the plaintiffs.

Having regard to the status and the habits of the persons whose claims are involved in this suit, it is difficult to expect any documentary evidence of the relationship between the parties going back to several generations. Oral evidence as to relationship of parties who must have died a considerable time before the living memory of the oldest member of the family, namely, the 1st plaintiff, is bound to be discrepant and easily susceptible to criticism. We are therefore thrown back on evidence of conduct and other circumstances which by a cumulative effect render one or other conclusion possible as to the truth of the case set up by the plaintiffs. It is true that the names of the alleged two brothers of Arunachala Goundan the ancestor of the branch of plaintiffs 1 to 3 and defendants 1 to 6 are not known. But there is evidence that Attukara Goundan and Mattukara Goundan were the sons of one of his brothers and Mondi Goundan and Nanja Goundan were the sons of the other brother. There is not much dispute as to the relationship to be traced from these four persons.

The learned Subordinate Judge came to the conclusions that the plaintiffs and defendants were members of a joint family and owned in common the properties set out in the plaint schedule after a consideration of the several circumstances which he gathered from the evidence. We have been taken through the evidence and we have come to the same conclusion as the Subordinate Judge came. The circumstances which have impressed us most are the following. The plaintiffs and the defendants with their families all reside in houses more or less adjacent but all of them in a compact compound, which is definitely fenced off from the rest of the village. They have common granaries and common places for storing fodder and agricultural implements. It is in evidence that some of the houses were built by Arunachala the father of the 1st defendant and some others, by Chinna Arunachala the elder brother of the 1st defendant. The 1st defendant's explanation for the position of the houses and for the fact that his brother and father had built them with money belonging to the family was that it was due to an assurance that they would all be permanent labourers on the lands belonging to the 1st defendant's branch. The learned Subordinate Judge did not accept this explanation and we think rightly. It is most unlikely that if the members of the branch of the 1st defendant were in the position of landlords and the others, in the position of mere labourers, the houses of the latter would have been built in such close proximity to the houses of the former.

Though it is not clear if Karia Goundan, the son of Arunachala Goundan, was possessed of any property, according to the evidence now on record, the properties were acquired only by Arunachala the father of the 1st defendant and Chinna Arunachala his elder brother. Even according to the 1st defendant, his father originally migrated into this village from a neighbouring village, and he admitted that along with him from the very inception Attukara Goundan and Mattukara Goundan, Pandara Goundan, Nanja Goundan and others worked with his father. This admission of his goes a long way in rendering the plaintiffs' case probable that the members of this family came to the village and worked jointly taking lands on lease. In course of time the family was also able to acquire lands for itself.

In spite of slight variations there is significant agreement between the evidence of the 1st defendant and the evidence on behalf of the plaintiffs as to the manner of distribution of the produce from the lands. The 1st defendant admitted that originally his father and subsequently his eldest brother would give definite quantities of paddy to each male and female member of the family of the plaintiffs. Only he would add that this distribution was really in the nature of payment of wages. He referred to his elder brother as the " head," that is, as the manager of the family. According to the plaintiffs' witnesses, there was a division of the produce at the thrashing floor in accordance with the needs of each branch of the family. But the fact remains that the plaintiffs were enjoying the income from the suit properties, and if we reject the case of the first defendant that they were coolies and were paid wages, the only inference left is to accept the case of the plaintiffs that they were members of a joint family.

There is some evidence which the learned Judge has accepted that the expenses of the marriages of the members of the family were met out of family funds. Likewise, other expenses such as medical charges were also met in the same way. P.W. 4 is the family physician who has deposed to this and the learned Judge saw no reason to disbelieve his evidence. We too see no reason to reject this evidence. The result is that there is evidence of joint living, of joint exertion, of joint acquisitions and joint enjoyment of the suit properties. In view of this evidence, we do not consider it to be a material flaw in the plaintiffs' case if they have not been able to establish by direct evidence that plaintiffs 4 to 21 were the descendants of two brothers of Arunachala, the ancestor of the branch of defendants 1 to 6 and plaintiffs 1 to 3.

The learned advocate for the appellant urged that it was most improbable that for such a length of time the several members of the family should have conti-

nued to be joint, but that is not surprising because apparently education had not destroyed mutual confidence and trust and the spirit of individualism had not made inroads into habits of communal living.

We therefore agree with the learned Subordinate Judge that the plaintiffs and the defendants are members of a joint Hindu family and the suit properties belong to them as such. It is not the case of the 1st defendant that there has been a division in the family at any time. The plaintiffs therefore are clearly entitled to a decree for partition.

There is one matter however relating to procedure which calls for some comment. The onus in this case initially lay with the plaintiffs to establish their case and quite properly the case began with the examination of the first witness for the plaintiffs on 9th March, 1945. But the learned Subordinate Judge then followed a somewhat curious procedure. Before the evidence of the first witness for the plaintiffs was concluded, he summoned the 1st defendant as a Court witness and examined him on certain matters. He was again examined on 14th March, 1945, on which date P.W. 1 was also further examined. Again on 21st March, 1945, the 1st defendant was recalled and further examined by Court. The plaintiffs' advocate was also permitted at this stage to put questions to him. Finally, after the plaintiffs had closed their evidence, the 1st defendant examined himself as the first witness for the defence. The learned Judge in his judgment apparently referring to this procedure relies upon Order 10, Civil Procedure Code. We are of the opinion that the learned Judge was not justified in following this course and Order 10, rule 2 of the Code does not contemplate such procedure. Order 10, rule 2 runs thus :

"At the first hearing of the suit, or at any subsequent hearing, any party appearing in person or present in Court, or any person able to answer any material questions relating to the suit by whom such party or his pleader is accompanied may be examined orally by the Court; and the Court may, if it thinks fit, put in the course of such examination questions suggested by either party."

At the outset it must be pointed out that this does not provide for an examination on oath. This provision was intended to be used to elucidate the matters in controversy in suit before the trial began. This is not a provision intended to be used to supersede the usual procedure to be followed at the trial. Their Lordships of the Judicial Committee in *Manmohan Das* v. *Musammat Ramdei*[1], made the following remarks when their attention was drawn to a similar procedure adopted at the trial :

"At the trial before the Subordinate Judge the evidence first recorded is that of the defendant, Behari Lal, who is described as a 'Court witness' and appears to have been called into the witness-box by the Judge himself. The record before their Lordships discloses no justification for this unusual proceeding. No doubt under Order 10, rule 2 any party present in Court may be examined orally by the Court at any stage of the hearing, and the Court may, if it thinks fit, put in the course of such examination questions suggested by either party. But this power is intended to be used by the Judge only when he finds it necessary to obtain from such party information on any material questions relating to the suit and ought not to be employed so as to supersede the ordinary procedure at trial as prescribed in Order 18."

We are, however, satisfied, that this procedure has not resulted in any miscarriage of justice.

The appeal is dismissed with costs.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL AND MR. JUSTICE RAJAGOPALAN.

K. Muhammad Sukri Sahib .. *Appellant**

v.

Thelapurath Madhava Kurup and another .. *Respondents.*

Madras Non-Residential Building Rent Control Order (1942, *as amended on 11th July,* 1944), *clause* 8 *—Decree for eviction passed before amendment—Execution petition—If can be filed.*

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1. (1931) 35 C.W.N. 925 at 927 (P.C.).

* L.P.A. No. 52 of 1948. 7th January, 1949.

Where a decree for eviction had been passed before the amendment on 11th July, 1944, of the Madras Non-Residential Building Rent Control Order, 1942, the decree-holder cannot execute that decree, his only way of evicting the tenant being to file an application before the Rent Controller.

Panchapagesa Sastri's judgment in *Madhava Kurup* v. *Muhammad Sukri Sahib*, (1948) 2 M.L.J. 359, reversed.

The United Provinces v. *Mt. Atica Begum*, (1941) 1 M.L.J. (Supp.) 65 : 3 F.L.J. 97 : I.L.R. 1941 Kar. 72 (F.C.), referred to.

Moothaliandan Chetti v. *Venkatesan Chetti*, (1945) 1 M.L.J. 441, distinguished.

Appeal under clause 15 of the Letters Patent against the order and judgment of Panchapagesa Sastri, J., dated 12th July, 1948, in A.A.A. O. No. 43 of 1946[1] preferred to the High Court against the order of the Court of the Subordinate Judge, South Malabar at Calicut, dated 3rd August, 1945, in A.S. No. 104 of 1945 preferred against the order of the Court of the District Munsiff, Calicut dated 30th December, 1944, in E.A. No. 2986 of 1944 in O.S. No. 405 of 1943.

S. R. Subramania Aiyar for Appellant.

S. V. Venkatasubrahmanyam for Respondents.

The Judgment of the Court was delivered by

Horwill, J.—The respondent is the owner of a shop in Calicut town and the appellant is his tenant, holding the shop on a month-to-month tenancy. The respondent filed O.S. No. 405 of 1943 for the eviction of the appellant; but before he could obtain a decree, the Non-Residential Building Rent Control Order, 1942, had been amended on 11th July, 1944. Apparently unaware of the amendment, a decree was passed in the respondent's favour on the 8th September, 1944. Almost immediately, the respondent applied for possession, obtained an *ex parte* order in his favour, and was actually put in possession on the 15th September, 1944. On the 28th October, 1944, the appellant drew the attention of the executing Court to the amendment on the 11th July, 1944, and pointed out that the Court had acted *ultra vires*, in that its order delivering possession to the respondent was void. The Court then took action under section 151 of the Code of Civil Procedure and set aside its previous order on the ground that it would not have passed that order if its attention had been drawn to the amendment. The matter was taken in appeal to the Subordinate Judge, who affirmed the decision of the trial Court. The matter came before Panchapagesa Sastri, J., in A.A.A.O. No. 43 of 1946.[1] The learned Judge held that despite the passing of the amendment on the 11th July, 1944, the law to be applied to the case was the law as it existed at the date of filing the suit. He therefore allowed the appeal with costs throughout. At the same time, he granted leave to appeal under the Letters Patent.

There can be no doubt, on the plain words of the amended clause 8 of the Non-Residential Building Rent Control Order, 1942, that the tenant was entitled to remain in possession.

Clause 8 (1) says:

"A tenant in possession of a non-residential building shall not be evicted therefrom, whether in execution of a decree or otherwise . . . . except in accordance with the provisions of this clause."

As there are no provisions in this clause for the eviction of the tenant on the grounds raised in the suit, it is clear that if this sub-clause be taken at its face value, the tenant could not be evicted even though a decree had been obtained. Sub-clause (2) makes the matter even clearer; because the procedure to be adopted by a landlord who desires to evict his tenant is not to apply to the Civil Court in execution of his decree, but to the Rent Controller for a direction that the tenant be evicted. The Controller has then, after giving the tenant a reasonable opportunity of showing cause against the application, to consider whether the tenant has been guilty of any of the laches or defaults referred to in the various paragraphs of sub-clause (2). If he is satisfied that he has, then he shall order the eviction; if he is not so satisfied, then he is bound to reject the application.

1. (1948) 2 M.L.J. 359.

The difficulty which the learned Judge felt in giving clause 8 its plain interpretation was that to do so would be to infringe the principle that a new legislation should not affect existing rights unless the wording of the statute makes it clear, expressly or by necessary implication, that it is to have retrospective effect. Although the suit was still pending at the time when the amendment was made, yet it has not been contended that the introduction of this legislation created a new law to be applied by the Court and that the decree passed by the Court was consequently not a valid one. The execution proceedings were filed long after the amendment came into force. Mr. Venkatasubramaniam has been constrained to argue that the moment a person files a suit he obtains thereby a vested right to have applied not only to the suit, but to all execution proceedings also, the law relating to execution as it existed at the time of filing the suit. We know of no such principle ; and we find no reason to think from the cases that have been cited before us that if a new law is introduced restricting the right to execute, execution proceedings can nevertheless be instituted if such a right existed on the date of the filing of the suit. Our attention has been drawn to the judgment of Sulaiman, J., in *The United Provinces* v. *Mt. Atica Begum*[1], in which reference is made to certain English cases interpreting British Statutes said to be similar to the Statute here under consideration ; but we have not seen those decisions or those Statutes and we are not at all convinced that any such general principle exists.

The learned Judge, in attempting to reconcile the new amendment with the principle leaning against giving retrospective effect to new legislation, was inclined to think that the words " in execution of a decree " can only be applied to suits instituted after the 11th July, 1944. It seem to us, however, that no suits could be instituted after that date ; for by the new Act a landlord desirous of evicting his tenant would not file a suit ; but would apply directly to the Rent Controller, who would then proceed to hear the objections of the tenant and to decide the case in accordance with the principles laid down in clause 8. The learned Judge found support for his conclusion in the decision of Mocket, J., in *Moothaliandan Chetti* v. *Venkatesan Chetti*[2], in which the learned Judge allowed a revision petition against an order of the Chief Judge of the Small Cause Court, Madras, who, during the course of a petition praying for possession, applied the new law as soon as it came into force and dismissed the application. That case can clearly be distinguished because, as we have already said, we are not here concerned with the applicability of the new law to pending proceedings ; and we do not find from Mockett, J.'s judgment any principle laid down that could usefully be applied to this case, except the well-recognised one that one should not apply a new law to divest a person of his vested rights, unless by express or necessary implication the new law is made by the Legislature to do so. In summing up, Mockett, J., said :

> " If and when an application for possession comes before the Controller, the Controller should apply his mind to the circumstances actually and presently before him to enable him to make or refuse an order, and it would be for one side or the other to point out that the application for ejectment had lost its force owing to the fact that since the application had been made, difficulties which were then not in existence had arisen or difficulties that were in existence had disappeared. I am not however concerned with any such position in this case."

It is seen from this passage that the learned Judge, far from thinking that the landlord had, by the institution of his application for possession in the Sub-Court, acquired an absolute right to physical possession, contemplated proceedings before the Rent Controller in which it would be contended by the tenant that in view of the new legislation, actual possession could not be given. Panchapagesa Sastri, J., also referred to certain passages in the judgment of Sulaiman, J., in the Federal Court case referred to and said :

> " Sulaiman, J., points out that unless either expressly or by necessary intendment it is made out in the new legislation that it applies to pending proceedings as well, it ought not to be construed to have retrospective operation so as to affect the rights of parties in pending suits."

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1. (1941) 1 M.L.J. (Supp.) 65 : 3 F.L.J. 97 : I.L.R. 1941 Kar. 72 (F.C.).
2. (1945) 1 M.L.J. 441.

With respect, we agree with this observation but, as we have already pointed out, we are not concerned here with pending proceedings. We are not prepared to say that during the period between the passing of the decree and the filing of the execution petition there were any pending proceedings. We are only concerned here with the right of the respondent to execute his decree; and we are of opinion that clause 8 prohibited him from filing an execution petition in the Court, his only way of evicting the tenant being to file an application before the Rent Controller.

The appeal is therefore allowed and the decrees of the trial Court and of the first appellate Court restored. The appellant will be given his costs in this Court and before Panchapagesa Sastri, J.

In this Court Ramanujam Chettiar has been brought on record in the place of the original respondent; and so Ramanujam Chettiar will be liable for costs in this Letters Patent Appeal and the original respondent in the other Courts.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE GOVINDA MENON.

Messrs. Kalla Surayya and Sons represented by Kalla Venkataraju .. *Petitioners**

v.

The Province of Madras represented by the Collector of East Godavari at Kakinada and another .. *Respondents.*

Court-Fees Act (VII of 1870), *section* 7 (iv-A) *and* (iv)(c)—*Applicability—Order of Deputy Commercial Tax Officer levying tax—Not a "decree"—Suit for declaration that such order was illegal—Court-fee.*

An order of the Deputy Commercial Tax Officer levying tax is not a "decree" within the meaning of section 7 (iv-A) of the Court-Fees Act and for a suit for declaration that such order was illegal section 7 (iv-A) does not apply and *ad valorem* court-fee on the amount of tax need not be paid.

Section 7 (iv) (*c*) of the Court-Fees Act applies and the plaintiff is entitled to value the relief under that section, put his own valuation, and pay court-fee on the value so fixed by him. That value will also be the value for purposes of jurisdiction under section 8 of the Suits Valuation Act.

It is not necessary to value separately the consequential reliefs for injunction to restrain the defendants from assessing sales tax in future on plaintiff's business.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Rajahmundry, dated the 6th September, 1947, and passed on the unregistered plaint in O.S. No. of 1947 Serial No. 5306.

M. S. Ramachandra Rao and *M. Krishna Rao* for Petitioners.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondents.

The Court (*Mack, J.*) made the following

ORDER OF REFERENCE (17th December, 1948).—This petition raises an interesting question of court-fee. The petitioner is a plaintiff who sued for a declaration that an assessment order of the Deputy Commercial Tax Officer requiring him to pay a sales-tax of Rs. 2,165 was illegal. He also sued for two consequential reliefs: (1) to restrain defendants from collecting this sales-tax on his commission business; (2) to restrain the defendants from assessing sales-tax in future on his commission business. The 1st defendant is the Government of Madras represented by the Collector of East Godavari, and the Deputy Commercial Tax Officer, Rajahmundry, is impleaded as the 2nd defendant. The District Munsiff treated this plaint as coming within the scope of section 7 (*iv*-A) of the Court-Fees Act and directed *ad valorem* court-fee to be paid at Rs. 2,165. The plaintiff valued his declaratory relief under Article 17-A (*i*) of the Court-Fees Act and paid

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*C.R.P. No. 1394 of 1947. 24th January, 1949.

a court-fee of Rs. 15. The two injunctions he valued at Rs. 10 each and paid *ad valorem* court-fee on these sums paying in all a court-fee of Rs. 17-4-0.

It is quite clear that Article 17-A (*i*) cannot apply as it governs suits for declarations only when no consequential relief is asked for. There is a difficulty in applying section 7 (*iv*-A) to this plaint in view of the decision of Venkataramana Rao, J., in *Govinda Chettiar* v. *Uthukottai Co-operative Society*[1]. That was a suit for a declaration that an order passed by the liquidator of a co-operative society requiring the plaintiff to pay a contribution of Rs. 8,000 under section 42 (2) (*b*) of the Co-operative Societies Act was "illegal, void and of no effect, and unenforceable against the plaintiff." It was held that the liquidator's order was not a decree within the meaning of section 7 (*iv*-A) and that this suit was correctly valued under Article 17-A (*i*) on which a court-fee of Rs. 100 was rightly paid. The learned District Munsiff took the view that this order for payment of sales-tax was a decree for payment of money. The precise meaning to be attached to the word decree in section 7 (*iv*-A) is open to some doubt; whether the ordinary dictionary meaning should be applied to it or the definition of a decree in section 2 (2) in the Civil Procedure Code which gives the word a special meaning for purposes of the Civil Procedure Code. The dictionary meaning of the word varies in dictionaries to which I have referred. In the Universal Dictionary of the English Language by Henry Wyld the meaning given to 'decree' is decision, judgment, pronouncement, formal order of a Court of justice, tribunal, high authority. There appears to be from the fiscal standpoint and from the point of view of the plaintiff no difference in substance between a decree in a suit *inter partes* by which he is made liable to pay a sum of money and an order by a competent tribunal or a tax levying authority by which he is similarly bound in law.

In view of the decision in *Govinda Chettiar* v. *Uthukottai Co-operative Society*[1], which appears to make section 7 (*iv*-A) inapplicable, there is difficulty in bringing this plaint within any of the other provisions of the Court-Fees Act. The learned Government Pleader has taken up another position which I am also unable to accept. Conceding on the strength of *Govinda Chettiar* v. *Uthukottai Co-operative Society*[1], that section 7 (*iv*-A) cannot apply he urges that the governing section is section 7 (*iv*) (*c*) which gives the plaintiff a right to value his own relief in a suit to obtain a declaratory decree or order where consequential relief is prayed for. He however argues that under section 8 of the Suits Valuation Act the value of such a suit for purposes of jurisdiction must be adopted for purposes of the Court-Fees Act also. Section 8 applies to cases only where court-fees are payable *ad valorem*. His argument, as I understand it, is that in a plaint of this kind the plaintiff cannot but value his suit for purposes of jurisdiction at Rs. 2,165 on the amount of taxation which he seeks to avoid, and that it is not open to him to fix any valuation less than this for his relief under section 7 (*iv*) (*c*). There are difficulties in the way of applying section 7 (*iv*) (*c*). As I understand it, it gives a plaintiff a right to value his relief for a declaratory decree or order as he pleases, but not the consequential relief which depends on its nature. The consequential relief may be for a fixed sum of money or property in which case he will have to pay *ad valorem* court-fee if he desires to recover it. The consequential relief may be for an injunction in which case he appears to be entitled under section 7 (*iv*) (*d*) to value it as he pleases. There are therefore difficulties in the way of applying any of the possible provisions of the Court-Fees Act to a plaint of this kind, *viz*., section 7 (*iv*) (*c*), section 7 (*iv*-A) or Article 17-A (*i*). Of these section 7 (*iv*-A) seems to be the provision substantially applicable but for the interpretation of the word "decree" in *Govinda Chettiar* v. *Uthukottai Co-operative Society*[1].

For these reasons the Civil Revision Petition will be placed before the Chief Justice for reference to a Bench if he thinks fit so that there may be an authoritative decision as to the court-fee payable on such plaint.

1. (1937) 1 M.L.J. 640 : I.L.R. 1938 Mad. 63.

This petition coming on for hearing this day in pursuance of the Order of Reference of the High Court dated the 17th December, 1948, and made herein, the Court delivered the following judgment :—

Satyanarayana Rao, J.—This civil revision petition was referred to a Bench by Mack, J., as he felt that there was a necessity for an authoritative decision as to the correct Court-fee payable on plaints like the one before him.

The petitioner filed the suit in the lower Court (in the Court of the District Munsiff, Rajahmundry) (*a*) for a declaration

"that the order of assessment of the Deputy Commercial Tax Officer dated 24th March, 1946, was illegal so far as it related to the plaintiff's commission business for the year 1944-45 (*b*) and for an injunction restraining the defendants from collecting sales-tax on the plaintiff's commission business for 1944-45 (*c*) and for a further injunction restraining the defendants from levying sales-tax for the subsequent years on the plaintiff's commission business."

In respect of relief (*a*) he paid a Court-fee of Rs. 15 under Article 17-A (*i*) and in respect of reliefs (*b*) and (*c*) he paid a Court-fee under section 7 (*iv*) valuing the subject-matter at Rs. 10 each. In other words, he paid a Court-fee in respect of relief (*b*) Rs. 1-2-0 and for relief (*c*) Rs. 1-2-0. When the matter came up before the learned District Munsiff, he was of opinion that Court-fee should be paid under section 7 (*iv*-A) as he thought that the order of the Deputy Commercial Tax Officer was practically a decree and called upon the plaintiff to pay Court-fee on Rs. 2,165 on the *ad valorem* basis.

When the revision petition came on for hearing before Mack, J., the petitioner contended on the strength of the decision of Venkataramana Rao, J., in *Govinda Chettiar* v. *Uthukottai Co-operative Society*[1], that the view of the District Munsiff that the order of the Deputy Commercial Tax Officer was a " decree " was wrong and the learned Judge thought that the word " decree " used in the section was capable of a wider meaning and is not restricted to the meaning given to it by Venkataramana Rao, J. In *Govinda Chettiar* v. *Uthukottai Co-operative Society*[1], Venkataramana Rao, J., held that the word " decree " in the section connotes

" a final order of a Court, whether civil or revenue, in a suit, and an order passed by an officer or a body which is not a Court but is invested with judicial powers in pursuance of which a liability is fixed on a person to pay a sum of money, will not come within its purview."

The case before the learned Judge was a case in which the plaintiff instituted a suit for a declaration that an order of a liquidator of a co-operative society determining the amount of contribution payable by him under section 42 (2) (*b*) of the Co-operative Societies Act is null and void. There was no prayer in the plaint, however, asking for a consequential relief. The amount of contribution determined was a sum of Rs. 8,000. The plaintiff paid a Court-fee in respect of the declaration under Article 17-A (*i*) of Schedule II to the Court-Fees Act of Rs. 100. When the matter came before the learned District Judge who heard the matter in the first instance, he was of opinion that section 7 (*iv*-A) of the Court-Fees Act introduced by the Madras Amending Act of 1922 applied to the case. The learned Judge Venkataramana Rao, J., disagreed with the view of the trial Court and held that as the order of the liquidator was not a " decree " the Court-fee paid by the plaintiff on the plaint as one for declaration was correct. The new section 7 (*iv*-A) was introduced by the Amending Act in the year 1922 and the Legislature must have been aware when enacting the amending section that the word " decree " had acquired a special significance and does not bear the dictionary meaning referred to by Mack, J., in his judgment. A decree always connotes as understood in law a final order of a Court in a suit, whether in a civil or revenue Court. As the proceeding before the Deputy Commercial Tax Officer was not a suit the order passed by him cannot be treated as a decree, and section 7 (*iv*-A) does not apply to the present case. We respectfully adopt the reasoning of Venkataramana Rao, J.,

1. (1937) 1 M.L.J. 640 : I.L.R. 1938 Mad. 63.

coming to the conclusion that an order like the one in question is not a " decree " and therefore section 7 (*iv*-A) does not apply.

In the present case, besides the declaration, there were also two consequential reliefs asked for by the plaintiff in the plaint. The plaintiff was certainly responsible for the present trouble as he valued these reliefs independently instead of valuing the reliefs under section 7 (*iv*) (*c*) of the Court-Fees Act which clearly applies to the facts of the present case. He asked for a declaration and as consequential to that declaration prayed also for two injunctions to prevent the Deputy Commercial Tax Officer from enforcig his order in any manner. If section 7 (*iv*) (*c*) applies, as we hold it does, the plaintiff is entitled to value the relief under that section and to pay Court-fee on the value so fixed by him. The value fixed by him for the purpose of section 7 (*iv*) (*c*) will also be the value for purpose of jurisdiction under section 8 of the Suits Valuation Act. The argument of the learned Government Pleader that as the plaintiff in the present plaint valued the suit for purpose of jurisdiction in paragraph 8 of the plaint at Rs. 2,165, the same should also be the value for purpose of Court-fee under section 7 (*iv*) (*c*) cannot be accepted. The plaintiff valued the plaint on a particular basis and that basis is now found to be erronecus. If section 7 (*iv*) (*c*) is the proper section applicable to the plaint, the plaintiff is entitled to put his own valuation for purposes of Court-fee and that value will also be the value for purposes of jurisdiction in respect of suits of that kind. The plaintiff will be given liberty to amend his plaint for valuing the reliefs in paragraph 10 of the plaint under section 7 (*iv*) (*c*) of the Court-Fees Act. That value will also be the value for purposes of jurisdiction and he will be given liberty also to amend the valuation which he has already given for purposes of jurisdiction.

It is unnecessary for us at this stage to consider the question that was raised by the Government Pleader that if the plaintiff puts an arbitrary valuation which is grossly inadequate, the Court would be entitled to ask him to place a proper valuation. The question does not arise for consideration at this stage and we therefore do not propose to consider the same.

In the result, this civil revision petition is allowed and the order of the District Munsiff set aside and the plaintiff will value the claim in the manner indicated in this judgment. There will be no order as to costs in this civil revision petition.

K.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VISWANATHA SASTRI.

Samayamanthula Parvata Vardhanamma .. *Petitioner.**

v.

Villa Subba Rao and others .. *Respondents.*

Madras Hindu Religious Endownments Act (II *of* 1927), *section* 76—*Order of Endowments Board sanctioning an exchange of lands belonging to a temple for other lands belonging to a stranger—Petition in District Court by two persons interested in the temple for cancelling the order—Jurisdiction of the District Judge—Nature of—Power to cancel or modify order—If includes power to direct a sale of temple land to one of the parties and fix a price for it.*

In a petition by persons interested in the temple to cancel (as detrimental to the temple) an order of the Hindu Religious Endowments Board sanctioning an exchange of some lands belonging to the temple for other lands belonging to a stranger, the jurisdiction of the District Judge is not original but only that of an appellate or revising authority. He could not under the guise of modifying or cancelling the order of the Board, start negotiations for sale of the property to other persons, fix the price and direct a conveyance to be executed.

Under section 76 (2) of the Madras Act II of 1927 the District Judge has the power to modify or cancel the order of the Hindu Religious Endowments Board sanctioning the exchange. But he has no power to sanction *de novo* a wholly different transaction by way of sale for a cash consideration, holding a kind of auction in Court among the parties to the proceeding before him.

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*C.R.P. No. 36 of 1947. 17th December, 1948.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the District Court, East Godavari, at Rajahmundry dated 29th June, 1946 in O.P. No. 11 of 1946.

P. Somasundaram and *K. Ramamurthi* for Petitioner.

M. Seshachalapathi and *C. Rama Rao* for Respondents.

The Court delivered the following

JUDGMENT.—The third respondent in the lower Court seeks to have the order of the District Judge of East Godavari in O.P. No. 11 of 1946 set aside in revision. Sri Visweswaraswami Temple of Inavilli village owned lands of an extent of 2 acres 18 cents in the vicinity of the village fit for building sites. The third respondent owned an extent of 1 acre 60 cents of wet land in a neighbouring village. By an order of the Hindu Religious Endownments Board passed under section 76, Madras Act II of 1927 dated 19th March, 1945, sanction was accorded to an exchange of these properties as between the temple and the third respondent, on the ground that the exchange was beneficial to the temple. It appears that this exchange was sanctioned on the assumption that the property of the temple sought to be alienated by way of exchange was worth about Rs. 1,500. The deed of exchange was duly executed on the 24th of August, 1945 by the executive officer of the temple and the third respondent. On 22nd January, 1946 O.P. No. 11 of 1946 was filed in the District Court of East Godavari by two persons interested in the temple for cancelling the order of the Hindu Religious Endowments Board dated 19th March, 1945, sanctioning the exchange on the ground that the transaction, far from being beneficial to the temple, was detrimental to its interests. When the petition came on for hearing before the District Court, an order was passed by that Court purporting to be by agreement of parties, cancelling the exchange sanctioned by the Hindu Religious Endowments Board and directing a sale of the temple property for Rs. 6000 to the petitioners, and the third respondent in O.P. No. 11 of 1946 and also apportioning the property and the price as between them in the manner agreed to by the parties. The bulk of the property was to be sold to the petitioners in the lower Court for Rs. 5,725 and a small portion to the third respondent for Rs. 275. The Hindu Religious Endowments Board was the first and the executive officer of the temple was the second respondent in the Court below.

The order of the learned District Judge states that it was passed by agreement of parties. This statement is challenged by the third respondent, petitioner in this Court. Affidavits of the advocates who appeared for the petitioners and the third respondent in the lower Court, have been filed in this Court and it is a distressing feature of the case that they contradict each other. The learned Judge who tried the petition, has now retired from service and it is not possible to get a report as to exactly what happended before him. It is desirable to have a written record of the agreement of parties where a decree or final order is passed by consent, especially in cases like the present where the Judge is invited to act and to some extent acts *extra cursum curiae*. In any case, the Court is not compelled to accept a compromise arrived at between the parties on the record where the interests of a public religious endowment are concerned. (See *Sankaralinga Nadar* v. *Rajeswari Dorai*)[1].

Assuming that the order of the Court below was passed with the consent of the petitioners and the third respondent, the further question that arises is whether the order of the Court below is one passed without jurisdiction. The Hindu Religious Endowments Board, in the exercise of its statutory power, sanctioned an exchange of temple land of the extent of 2 acres 18 cents for an extent of 1 acre 60 cents belonging to the third respondent in the Court below on the assumption that the temple land was worth about Rs. 1,500 or thereabouts. It is now manifest that the temple land would be worth at least Rs. 6,000, if not more, as the District Judge's order itself demonstrates. Under section 76, clause (2) of Madras Act II of 1927 the District Judge had the power to modify or cancel the order of the Hindu Religious

1. (1908) 18 M.L.J. 387 : L.R. 35 I.A. 176 : I.L.R. 31 Mad. 236 (P.C.).

Endowments Board sanctioning the exchange. He had no power, in my opinion to sanction *de novo* a wholly different transaction by way of the sale for a cash consideration, holding a kind of auction in Court among the parties to the proceedings before him. The learned District Judge having presumably found that the exchange sanctioned by the Board was injurious to the interests of the temple was bound to set aside the order of the Hindu Religious Endowments Board according sanction. He could not, it seems to me, under the guise of modifying or cancelling the order of the Board, start negotiations for sale of the property to other persons, fix the price and direct a conveyance to be executed. His jurisdiction in this matter is not original but only that of an appellate or revising authority. It is not without significance that directly he made an order for sale of the property for Rs. 6,000 to the parties on record in O.P. No. 11 of 1946, an application by some other persons was made offering Rs. 7,000 for the same property. Whether this offer is genuine or not, I have no means of knowing, but it brings into relief the danger of the District Court usurping functions not assigned to it by Madras Act II of 1927 and taking upon itself the management of the properties of a religious endowment.

For these reasons I hold that the order of the Court below in O. P. No. 11 of 1946 was passed without jurisdiction and that the proper order to be passed in the circumstances of this case, is to cancel the order of the Hindu Religious Endowments Board dated 19th March, 1945, according sanction to the exchange of the lands specified in schedule A to O.P. No. 11 of 1946 for the lands specified in schedule B to that petition. The aforesaid order of the Hindu Religious Endowments Board is hereby cancelled. The further order of the District Judge directing a sale of the temple properties to the petitioners and the third respondent in the Court below in O.P. No. 11 of 1946 in also set aside. Having regard to the conduct of the third respondent in the Court below and her present attempt to upset an order to which she was apparently a consenting party, I direct that she should not have the costs of this civil revision petition.

K.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

A. Rangaswamy Iyer .. *Petitioner.**

v.

Thd Madura Urban Co-operative Bank Ltd. .. *Respondent.*

Execution—Decree for costs against trustee suing on behalf of trust—Executable personally against trustee.

Where a decree does not say on the face of it that the costs should be paid out of the estate or institution, the trustee is personally liable.

It is regrettable that in cases where a trustee sues or is sued, there should be any ambiguity in the decree which should make it perfectly clear whether the trustee is liable personally or whether the costs should be paid out of the estate.

Panchakshari v. *Venkataratnam,* (1934) 67 M.L.J. 209 : I.L.R. 58 Mad. 160 and *Munuswami Mudaliar* v. *Kandaswami Pillai,* (1934) 67 M.L.J. 787 relied on.

Petition under section 25 of Act IX of 1887 praying that the High Court will be pleased to revise the Judgment of the Court of the Subordinate Judge of Mathurai dated 28th February, 1947, in E.P. No. 21 of 1947.

M. S. Venkatarama Aiyar for Petitioner.

P. V. Subramanyam for Respondent.

The Court delivered the following

JUDGMENT.—The petitioner is Sri A. Rangaswami Iyer, said to be a leading pleader of the Madura Bar. He finds himself in the strange position of being a

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* C. R. P. No. 1132 of 1947. 26th January, 1949.

judgment-debtor in execution proceedings for the attachment of his law books and moveables on two decrees passed against him for costs in two unsuccessful suits he filed as trustee of two funds. The learned Subordinate Judge found that he was personally liable on these decrees and directed execution to proceed.

The short facts as admitted before me are these : The petitioner got himself appointed as trustee by Court in O.P. No. 57 of 1936 of two old funds, one the Madura Provincial Conference Fund and the other the Governor's Reception Committee Fund, which had deposited their moneys in the Madura Urban Co-operative Bank, Ltd. Some years after his appointment he sued for recovery of the deposits of these two funds in O.S. No. 27 of 1941 for about Rs. 3,000 and in S.C. No. 41 of 1942, both on the file of the Subordinate Judge, Madura, as trustee. The bank put up a successful plea of limitation and both the suits were dismissed. An appeal to the District Judge in the original suit and also a revision petition to the High Court were dismissed. The result is that there are two decrees for costs, one amounting to about Rs. 350 in connection with the original suit and the other for Rs. 56, odd, arising out of the small cause suit. The learned Subordinate Judge in simultaneous execution proceedings by the bank passed a common order overruling the objections of the judgment-debtor and directed execution to proceed. It is said that an appeal has been filed in the District Court so far as the decree on the original suit is concerned. The petitioner has come up in revision here in connection with the execution of the small cause decree for costs.

The actual decrees under execution in the small cause suit and in the civil revision petition in the High Court merely direct the plaintiff to pay the costs of the defendant-bank. The objection of the petitioner is that he is not personally liable under these decrees which imposed an obligation only on him as trustee of these funds. The learned Subordinate Judge followed the decisions in *Panchakshari* v. *Venkatarathnam*[1] and *Munuswami Mudaliar* v. *Kandaswami Pillai*[2], which are clear authority for the position that trustees are liable personally if such decrees do not specify that the costs should be paid out of the estate or institution. It is regrettable that in these cases where a trustee sues or is sued, there should be any ambiguity in the decree which should make it perfectly clear whether the trustee is liable personally or whether the costs should be paid out of the estate. It is, however, settled law as the learned Subordinate Judge has found that where the decree does not say on the face of it that the costs should be paid out of the estate or institution the trustee is personally liable. I am unable to accept the contention on behalf of the petitioner that the direction to the plaintiff to pay the costs means the plaintiff *qua* trustee of the fund and not the plaintiff individually and that the costs are only payable out of the fund's assets. On the admitted facts also all the fund's assets were in the bank and it is *prima facie* very unlikely that the Court should have contemplated costs being paid by the plaintiff out of no fund's assets in his possession at all.

It is competent for a Court to direct costs being paid out of the institution even in the event of an unsuccessful litigation by a trustee. In *Westminster Corporation* v. *St. George, Hanover Square (Rector and Church Wardens)*[3], the decision referred to by Curgenven, J., in *Panchakshari* v. *Venkatarathnam*[1], the trustees were given their costs out of the trust estate in very special circumstances although their appeal failed. It was made perfectly clear in that decision that the ordinary practice which was deviated from in that case was that the trustee who appeals does so at his own risk as to costs and should normally be content with the decision of the Court of first instance ; so, in this case, we have this petitioner, a lawyer, himself appealing against two considered decisions by Courts of first instance and increasing costs. It is urged that he was permitted to file these suits *in forma pauperis* and also that Government have thought fit to waive the collection of court-fee from him. These are really matters extraneous to the simple decree which I am called upon

1. (1934) 67 M.L.J. 209 : I.L.R. 58 Mad. 160.
2. (1934) 67 M.L.J. 787.
3. (1909) 1 Ch. D. 592.

to interpret. The learned Subordinate Judge has, in my opinion, correctly interpreted it in the light of settled case-law and held that the decree as it stands makes the petitioner personally liable for these costs.

The revision petition is dismissed but on it, in the circumstances, I make no order as to costs.

K.S. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO AND MR. JUSTICE PANCHAPAKESA AYYAR.

Madda Peda Brahmayya *alias* Satyanandam .. *Appellant.**

Criminal trial—Confession by accused—Voluntary nature—Retracted before the Sessions Judge—No reasons given for retraction—Conviction on such confessions not bad.

The fact that a confession is more elaborate than necessary or that it contains more particulars than are required at the particular stage does not necessarily show that the confession was not voluntary.

A voluntary and genuine confession is legal and sufficient proof of guilt, though the rule of prudence is in favour of seeking corroboration of a confession which has been retracted. So, where the confession was voluntary and represented the true state of facts and the accused did not give any reasons why he made the confession which he later on retracted, a conviction can be based on such retracted confession.

In re *Rajagopal*, (1943) 2 M.L.J. 634 : I.L.R. 1944 Mad. 308 (F.B.), referred to.

Appeal against the order of the Court of Session of East Godavari division at Rajahmundry in C.C. No. 36 of 1948, dated 25th August, 1948.

A. Varadarajan (as amicus curiæ) for Appellant.

The Crown Prosecutor for the Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Judgment of the Court was delivered by

Subba Rao, J.—The accused was convicted under section 302, Indian Penal Code and has been sentenced to transportation for life. The accused and P.W. 7 are husband and wife, P.W. 7 being his third wife. The husband and wife lived together happily and had a number of children. One Narayanamurthi (the deceased) was a neighbour of the accused, and it is in evidence that he led a wayward life. Somehow he was able to seduce P.W. 7 and there is evidence that there was illicit intimacy between P.W. 7 and the deceased Narayanamurthi. The husband discovered her in a compromising position twice, and on the second occasion as the accused threatened to put an end to their lives, the wife left the husband for her parent's house. On the morning of the 30th March, 1948, Narayanamurthi was found dead in his house, and the prosecution case is that he was murdered by the accused. That there was sufficient motive for the accused to commit the murder admits of no doubt. P.W. 7, Seethamma, the wife of the accused, admits in her evidence that she had illicit intimacy with Narayanamurthi and that she was discovered twice in a compromising position. There is also other evidence to that effect.

The more difficult question is whether the accused was the person who stabbed Narayanamurthi. There is no direct evidence in the case. The only important document on which the lower Court convicted the accused is the confession made by him before the Magistrate, Ex. P-16 in the case. In this the accused gave in a detailed manner the reason for the crime and the circumstances under which and the manner in which the offence was committed. Before the Sessions Court, when the Sessions Judge put him a direct question with reference to the confession made by him, he only stated "I know nothing. I cannot see after sunset. I sleep in the field." It will therefore be seen that the accused did not give any reason why he made a confession before the Magistrate. The learned counsel

* Cr. App. No. 568 of 1948. 18th January, 1949.

appearing for him contended that the confession was not voluntary and therefore should not be relied upon. He argued that the fact that the confessions contained so many details and so many facts corroborating the evidence in the case indicated that it could not have been a voluntary one. The elaborate manner in which the confession was made may well have been due to the fact that the accused, in a penitent mood, intended to make a clean breast of all the facts known to him. The fact that a confession is more elaborate than necessary or that it contains more particulars than are required at the particular stage does not necessarily show that the confession was not voluntary.

It was next contended that we should not act upon a retracted confession without corroboration on material particulars. As a question of law this argument is not sound, at least so far as our High Court is concerned. It has been held in a number of cases, the latest being *Rajagopal*, In re[1], that a conviction can be based on a retracted confession without corroboration if the reasons given by the accused for withdrawing the confession are palpably false. Ordinarily we should expect corroborative evidence of a retracted confession. Though it is not a rule of law as a rule of prudence it is generally unsafe to convict a person on a retracted confession alone. This statement of law is concisely and accurately stated in *Sukar Dusadh* v. *Emperor*[2],

> "As far back as in *Queen* v. *Jhurree*[3], it was held that a voluntary and genuine confession is legal and sufficient proof of guilt and this decision has never been overruled though it has sometimes been said that the rule of prudence is in favour of seeking corroboration of a confession which has been retracted."

But in this case we are satisfied that the confession was voluntary and represented the true state of facts. Indeed the accused did not even give any reasons why he made the confession which he later on retracted. He did not give, for the obvious reason that the confession was voluntary.

We, therefore, accept the confession made by the accused in the lower Court and hold that the learned Sessions Judge had rightly convicted him. The appeal is dismissed.

V.P.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL AND MR. JUSTICE GOVINDA MENON.

Muthiah Thevan .. *Prisoner.**

Criminal trial—Examination of medical witness—Desirability of medical witness being examined after the eye witnesses.

If the doctor who conducted the post-mortem examination is examined after the eye-witnesses' testimony had been recorded, the Court would be in a position to have an overall idea of the entire prosecution case so that it would be in a position to put proper questions to the doctor to elucidate fully the nature of the injuries.

Trial referred by the Court of Session of the Madura Division for confirmation of the sentence of death passed upon the said prisoner (2nd accused) in Case No. 128 of the Calendar for 1948 on 7th October, 1948, and appeal by the said accused.

V. T. Rangaswami Aiyangar for Accused 2 and 3.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Judgment of the Court was delivered by

Govinda Menon, J.—This case, again illustrates the inconvenience and difficulties experienced especially by a Court of Appeal when the doctor who speaks to the post-mortem examination of the body is examined as the very first witness for

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1. (1943) 2 M.L.J. 634 : I.L.R. 1944 Mad. 308 (F.B.).
2. A.I.R. 1941 Pat. 303 at p. 306.
3. (1867) 7 W.R. (Crl.) 41.

*R.T. No. 105 of 1948.
(Crl. App. No. 594 of 1948).
30th November, 1948.

the prosecution. We feel that if the doctor had been examined after the eye-witnesses' testimony had been recorded, the learned Sessions Judge would have been in a much better position to have an overall idea of the entire prosecution case so that he would have been in a better situation to put proper questions to the doctor to elucidate fully the nature of the injuries.

The appellants were accused 2 and 3 respectively in the Court below. The first appellant has been sentenced to death for the murder of Veeranna by cutting him at about 6 A.M. on the 29th of March, 1948. The second appellant was also charged along with the first for the same offence; but the learned Sessions Judge found him not guilty of having any common intention with the first appellant to commit the murder, and therefore he was convicted only of an offence under section 324, Indian Penal Code, and sentenced to rigorous imprisonment for two years.

The prosecution case is very simple. P.W. 4 according to his testimony, had gone a few days prior to the date of murder to the house of the 2nd accused for the purpose of borrowing a vel stick for boar hunting. At that time the 2nd accused was not in the house, the time of the visit being night time. The 2nd accused probably thought that P.W. 4 went there as he was friendly with the 2nd accused's wife. This is alleged to be the motive for attacking P.W. 4. Shortly stated, what happened on the day of occurrence was this. At about dawn P.W. 4 had gone to answer the calls of nature and was returning homewards, when, the second accused met him and attempted to cut P.W. 4 with the aruval which accused 2 was having with him. On seeing this P.W. 4 ran raising an alarm. The third accused who had also been armed with a vel stick chased him and both of them ran after P.W. 4; but fortunately he outstripped them and hence could not be injured; but the father of P.W. 4 on hearing this noise and the cry of P.W. 4 came running and wanted to intercede. The second accused then, according to the prosecution case now, cut the deceased, the father of P.W. 4 on the right side of the neck. The third accused stabbed him on the left shoulder with a vel stick. P.W. 4 pelted a stone at the 3rd accused which felled him down. P.W. 5 came running from the north and tried to separate but the second accused could not be pacified at all. He again cut the deceased on the neck and on the head. Afterwards the accused ran away when the deceased fell down. The deceased was taken to the house of the Village Munsiff, P.W. 9, at about 6-30 A.M. that is nearly within half an hour of the occurrence and a statement was recorded at the house of the Village Munsiff which was written by a teacher, P.W. 8, Ex. P-4. In that statement the deceased stated that when he was returning home the second accused came from the Mandaiamman temple and cut him with a vettaruval on the neck. After he fell down, the second accused cut the deceased again twice on the left shoulder. The third accused stabbed the deceased above the left elbow with a spear and cut him on the head above the right eye with a spear. Therefore according to this statement of the deceased, which is a dying declaration, the injury on the head above the right eye was given with a spear by the third accused and the other serious injuries were given by the second accused. After this statement was recorded the deceased was sent to the hospital at Uthamapalayam where he was admitted as an in-patient. By the time he reached the hospital, the deceased was unconscious and so no further statement could be taken from him. In spite of the best medical aid that could be given the deceased died on the 15th of April, 1948. It is unnecessary to state at any length about the various other stages in the investigation, for though three persons were charge-sheeted the learned Sessions Judge acquitted the first accused before him.

According to the post-mortem certificate, Ex. P-2, there were six injuries on the body of the deceased of which injuries 1, 2 and 5 were grievous and the doctor was of opinion that death was due to the injury on the brain which was a necessarily fatal one. He also testified that at the post-mortem all the injuries excepting injury No. 1 were almost healed up. Though the doctor does not say that, from the general tenor of the evidence we are led to conclude that the healing up was only

superficial because internally it is seen that the brain matter had become softened and putrid and there was pus on the right side of the brain. The spinous process of the third cervical vertebra was slightly broken. The cerebro spinal fluid was turbid and blood-stained and contained pus. The post-mortem certificate also shows that as a result of the second injury a portion of the occipital bone had been sliced off. In spite of all these injuries the doctor was of opinion that death was due to the injury in the brain and that the rest of the injuries were grievous.

The question then for decision is whether if we are to accept the dying declaration of the deceased, the second accused can be held guilty of murder. The doctor gave as his view that it is not unlikely that the man was conscious. The man was conscious and able to make a statement for some time after the receipt of the injuries, and from the evidence of the Village Munsiff, P.W. 9, we are satisfied that he was in a conscious and fit state of mind to give the dying declaration. Therefore the dying declaration cannot be brushed aside as being made by a person who was not in his proper senses. And if the dying declaration is read along with the evidence of the doctor, the result necessarily follows that none of the injuries caused by the second accused resulted in the death of the deceased. But P.Ws. 4 and 5 depose as if all the serious injuries were given by the second accused, and they attribute one stab to the third accused on the left shoulder with a vel stick. When we come to the evidence of P.Ws. 6 and 7 it is seen that no part is attributed in the inflictions of these injuries to the third accused at all, because by the time he pointed the vel stick at the deceased, according to P.Ws. 6 and 7, P.W. 4 pelted the third accused with a stone and the third accused fell down as a result of the hit by the stone. In this state of conflicting evidence we find it difficult to hold that the injury which caused the death of the deceased was dealt by the second accused.

So far as the third accused is concerned the learned Sessions Judge has held that he is guilty only of an offence under section 324, Indian Penal Code, as he had no common intention to commit murder along with the second accused. We are in agreement with the learned Judge that accused 3 did not entertain any common intention with accused 2 to commit murder. But there are no grounds to differ from the lower Court that accused 3 caused hurt to the deceased with a dangerous weapon; for which he has been properly convicted under section 324, Indian Penal Code. His conviction and sentence are confirmed.

As regards the second accused we have already stated that the injuries caused by him were serious and grievous; but if we accept the evidence of the doctor it cannot be said that any of these injuries caused the death of the deceased. In these circumstances we can convict the second accused only of an offence under section 307, Indian Penal Code. He no doubt intended to murder the deceased, but we cannot be sure that death resulted out of the injuries inflicted by him. The conviction and sentence on the second accused for the offence under section 302 are therefore set aside, and he is convicted of an offence under section 307, Indian Penal Code. As regards the sentence we are satisfied that the injuries were certainly very serious, and we therefore sentence him to transportation for life.

V.P.S. ——— *Accused 2 convicted under S. 307, I.P.C.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL AND MR. JUSTICE GOVINDA MENON.

Pugalumperumal Pillai .. *Appellant**

v.

Thangathammal .. *Respondent.*

Hindu Law—Gift by donor entitled in absolute fee-simple to estate—Donee a woman—Words indicating absolute gift—Clause of reverter in the absence of issue to the donee—Effect.

The two cardinal principles in the construction of wills, deeds and other documents are (1) that the clear and unambiguous dispositive words are not to be controlled or qualified by any general

*L.P.A. No. 48 of 1947. 30th November, 1948.

expression of intention; (2) that technical words, or words of known legal import, must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not use the technical terms in their proper sense.

Where a gift deed contains three distinct and clear phrases like, "hold and enjoy the property hereditarily," "from son to grandson and so on" and "as long as the sun and moon last" indicating the nature of the estate to be taken by the donee, any of which occurring alone will be sufficient ordinarily to enable the Court to construe the document as one granting an absolute estate,

Held, it was difficult to see what more words could have been used by the donor to confer an absolute estate on the donee.

Where by the first clause an absolute esate is granted to the donee, the next clause, reciting that in the absence of any issue to the donee the property should revert to the donor and her male heirs, should be read rather as an attempt to restrict the powers of an absolute owner, by a mode of devolution of the property according to the known ideas of the community to which the donor and donee belong, than as an intention to grant a life estate. Such a restriction being repugnant to an absolute estate is void.

Lalit Mohan Singh Roy v. *Chukkun Lal Roy*, (1897) L.R. 24 I.A. 76 : I.L.R. 24 Cal. 834 (P.C.), referred to.

Appeal against the judgment and decree of Rajamannar, J., dated 9th April, 1947, in S.A. No. 1036 of 1945 preferred to the High Court against the decree of the Court of the Subordinate Judge, Tuticorin, in A.S. No. 10 of 1944 preferred against the decree of the Court of the District Munsiff, Tuticorin, in O.S. No. 236 of 1942.

K. R. Rama Aiyar for Appellant.

C. R. Krishna Rao for Respondent.

The Judgment of the Court was delivered by

Govinda Menon, J.—This is an appeal under clause 15 of the Letters Patent against the judgment of Rajamannar, J., as he then was, reversing the decision of the Subordinate Judge of Tuticorin, in A.S. No. 10 of 1944, which in its turn reversed the decree of the District Munsiff of Tuticorin in O.S. No. 236 of 1942. As the facts and circumstances have been stated in great detail in the judgment appealed against, we do not consider it necessary to set them out at all. What the true construction of the deed of gift dated 8th May, 1905, executed by Pichiyarammal in favour of her daughter Veeraperumal Ammal is, is the only subject of controversy. If the donee Veeraperumal Ammal took the property the subject-matter of the gift, as an absolute property, then, the appellant necessarily fails. If, on the other hand, what was donated under Ex. P-7 in favour of Veeraperumal Ammal is only a life estate, or a woman's estate as is known under the Hindu law, then it is the common case that the appellant will succeed.

The relevant portions of the gift deed are as follows:

> "As I have given away to you the property in the schedule herein worth Rs. 1,500 as stridhanam gift, you shall hold and enjoy the aforesaid property hereditarily and from son to grandson and so on as long as the sun and moon last. After your lifetime, your issues if there are any, shall get the aforesaid property. If you have no male or female issues, the aforesaid property shall revert to me and to my male heirs. I shall, till my lifetime, reside jointly with you in the thatched house mentioned in the schedule."

The learned Judge, after an exhaustive consideration of some of the leading cases, relating to the construction of such deeds of gift and wills and relying upon the meaning of the terms mentioned in the deed, came to the conclusion that Veeraperumal Ammal took the properties absolutely under the gift deed.

The appellant's counsel urges as the first contention that what was intended by the donor was the granting of a life estate to Veeraperumal Ammal with a remainder to her issues and that this is made plain by the second sentence showing that the donor wanted the issue of Veeraperumal Ammal to get the property after her death. He further contends that as the clause stood, in the absence of any issue for Veeraperumal Ammal, the property should revert to the donor and her male heirs. There is a defeasance clause or a reverter which shows that the donee had only a life estate. No powers of alienation as such have been granted in favour of the donee and from this fact an inference is sought to be drawn that the intention

of the donor was in favour of a life estate and not of an absolute one. For this purpose, Ex. P-4, a sale deed dated 12th February, 1930, executed by Veeraperumal Ammal, the donee, is referred to. But we are satisfied that no guidance in the construction of Ex. P-7 can be gained by looking at an absolutely different kind of document executed by the donee twenty-five years after the date of gift.

It is unnecessary to consider any long list of cases in construing this document. In the very first sentence of the operative portion of the deed itself, it is clearly stated that the donee is to have the property as stridhanam in addition to a further recital that she shall hold and enjoy the property hereditarily and from son to grandson and so on as long as the sun and moon last. This contains three distinct and clear phrases indicating the nature of the estate to be taken by the donee. Any one of such phrases occurring alone in a deed of gift will be sufficient ordinarily to enable the Court to construe the document as one granting an absolute estate. If the donor had stated that the donee shall hold and enjoy the property hereditarily, there would not be much difficulty in construing it as a gift absolute. But here other phrases such as "from son to grandson and so on" and also "as long as the sun and moon last" are indicative of nothing but an absolute grant. These are words of disposition so well known and accepted as implying absolute rights that they have come to be recognised as practically terms of art and as the learned Judge says, it is difficult to see what more words could have been used by any donor to confer an absolute estate on the donee than the words used in this deed.

As observed by their Lordships of the Privy Council in *Lalit Mohan Singh Roy* v. *Chukkun Lal Roy*[1], there are two cardinal principles in the construction of wills, deeds and other documents. The first is that clear and unambiguous dispositive words are not to be controlled or qualified by any general expression of intention. The second is that technical words, or words of known legal import, must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not use the technical terms in their proper sense. Applying the principle mentioned above to the document in question, we do not feel any difficulty in holding that the intention of the donor was that her daughter should take an absolute estate. We need not discuss the effect of the last clause in the deed, because the contingency contemplated therein has not and cannot come to pass. The donee has left daughters and the dispute in the case has arisen as a result of transfers and claims made either by one of them, or all of them on the one hand and the alienees from another.

Relying upon the decision in *Subbamma* v. *Ramanaidu*[2], it is argued that there is a donation in this case to Veeraperumal Ammal with a gift over to her issue and such being the case the whole document should be given effect to which can be done only by construing the gift as a life estate. No doubt Varadachariar, J., in construing the will, the subject-matter of the dispute in that case, was of opinion that in order to avoid the possibility of not giving effect to certain portions of the will, the proper rule of construction has been to take the will as a whole; and the presence of a gift over, which is not a mere gift by way of defeasance, was held to be an indication that the prior gift was only a limited estate. Special circumstances which were present in that will, also led the learned Judge to come to that conclusion. Having considered that case carefully, we are of opinion, that the observations therein do not afford much assistance for the construction of Ex. P-7, where, as stated already, there are clear and unambiguous words denoting the grant of an absolute estate in favour of Veeraperumal Ammal.

Another decision on which the appellant's learned counsel relied was *Swamidayal* v. *Ramadhar*[3], in which the observations at pages 721 and 724 are stressed as indicating dicta supporting the appellant's argument. The principle underlying that decision of the Chief Court of Oudh at Lucknow was the use of certain words denoting proprietary rights and therefore we are not able to find that there can be

1. (1897) L.R. 24 I.A. 76: I.L.R. 24 Cal. 834 (P.C.).
2. (1937) 1 M.L.J. 268.
3. (1931) I.L.R. 6 Luck. 715.

any resemblance between the document construed there and Ex. P-7. Words such as "Hakdar" in *Subbamma* v. *Rama Naidu*[1] and "Malika" in *Swamidayal* v. *Ramadhar*[2], might denote rights of ownership, but certainly they are not of such wide and untrammelled amplitude as those used in the document under consideration.

Learned counsel for the appellant next relied upon certain observations contained in Theobald on Wills, 10th edition, page 332, to the effect that a gift without words of limitation may be cut down to a life interest, if the same property is disposed of at the death of the first taker and that words indicating that the property is to be enjoyed by some one else after the death of the first taker may have the effect of cutting down the first taker's estate to that of a life interest. It is further stated there that where the testator's whole property is given to a person absolutely, followed by a gift of the residue at his death, the first gift may be cut down to a life interest. An analogy is sought to be drawn between the second clause to the effect that on the death of the donee her issue, if there be any, shall get the property, and the circumstance envisaged in the portions considered above in Theobald on Wills.

We are of opinion that the analogy is not apt.

The second line of argument of Mr. K. R. Rama Aiyar is that the right of reverter to the donor and her male heirs is indicative that what was contemplated by the earlier portion of the deed was only a life estate. We do not think that it is possible to construe this document like that. We have already referred to the observations of the Privy Council in *Lalit Mohan Singh Roy* v. *Chukkun Lal Roy*[3] and these have been affirmed in a later decision in *Sarajubala Debi* v. *Jyotirmoyee Debee*[4], where the earlier case in *Lalit Mohan Singh Roy* v. *Chukkun Lal Roy*[3] has been specifically referred to. In view of the fact that by the first clause an absolute estate is granted to the donee, the next clause should be read rather as an attempt to restrict the powers of an absolute owner than as an intention to grant a life estate. Such a restriction is repugnant to an absolute estate and is void on the ground.

We are asked to hold that the intention of the donor would have been only to grant a life estate because ordinarily under the Mitakshara law what is known as a woman's estate enures only for her lifetime. To substantiate this argument, a passage from the well-known case in *Mohamed Shumsool Hooda* v. *Shewukram Mulli*[5], cited by their Lordships of the Privy Council in *Radhaprasad Mullick* v. *Ranee Mani Dasee*[6], to the following effect, was stressed on us :

> "In construing the will of a Hindu, it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family, and it may be assumed that as a general rule, at all events, women do not take absolute estates of inheritance, which they are unable to alienate."

But so far as the donor here was concerned, she was the sole owner entitled in absolute *fee-simple* to the estate she was making a gift of and from the words "stridhanam" and the other expressions which we have considered, we have necessarily to hold that her intention would have been that her daughter should have the same kind of rights in the property as she herself was enjoying. It is undisputed that she was the absolute owner and there are no materials gatherable from the four corners of the document from which it can even be surmised that the intention of the donor was to give a lesser estate to the donee than she was herself enjoying. In addition to the cases discussed above, our attention was also invited to a judgment of the Calcutta High Court in *Nandagopal* v. *Pareshmoni Debi*[7]. The learned Judges there do not lay down anything contrary to the well-known accepted principles which can be ascertained from cases of highest authority, but on the other hand what the learned Judges have decided is that the intention of the donor must be ascertained

1. (1937) 1 M.L.J. 268.
2. (1931) I.L.R. 6 Luck. 715.
3. (1897) L.R. 24 I.A. 76 : I.L.R. 24 Cal. 834 (P.C.).
4. (1931) 61 M.L.J. 501 : L.R. 58 I.A. 270 : I.L.R. 59 Cal. 142 (P.C.).
5. (1874) 14 B.L.R. 226 : L.R. 2 I.A. 7 (P.C.).
6. (1908) 18 M.L.J. 287 : L.R. 35 I.A. 118 : I.L.R. 35 Cal. 896 at 902 (P.C.).
7. (1910) 6 I.C. 354.

from a consideration of the entire passage in the deed of gift, and that in considering that passage, effect must be given to what is known to be the usual intention of a Hindu in disposing of his property, which is to keep the property in the family so that it may pass to persons who may be able to confer spiritual benefits on the donor. The donor in that case was a father who made a gift in favour of his daughter and from the words of the document the learned Judges came to the conclusion that the intention was only to confer a woman's estate. It is unnecessary to discuss this case at any length because the observations there, if we may say so, fit in with the facts of that case.

Learned advocate for the respondent invited our attention to two cases, *viz.*, *Tiruchendur Sri Subramaniaswami Temple* v. *Ramasamia Pillai*[1] and *Damodara Moothan* v. *Ammu Amma*[2], where words, though not very similar to those in Ex. P-7 but somewhat akin, have been construed as conferring an absolute estate. We do not think it necessary to discuss these cases at any length because when once it is found that by the first portion of the grant an absolute estate is intended to be conferred upon the donee, the subsequent clauses can only be read as a mode of devolution of property according to the known ideas of the community to which the donor and the donee belong. We are therefore in entire agreement with the learned Judge that on a true and proper construction of the deed of gift, Ex. P-7, Veeraperumal Ammal takes an absolute estate in the properties.

The appeal is therefore dismissed with costs.

V.P.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN.

Thathi Naicker .. *Appellant**

v.

The Co-operative Society, Kundalaputhur, through its President Nallama Naicker and others .. *Respondents.*

Civil Procedure Code (V of 1908), *sections* 63 *and* 64 *and Madras Co-operative Societies Act (VI of* 1932) *—Rules under, rule XXII* (20) (a)*—Sale under an award at the instance of a Co-operative Society—Not a "private transfer" within the meaning of section* 64, *Civil Procedure Code—Sale in contravention of rule—Not a nullity.*

A sale in execution of an award under the Madras Co-operative Societies Act (which has the force of a decree) at the instance of a Co-operative Society is not a " private transfer " within the meaning of section 64 of the Code, and that section will not save the rights of a prior attaching decree-holder.

The absence of an enabling provision like sub-section (2) of section 63 of the Code in rule XXII (20) (*a*) of the rules made under the Co-operative Societies Act does not necessarily imply that a sale in contravention of the rule is a nullity.

Appeal against the decree of the District Court, Ramnad at Madura, dated 20th March, 1946, in A.S. No. 520 of 1945 preferred against the decree of the Court of the District Munsiff, Sattur, dated 8th October, 1945, in O.S. No. 24 of 1945.

T. K. Rajagopala Aiyangar for Appellant.

K. Veeraswami for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff is the assignee-decree-holder in S.C. No. 80 of 1933, the decree in which was passed on 16th March, 1933. In execution of that decree the properties involved in this appeal were attached on 21st June, 1937 and were brought to sale on 4th January, 1944. The plaintiff decree-holder purchased the property himself and took delivery of the property on 3rd March, 1944. The properties originally belonged to the second defendant, judgment-debtor.

1. (1940) 2 M.L.J. 510.
2. (1943) 2 M.L.J. 332.

* Second Appeal No. 2119 of 1946. 24th January, 1949.

The first defendant, Co-operative Society, obtained an award to recover a debt due from the second defendant and his wife. The award was dated 16th June, 1938. That had the force of a decree and in execution of that decree (award) the properties were brought to sale on 12th May, 1941; the first defendant society itself purchased the property. A sale certificate, however, appears to have been applied for only subsequent to the sale in execution of the decree in S.C. No. 80 of 1933. It was issued to the first defendant on 11th March, 1944. By then, the plaintiff had obtained delivery of the properties. The first defendant applied for re-delivery of the properties in E.A. No. 194 of 1944 and it was allowed; delivery was effected on 9th July, 1944. Subsequent to that the first defendant sold the properties to the third defendant.

The plaintiff's claim was that he had acquired title to the properties and that re-delivery of the properties to the first defendant and their present possession with the third defendant cannot prevail against the superior claims of the plaintiff.

These contentions failed to find acceptance with the Courts below. The plaintiff comes up in second appeal.

Of the three points raised by the learned advocate for the appellant two were not specifically raised before the lower appellate Court nor decided there. The learned advocate for the appellant contended :

(1) That the sale by the Co-operative Society was not valid as it infringed the provisions of rule XXII (20) (*a*) of the rules framed under the Madras Co-operative Societies Act;

(2) that section 64, Civil Procedure Code, saved the rights of the plaintiff who had attached the properties earlier in point of time than the sale under which the first defendant purchased the properties; and

(3) that in any event it was not open to the first defendant to apply under Order 21, rule 100, Civil Procedure Code, in E.A. No. 194 of 1944, since he was not the person in possession on the date of delivery, 3rd March, 1944, and could not therefore be deemed to have been dispossessed on that date by delivery of property to the plaintiff.

It is not open to the plaintiff to bring up in second appeal a question mainly of fact, that the first defendant was not the person in possession on 3rd March, 1944. It was not specifically raised in the pleadings; there was no issue, there was no adjudication in the trial Court. Though that ground was raised in the memorandum of appeal in the lower Court it was not decided in the lower appellate Court and there was nothing to indicate that the point was even urged before the learned District Judge. It is not open to the plaintiff to bring it up in appeal at this stage.

There is no real substance in the contention that the plaintiff is entitled to invoke section 64, Civil Procedure Code. What this section provides for is that a "private transfer" of property attached in execution of a decree shall not prevail against the attaching decree-holder. As the learned advocate for the appellant interpreted section 64, it would virtually delete the word "private" from "private transfer." We are here dealing with a case of a sale under a decree in favour of the plaintiff and a sale under an award in favour of the first defendant, that award itself having the force of a decree. Such a sale at the instance of the Co-operative Society is not a private transfer within the meaning of section 64 of the Civil Procedure Code. An elaborate discussion on this point appears to be unnecessary.

The learned District Judge dealt with the first of the contentions, based upon rule XXII (20) (*a*) of the rules framed under the Madras Co-operative Societies Act. I entirely agree with the learned Judge's reasoning and his conclusions. Merely because there is a specific provision in section 63, Civil Procedure Code, clause (2), that nothing in section 63 shall be deemed to invalidate any proceeding taken by a Court executing a decree, it does not mean that a sale held by an inferior Court, in this case, the "Court" enforcing the award under the Co-operative Societies Act, is invalid. The absence of an enabling provision like section 63 (2) of the Civil Procedure Code from rule 20 (*a*) of the rules framed under the Madras Co-operative Societies Act does not necessarily imply that a sale in contravention of rule XXII (20) (*a*) is a nullity. As pointed out by the learned Judge even prior

to the amendment of section 63, Civil Procedure Code, Courts always held that a sale in contravention of what corresponded to the provisions of section 63 (1) of the Civil Procedure Code was not a nullity.

The appeal fails and is dismissed with costs.

V.P.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN.

A.B. Tonse and others .. *Petitioners.**

Penal Code (XLV of 1860), *section* 4 (1) *and Criminal Procedure Code (V of* 1898), *section* 188 *as amended by the Indian Independence (Adaptation of Central Acts and Ordinances) Order*, 1948—*Section* 4 (1), *Penal Code and section* 188, *Criminal Procedure Code—If and how far extra-territorial—Offences committed in Travancore and Cochin when those States were outside British India—Initiation of proceedings after accession of such States—Jurisdiction of a Court in India to try the same—Law governing—Government of India Act*, 1935, *section* 205 (1)—*No final adjudication as to liability under criminal law—Decision on a question of jurisdiction—Not enough to justify the grant of a certificate for leave to appeal to the Federal Court.*

Offences committed in Travancore and Cochin which were outside British India when those offences were alleged to have been committed by a person who is a subject of the Dominion of India resident in a Province are permissible under section 4 (1), Indian Penal Code, as it stood on the date on which the offences are alleged to be committed, after such States had become part of the Dominion of India, provided the requirements of section 188, Criminal Procedure Code, were satisfied and a Court in the Dominion of India has jurisdiction to try the same.

Where there has not been a final adjudication of the rights of the parties, that is the liability in criminal law of the parties, the fact that an important point of jurisdiction has been decided is not enough to justify the grant of a certificate under section 205 (1) of the Government of India Act.

Petition praying that in the circumstances stated therein the High Court will be pleased to quash the charges framed against the petitioners herein, the accused in C.C. No. 4 of 1948 on the file of the Court of the Special First Class Magistrate of Kankanadi, Mangalore.

N.K. Nambiar and *M. Sekhara Menon* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The three charges against the petitioners were (1) that in the month of April or May 1946 they cheated Albert Correa, P.W. 10, at Varapurzha in Travancore State; (2) that about the month of March, 1946, they cheated P.W. 11, V. Hormis, at Cheranallur in Cochin State ; and (3) that in about February, 1946, again at Cheranallur in Cochin, they cheated P.W. 12, M.C. Simon, and that they committed offences punishable under section 420 read with section 37, Indian Penal Code. The petitioners have applied to have these charges quashed.

On the date of the offences complained of the accused were "native Indian subjects of His Majesty" within the meaning of section 4, clause 1, Indian Penal Code, as it stood on that date. The offences were alleged to have been committed in Travancore and Cochin which were beyond "British India" within the meaning of section 4 (1), Indian Penal Code. Section 188 of the Criminal Procedure Code prescribed the sanction of the political agent or of a local Government before criminal proceedings could be validly initiated for offences committed by such persons outside British India. That sanction was given by the Government of Madras on 25th May, 1948. There was thus a valid initiation of criminal proceedings against these petitioners only on 25th May, 1948.

Between the dates on which the offences were alleged to have been committed and the initiation of criminal proceedings against the petitioners the Indian Independence Act was passed. Subsequent to that Travancore and Cochin, which had been beyond British India before the Indian Independence Act, acceded to the Dominion of India.

* Crl.M.P. No. 1906 of 1948. 26th November, 1948.

The question for consideration in this petition is whether the criminal Court in South Kanarà in the Dominion of India has jurisdiction to try the petitioners for the offences they were alleged to have committed in Travancore and Cochin.

Had there been a valid initiation of the criminal proceedings before 15th August, 1947, on which date the Indian Independence Act came into force, the case for the Crown would have been unanswerable. Were the dates on which the offences were alleged to have been committed and the date on which criminal proceedings against them were validly initiated subsequent to 15th August, 1947 and the date of accession of Travancore and Cochin to the Dominion of India, the case for the Crown would have been equally unanswerable.

Section 4 (1) of the Indian Penal Code as amended by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948, ran :

"The provisions of this Code apply also to any offence committed by

(1) Any British subject of Indian domicile in any place without and beyond the Provinces of India."

No doubt, as the learned advocate for the petitioners pointed out, on 25th May, 1948, Cochin and Travancore were part of the Dominion of India. A reference to section 2, clause 4 of the Indian Independence Act and section 5 (1) (*c*) of the Government of India Act, 1935, as adapted by the India Provisional Constitution Order of 1947 should make that quite clear. There is really no need at this stage to consider the scope of section 7 of the Indian Independence Act. As I have already pointed out, before 25th May, 1948, Cochin and Travancore had acceded to the Dominion of India.

The learned advocate for the petitioners contended that section 4 (1), Indian Penal Code, was extra-territorial in its operation and could not, therefore, by itself confer jurisdiction on criminal Courts in the Dominion of India to try persons for offences committed in India. As ancillary to this contention the learned advocate urged that the amendment of section 4 of the Indian Penal Code by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948, was *ultra vires* the Governor-General and that such a change in law would also be *ultra vires* the Legislature of the Dominion of India. No doubt, section 6 (2) of the Government of India Act limits the powers of the Legislature of the Dominion of India to enact laws to be in operation in the Acceding States. It was not denied that Criminal Law and Criminal Procedure were not included within the scope of the Instrument of Accession signed by the Rulers of Travancore and Cochin.

Section 4 (1), Indian Penal Code, as amended provides a complete answer to the contentions of the learned advocate for the petitioners. To reiterate, section 4 (1) ran

"The provisions of this Code (Indian Penal Code) apply also to any offence committed by any British subject of Indian Domicile in any place without and beyond the Province of India."

That the petitioners are British subjects of Indian domicile was not questioned. That Travancore and Cochin are beyond the Provinces of India as the expression "Province" has been defined and used in the Government of India Act is not open to question. Section 5 of the Government of India Act itself differentiates between the Governors' Provinces and Indian States acceding to the Dominion. What section 4 (1), Indian Penal Code, provides for is the punishment of British subjects of Indian domicile resident in a Province—whether it is a Governor's Province or a Chief Commissioner's Province, it is immaterial—for offences committed outside the Provinces. The Acceding States are certainly outside the Provinces within the meaning of section 4 (1), Indian Penal Code and that they are outside the Province is established by section 5 of the Government of India Act, though those States have become part of the Dominion of India.

To reiterate, the learned advocate for the petitioners urged that section 4 (1), Indian Penal Code, was extra-territorial in its operation. To that extent that contention is quite correct. But what section 4 (1), Indian Penal Code, really provides for is its operation ex-the territory of the Province, in this case ex-the territory of the Province of Madras. That the Legislature of the Dominion of India is

competent to legislate for such a class of offences cannot be really open to question. It should be remembered that the persons to whom section 4 (1) is intended to apply are British subjects of Indian domicile : and the petitioners are British subjects of Indian domicile. They are British subjects, residents of a Province, for whom the Legislature of the Dominion of India can legislate. I am unable to see any real basis in law for the contention of the learned advocate for the petitioners, that because such persons are to be punished for acts done by them in an acceding State, section 4 (1), Indian Penal Code should be deemed to be the law prevailing in the acceding States. It is not as if section 4 (1), Indian Penal Code was intended to confer jurisdiction on a criminal Court in one of the acceding States to try British subjects of Indian domicile for offences committed by them in such an acceding State.

The real question for consideration in this petition is whether section 4 (1) Indian Penal Code would apply when the offence was alleged to have been committed on a date when Cochin and Travancore were not part of British India and when the initiation of criminal proceedings against the petitioners for those acts was on a date when Cochin and Travancore had become part of the Dominion of India.

What constituted the offence complained of should obviously be governed by the law as it stood on the dates the offences were alleged to have been committed. Under section 4 (1), Indian Penal Code, as it stood on the dates the offences were alleged to have been committed, such offences committed in Cochin and Travancore were punishable under section 4 (1), Indian Penal Code, provided the requirements of section 188, Criminal Procedure Code, were satisfied. As has been pointed out in *Antony D'Silva and others*[1], the first part of section 188 is really the counterpart of section 4 (1), Indian Penal Code. Section 188, Criminal Procedure Code, being procedural, had to be applied as it stood on 25th May, 1948 : and section 188, Criminal Procedure Code, was amended by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948 to conform to section 4, Indian Penal Code, as it was amended by the same Order. On 25th May, 1948, the Government of Madras could and did sanction the inititation of criminal proceedings against the petitioners for offences alleged to have been committed by them outside the Province of Madras. Section 4 (1), Indian Penal Code, and section 188, Criminal Procedure Code cannot be viewed as wholly extra-territorial in its operation. It is not extra-territorial in the sense that that would be the law applicable to the Courts in Cochin and Travancore ; but in a restricted sense the operation of section 4 (1), Indian Penal Code and section 188, Criminal Procedure Code is extra-territorial in that it provides for punishment of offences committed by the British subject of Indian domicile resident in a Province for offences committed by him outside that Province. It is not the marginal note to section 4 (1) that really governs the scope of the operation of that section but the plain wording of the section itself.

To sum up, the contention of the learned Advocate for the petitioners, that there is no provision in the Indian Penal Code to punish any person, though he be a subject of the Dominion of India resident in a Province, for offences committed in Travancore and Cochin, which were outside British India when the offences were alleged to have been committed, after such States had become a part of the Dominion of India, must fail. Such offences, in my opinion, are punishable under section 4 (1), Indian Penal Code, as it stood on the date the offences were alleged to have been committed provided the requirements of section 188, Criminal Procedure Code, were satisfied. They were satisfied on 25th May, 1948, and there was a valid initiation of proceedings. The petition is dismissed.

Mr. Nambiar for the petitioner asked for a certificate to issue for leave to appeal to the Federal Court under section 205 (1) of the Government of India Act, 1935. It is no doubt true that an interpretation of the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948, amending the provisions of section

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1. (1948) 2 M.L.J. 132.

4, Indian Penal Code and section 188 of the Code of Criminal Procedure and their validity in the Acceding States was involved in the case before me. But as pointed out by the learned Public Prosecutor, *Kuppuswami* v. *King*[1], bars the grant of a certificate at this stage. There has been no final adjudication of the rights of the parties, that is of the liability in criminal law of the petitioners. No doubt an important point of jurisdiction has been decided. That by itself is not enough to justify the grant of the certificate contemplated by section 205 (1) of the Government of India Act, 1935. It would still be open to the petitioners to ask for such leave should there be a final determination of their liability, for example, by a conviction in the ultimate Court. At present there can be no issue of the certificate prayed for.

V.P.S. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Sowcar Chinna Basamma .. *Appellant**

v.

Veeradhi Veerappa and another .. *Respondents.*

Civil Procedure Code (V of 1908), *section* 66—*Applicability—Certified purchaser before* 1908—*Suit against person claiming under him alleging that the purchase was made benami for plaintiff—Maintainability.*

A suit cannot be maintained against a certified purchaser or any one claiming through him on the ground that the purchase was made on behalf of the plaintiff whether the purchase was made before 1908 or afterwards.

Promatha Nath Pal Chowdhuri v. *Mohini Mohan Pal Chowdhuri,* (1920) I.L.R. 47 Cal. 1108, not followed.

Theyyavelan v. *Kochan,* (1897) 7 M.L.J. 290 : I.L.R. 21 Mad. 7, *Sowcar Kamurudeen Sahib* v. *Noor Mohammad Usman Sahib,* (1914) 28 M.L.J. 251 and *Chidambaram Chettiar* v. *Subramania Aiyar,* (1915) 3 L.W. 86 relied on.

Appeal against the decree of the District Court, Chittoor dated 9th November, 1945, in A.S. No. 197 of 1945 preferred against the decree of the District Munsiff Court of Chittoor in O.S. No. 157 of 1942 dated 11th January, 1945.

Ch. Raghava Rao and *B. Srinivasamurthi* for Appellant.

T. K. Subramania Pillai for *A. C. Sampath Aiyangar* and *S. Krishnamachari* for Respondents.

The Court delivered the following

JUDGMENT.—One Veerabhadrappa was a mortgagee ; and he filed a suit for sale on his mortgage deed and obtained a decree. In execution of the decree he brought the hypotheca to sale on the 9th March, 1896; and according to the finding of fact which cannot be canvassed here in second appeal, it was purchased by him *benami* in the name of his father-in-law, Lingappa. Prior to the present Code of Civil Procedure, section 317 of the Code of 1882 prevented any person from maintaining a suit against a certified purchaser on the ground that the purchase was made benami. The first defendant in this suit is not the certified purchaser herself, but a person who claims through him ; and the question that arises in this appeal is whether the plaintiffs can put forward the benami nature of the transaction in the suit, in view of the wording of section 66 of the present Code, which is wider than that of section 317 of the old Code and runs :

"No suit shall be maintained against any person claiming title under a purchase certified by the Court. . . . . on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims."

This point was not raised in the trial Court ; but only in appeal to the lower appellate Court, which purported to follow *Promatha Nath Pal Chowdhuri* v. *Mohini Mohan Pal Chowdhuri*[2], in which it was held that section 66 had no retrospective effect and

1. (1948) 1 M.L.J. 103 : 1947 F.L.J. 110. 2. (1920) I.L.R. 47 Cal. 1108.

*S.A. No. 558 of 1946. 10th January, 1949.

that section 317 did not prevent that plea being put forward against somebody who claimed through the certified purchaser.

It is strange that the attention of the learned District Judge was not drawn to the Madras decisions on this point. In *Theyyavelan* v. *Kochan*[1], a brief reference was made to the wording of section 317; and it was held that a person taking an assignment from a certified purchaser at a Court sale is not entitled under section 317 of the Code of Civil Procedure to object to the maintainability of a suit on the ground that the purchase was made benami. The opposite view has however been taken in later decisions. Sadasiva Ayyar, J., in *Kandasami* v. *Nagalinga*[2], seems to have taken the view that even though section 317 of the Civil Procedure Code was in force when the purchase was made, section 66 of the new Code should be applied; for that section, as well as section 317, Civil Procedure Code, did not deprive the true owner of his proprietary right, but merely prohibited him from maintaining a suit against a certified purchaser; and so the amendment was of a procedural nature and that it was section 66 of the new Code rather than section 317 of the old that had to be applied to a suit filed after the new Code came into existence. That view was affirmed in *Sowcar Kamurudeen Sahib* v. *Noor Mohammad Usman Sahib*[3], It was also held in this latter case that section 66 of the new Code was purely declaratory of the true meaning of section 317 of the old Code. The same question arose in *Chidambaram Chettiar* v. *Subramania Aiyar*[4]. There, both the learned Judges were clearly of opinion that the law under the new Code was the same as the law under the old Code in that respect. The question was also raised, however, whether section 66 had retrospective effect. Coutts Trotter, J., did not discuss that question, and also Srinivasa Aiyangar, J., was inclined to hold that it was a mere regulation of procedure and that section 66 of the new Code had therefore to be applied; yet he preferred to base his decision on the same ground as Coutts Trotter, J., *i.e.*, that section 317 of the old Code applied to persons claiming through the certified purchaser as well as to the certified purchaser himself. In view of these recent decisions, I have no doubt that the present law, as far as it relates to this High Court, is that a suit cannot be maintained against either the certified purchaser or any one claiming through him, whether the purchase was made before 1908 or afterwards.

Mr. Subramania Pillai argues that even if section 66 of the new Code or section 317 of the old prevents the plaintiffs from having recourse to their title through Veerabhadrappa; yet they are entitled to rely on long possession as affording them a title by prescription. That is no doubt true. The only question is whether at this stage they should be given a further opportunity to establish their title on that ground. In their plaint, they made reference to the long possession of Veerabhadrappa and his wife but they did not refer to their acquisition of a title on that ground. No issue on this matter was framed in the suit; nor was any mention made of it in either of the Courts below. It has however to be remembered that in the trial Court no question of the applicability of section 66 was raised, and the plaintiffs had secured a finding in their favour on the question of benami, which in the absence of section 66 would have been sufficient to entitle them to a decree. The appeal to the lower appellate Court was by the first defendant; and there again the question of fact with regard to the benami nature of the purchase was the main question argued. The applicability of section 66 was then raised; but the point was decided in favour of the plaintiffs; and so no occasion really arose for any argument on the question of the plaintiffs' alternative title by way of prescription. I think therefore that it would be only just that the plaintiffs should be given an opportunity, now that the point of law has been decided against them, to argue that they have acquired title to the property by prescription.

The appeal is allowed and A.S. No. 197 of 1945 remanded to the lower appellate Court for fresh disposal on the question of the plaintiffs' alternative claim.

1. (1897) 7 M.L.J. 290 : I.L.R. 21 Mad. 7.
2. (1912) 23 M.L.J. 301 : I.L.R. 36 Mad. 564.
3. (1914) 28 M.L.J. 251.
4. (1915) 3 L.W. 86.

As the matter was not raised in the form of an issue before the trial Court, it will perhaps be more just if the parties, whose attention was not as forcibly directed to the question of possession as would have been necessary if there had been an issue on the question of adverse possession, be given an opportunity to adduce additional evidence.

The costs of this appeal will abide the result. The Court-fee paid in appeal will be refunded.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, AND MR. JUSTICE SOMASUNDARAM.

Chennuru Sitharamamurthi Chetty and others .. *Appellants**

v.

Chennuru Guruswami Chetti and others .. *Respondents.*

Partnership—Renewal of lease obtained by one of the partners in his own name—Presumption—Right of other partners—Trust Act (II of 1882), sections 88 and 90—Applicability—Constructive trust—Limits—Sale of lease (of salt pans) not permitted by Madras Salt Act, (VI of 1889)—Proper course to adopt.

The renewal of a lease of the partnership property by one or more of the partners without the privity of the others enures for the benefit of all. The law is substantially the same in India as in England and it is contained in sections 88 and 90 of the Indian Trusts Act. There is no irrebuttable presumption of law that a renewal of a lease belonging to the partnership by one of the partners enures to the benefit of all the partners. A partner no doubt occupies a fiduciary position in relation to the other partners in the affairs of the firm, but he does not suffer under an absolute disability by virtue of his position to acquire any benefit or advantage for himself in any circumstances. There may be cases when a partner, during the continuance of a partnership, can secure a new lease to himself without the new lease being held to be for the benefit of the partnership. It would depend upon the facts and circumstances in each case. In the case of trustees and personal representatives the presumption of personal incapacity to retain the benefit is treated as irrebuttable, inasmuch as the basis of the presumption is considered to be public policy. But, in the case of mortgagees, joint tenants and partners the presumption is treated as rebuttable and depends upon the facts and circumstances of each case. The doctrine of constructive trust in respect of the renewal of a lease applies even to cases where the renewal is made after the termination of the partnership but before its assets have been sold. The fact that the renewed lease would commence after the termination of the partnership cannot make any difference, so far as the application of this doctrine is concerned, if the renewal was obtained either during the partnership or before its assets have been sold.

Whether the partnership is for a limited time or is dissoluble at will the rule equally applies.

Case-law discussed.

The fact that the lease is of salt pans from the Government the sale of which is not permitted by the Madras Salt Act will not be a bar to the granting of relief to the other partners. In such a case the only practicable course is to direct a value to be put upon the benefit of the lease which value will be available for distribution between the partners according to their shares.

Appeal against the decree of the Court of the Subordinate Judge, Chicacole in O.S. No. 1 of 1943 dated 30th March, 1946.

T. L. Venkatarama Aiyar, Kasturi Seshagiri Rao and *Kasturi Sivaprasada Rao* for Appellants.

The Advocate-General (*K. Rajah Aiyar*), *K. Bhimasankaram* and *B. V. Subrahmaniam* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—This appeal and the memorandum of objections arise out of a suit filed in the Court of the Subordinate Judge at Chicacole for reliefs in respect of an alleged partnership formed to work a salt factory called the Badjanapara salt factory in the Naupada division, Vizagapatam district.

In this Province the right to manufacture and sell salt is generally obtained by the grant of a licence issued by the Government subject to the rules under the Madras Salt Act of 1889 in pursuance of a lease of salt pans belonging to Government. The leases are usually for long periods, and in common practice are granted

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*Appeal No. 609 of 1946. 10th December, 1948.

to the highest bidder or bidders at auctions held by the Salt Department, unless the Salt Department chooses to renew an expired lease already granted. In or about the later half of the year 1925, the Salt Department put up for auction the leasehold interest in a salt factory called the Badjanapara salt factory. Five persons, namely, Chennuru Appalanarasayya Setti, the father of defendants 2 to 7 in the suit, Chennuru Guruswami Setti, the first defendant, Chennuru Appanna Setti, the first plaintiff, Chennuru Gavarayya, the father of plaintiffs 2 to 4, and Vajrapu Venkataratnam Setti, the fifth plaintiff entered into an agreement that each of them should offer bids at the auction, and if the sale was confirmed in favour of any one or more of them, all the five should enjoy the profit or bear the loss thereof, according to particular shares. They each contributed their share to the amount of the bid. At the auction held by the Salt Department, the sale was confirmed in favour of Appalanarasayya and Guruswami out of the five. The lease was for a period of 17 years from 1st January, 1926 to 31st December, 1942. In pursuance of the lease executed by the Government, necessary licences were also granted to work the factory. On 18th March, 1926, a formal deed of partnership was executed between the five individuals, and registered on 25th March. The shares of the five partners were as follows : Chennuru Appalanarasayya, five annas, Chennuru Guruswami, five annas, Chennuru Appanna, two annas, Chennuru Gavarayya, two annas, and Vajrapu Venkatratnam Setti, two annas in the rupee. Appalanarasayya and Guruswami in whose names the licence stood were to be the managing partners. The capital was a sum of Rs. 30,000 contributed in accordance with the respective shares of the five partners. It was *inter alia* provided in the deed that the two managing partners should consult the remaining partners and act according to the majority in case a sum exceeding Rs. 100 was required for any expense, and that the resolutions that may be passed at the meetings of the partners should be entered in a resolution book, maintained for the purpose. The other provisions are not material for the disposal of this appeal.

As already mentioned, the lease was to expire by 31st December, 1942. In August, 1941, the Salt Department began to take steps to ascertain if the lessees who were working salt factories under leases which would expire during the course of the year 1942 required renewal for a further period of 25 years from the date of expiry of the subsisting lease. A notice was served on the joint licensees of M.E. No. 5, the suit salt factory, informing them that their lease would expire by 31st December, 1942, and requesting them to submit a petition to the office before 20th August, 1941, if they required the renewal of their lease for a further period of 25 years. It may be mentioned that prior to this, Appalanarasayya had died, on or about 23rd August, 1935, and his sons, defendants 2 to 7 were recognised by the Government as the joint lessees in the place of their father, and they were also admitted into the partnership in his place. On 23rd July, 1942, defendants 1 to 7 as joint lessees of the suit salt factory put in a petition to the Collector of Customs and Salt Revenue, Madras, through the Factory Officer, Naupada, requesting that they may be granted a fresh lease of the factory for a further period of 25 years commencing from 1st January, 1943. In this petition, they mentioned the fact that they had been granted a lease current up to 31st December, 1942, and that they had faithfully observed the terms and conditions of the lease to the entire satisfaction of the department. On this petition, the officers of the Salt Department reported that the work and conduct of the lessees were satisfactory. On 11th November, 1942, the Collector sanctioned renewal of the lease in the names of the existing lessees in respect of the areas held by them, if they accepted the terms and conditions of the draft lease prepared by the department. On 18th December, 1942, defendants 1 and 2 to 7 represented by the 2nd defendant, issued a notice to the fifth plaintiff intimating that the period of the partnership agreement would terminate by 31st December 1942, and that in respect of the 2 annas share belonging to the fifth plaintiff a sum of Rs. 1586-11-0 was due by him to the firm. There was a reference to a settlement of account arrived at on 21st January, 1939. A

demand was made to agree to settle profits and losses for the period from 21st January, 1939 upto 31st December, 1942, after verifying the accounts. It was acknowledged that about 82,100 maunds of salt remained undisposed of, which would be sold subsequently and the net proceeds divided. There was no reference whatever in this notice (Ex. P-9) to the renewal of the lease which had been sanctioned by the Collector on 11th November, 1942. Under instructions from the fifth plaintiff, his advocate replied to this notice (Vide Ex. P-9-a). In this reply, the fifth plaintiff characterised the conduct of defendants 1 to 7, in issuing the notice as fraudulent, because the renewal of the lease for a further period of 25 years was for the benefit of the partnership which had to be continued as before, and that they were actuated by the evil intention of obtaining wrongful gain, alleging that the renewed lease was their private property. The settlement of account on 21st January, 1939 alleged in the notice of defendants 1 to 7 was denied. The fifth plaintiff even invoked the operation of the penalty clause in the partnership deed, Ex. P. 2, under which he charged that defendants 1 to 7 were liable to a penalty at the rate of Rs. 2,500 per individual. This reply was dated 28th December, 1942, and on 5th January, 1943, the suit out of which this appeal arises was instituted by the fifth plaintiff, along with Chennuru Appanna Setti as the first plaintiff, and the sons of Gavarayya as plaintiffs 2 to 4. Besides defendants 1 to 7, other defendants were added as *pro forma* defendants as persons who might have an interest in the benefits of the partnership indirectly. The plaintiffs originally prayed for the following reliefs :

" (*a*) For a declaration that the defendants 1 to 7 have forfeited their rights in the suit partnership, and

(*b*) For a declaration that the suit partnership is continuing and that the renewal of the salt lease contained in the names of defendants 1 to 7 for a further period of 25 years is one of the assets of the said partnership enuring to the benefit of the partnership, and

(*c*) For an injunction restraining defendants 1 to 7 from carrying on the salt works or salt business independently of the partnership and for their personal benefit by using the firm name "Chennuru Guruswami Chetty and Venkataramanayya Chetty and Bros., Lessees of Badjanapara Extension, Naupada," the goodwill of the firm and the material and the properties of the firm or partnership and its business connections, and

(*d*) That an account be directed to be taken of the profits that arose annually from the suit partnership since the beginning of the partnership, till this day and the plaintiffs' share of such annual profits be directed to be paid by defendans 1 to 7 with interest at 6 per cent. per annum alternatively, if for any reason the Court were to hold that the suit partnership terminated or legally dissolved by virtue of any construction put on the partnership agreement dated 18th March, 1926 and therefore not possible to grant the aforesaid reliefs, the plaintiffs pray that

(*e*) It be declared that the renewal of the suit lease obtained in the names of defendants 1 to 7 for a further period of 25 years is also an asset of the suit partnership concern, and

(*f*) A general account of all the assets and liabilities and of all the profits arising from the partnership from its beginning be directed to be taken, and defendants 1 to 7 be directed to pay, deliver and distribute to the plaintiffs their share of the profits and assets that may be found due and payable on taking such accounts, and

(*g*) That defendants 1 to 7 be further restrained by a permanent injunction from carrying on the partnership salt works or business or similar salt works or business and from using any of the partnership assets, material and utilities such as the salt works, trollies, channels, and other facilities and business connections, established or created for salt manufacture with partnership funds in the pans described in the A schedule in such business and from using the goodwill of the firm and the firm's name " Chennuru Guruswami and Venkataramanayya, Bros., Lessees of Badjanapara Extension, Naupada " in the carrying on of any such business, and

(*h*) Grant the costs of the suit and such further or other relief which the Court might deem fit and proper after taking into consideration all the circumstances, pleadings and evidence of the case."

At the trial, reliefs (*a*), (*b*) and (*c*), were abandoned, and the plaintiffs filed a memorandum on the 8th February, 1946 electing to seek for the reliefs (*d*), (*e*), (*f*) and (*h*) only.

The contesting defendants 1 to 7 raised several pleas in defence, some of which have been found to be obviously untenable, such as, for instance, the plea that there was no partnership at all. Very properly, the arguments of learned counsel in appeal on both sides, were confined to the rights of parties in respect of the renewal of the lease which expired on 31st December, 1942 for a further period of 25 years.

from 1st January, 1943. The plaint allegations relating to this renewed lease are contained in paragraph 12 which runs as follows :

" As the term of the partnership's salt lease was to expire by the end of 1942, and as enormous sums were being continuously expended for extensions and improvements to the pans, channels, reservoirs etc., both from the capital and from out of the large profits accruing to the partnership, and in pursuance of the object of the partnership, and as a continuation of the venture of the partnership, it was unanimously resolved by the partners to seek for a renewal of the partnership's salt lease and obtained a renewal of the same from the salt authorities for a further period, for the benefit of the partnership. To this end the managing partners made necessary application and trials using the goodwill of the partnership. The said managing partners accordingly obtained a renewal of the partnership salt lease which was granted by the salt authorities solely on account of the goodwill earned by the firm. The said renewal was obtained for the purposes of the partnership during its continuance and in the trade name of the firm and therefore the benefits of the renewed lease enured also in favour of the other partners. Even apart from the unanimous resolve of the partners to obtain the renewal, the obtaining of the renewal of the lease in the name of defendants 1 to 7 accrues to the benefit of the partnership."

The plaintiffs claimed the benefit of the lease both on the footing that the partnership had not become dissolved and on the alternative footing which they adopted at the trial that the partnership terminated on 31st December, 1942, in which case they alleged that the lease must be treated as an asset of the partnership and an acquisition by it, to be dealt with as such in settling the accounts, as defendants 1 to 7 had obtained a renewal of the previous lease by utilising the goodwill of the firm and while the partnership was continuing and in existence. Relief (*e*) has reference to this part of the plaintiffs' case. Defendants 1 to 7 in their written statement denied that their application for renewal was in pursuance of a resolve on the part of all the partners to make such an application for the benefit of the partnership. They then made the following assertion in paragraph 7 of their statement :

" Defendants 1 to 7 applied for a licence in their own name to commence from 1st January, 1943 and the Collector of Salt Revenue agreed to grant the same. This new licence cannot enure to the benefit of any of the plaintiffs or any others. No lease is as yet executed by these defendants though the draft lease submitted by them was approved by the salt authorities. There was never any attempt on the part of these defendants to obtain any wrongful gain to themselves."

The learned Subordinate Judge held that it was not open to defendants 1 to 7 to contend that there was no partnership at all between them for working the factory, that the shares of the several partners were as provided in Ex. P-2, that the suit must be treated as one for settlement of accounts of a dissolved partnership and accounts had to be settled on the footing that it became dissolved on 31st December, 1942, that there was no settlement of accounts on 21st January, 1939 as alleged by defendants 1 to 7, that the renewal of the lease was not obtained in virtue of the goodwill of the partnership, and that otherwise the goodwill of the old firm may be sold for what it was worth in the realisation of the assets of the dissolved firm. He, therefore, granted a preliminary decree declaring the shares of the parties in the partnership and that the partnership shall be deemed to have been dissolved as from 31st December, 1942. He appointed a Commissioner for the taking of partnership accounts and directed the goodwill of the business and the stock-in-trade to be sold by the commissioner, and also gave other directions as regards the manner of taking accounts. Plaintiffs 2 to 5, 9th defendant, the undivided son of the 1st plaintiff, who had been transposed as the 6th plaintiff and defendants 14 and 15, the divided brothers of the 5th plaintiff, have filed the above appeal, while defendants 1, 2, 4, 5 and 6 have filed a memorandum of cross-objections.

The only question for decision in the appeal is what are the rights, if any, of the plaintiffs in and to the lease for the further period of 25 years from 1st January, 1943. On the one hand, the plaintiffs contend that the new lease should be treated as an asset of the suit partnership which stood dissolved on 31st December, 1942 ; on the other hand, the contesting defendants contend that the plaintiffs have no manner of right to the benefits of that lease.

For the appellants, Mr. T. L. Venkatarama Aiyar, their learned counsel rested their case on two alternative grounds : (1) that the application made by the defendants 1 to 7 for a renewal of the expiring lease was made on behalf of, and for

the benefit of, all the partners in pursuance of a resolution, and therefore, the grant of the lease must enure for the benefit of all the partners, and (2) that the new lease was obtained by defendants 1 to 7 as partners or co-owners by availing themselves of their character and position as such, and therefore they must hold for the benefit of all the partners and co-owners the advantage so gained by them.

There is very little evidence bearing on the first part of the appellants' case. There is no documentary evidence on record of any resolution of the partners deputing defendants 1 to 7 to apply on behalf of the partnership for a renewal of the lease. Even the 5th plaintiff, who ought to know everything about it, does not say definitely that on any particulr date the partners met and passed a resolution and entered it in a book of resolutions. A resolution book, Ex. P-4, was produced, but that admittedly does not contain any such resolution. The 5th plaintiff, in his evidence, deposes that there were 4 or 5 resolution books like Ex. P-4, and in particular, that there was a book which contained resolutions passed subsequent to January, 1940. We are unable to believe him. It is extremely improbable that there should have been another resolution book from January, 1940 when only a few pages in Ex. P-4 had been used and there were several pages still left blank. In the reply notice sent by the 5th plaintiff on the eve of the institution of the suit, the allegation made is that with the consent of all the partners the lease was renewed. We have no hesitation in holding that the case of a specific resolution having been passed by all the partners that defendants 1 to 7 should apply for a renewal of the lease was an after-thought, for which there is no support in the oral or documentary evidence in the case. It is not the case of the contesting defendant that their application was made to the knowledge of the other partners. The 3rd defendant, as D.W. 1 said "we did not say that we were obtaining a fresh licence on behalf of all the partners." If there had been unimpeachable evidence that the correspondence between the Salt Department and defendants 1 to 7 was known to the plaintiffs and to the other partners, then we might have been inclined to hold that on the probabilities it was most likely that the application was made on the understanding that the renewal would enure to the benefit of all the partners. Otherwise, the plaintiffs would certainly have made their individual attempt to obtain a lease, at an auction or otherwise. But as the evidence now stands, it appears clear to us that the application by defendants 1 to 7 was made without the knowledge and therefore without the consent of the other partners. It is not necessary for us to decide whether at the time of making the application defendants 1 to 7 intended to give the benefit of the renewed lease to the other partners.

The plaintiffs, therefore, can lay any claim to the new lease only on a legal basis, which their learned counsel found in section 88 and section 90 of the Trusts Act, which embody the general equitable principles established by course of decisions in England. There is no substantial divergence in the principles applicable to the case between the law in England and the law in India.

The general rule in England is thus stated in Lewin on Trusts, 14th edition, page 160:

> "A constructive trust is raised by a Court of equity wherever a person, clothed with a fiduciary character, gains some personal advantage by availing himself of his situation as trustee."

He says that a common instance of such constructive trust occurs in the renewal of leases; the rule being, that if a trustee, or executor, renews a lease in his own name, he will be deemed in equity to be a trustee for those interested in the original term. The new lease is deemed to be a graft upon the old one. The leading authority upon this subject is *Keech* v. *Sandford*[1]. Upon the same principle, if a person possessing only a partial interest in a lease as a tenant for life, mortgagee, or partner, renews the term upon his own account, he shall hold it for the benefit of all parties interested in the old lease.

A slight difference in the application of the rule is made between the case of trustees and personal representatives on the one hand and the case of mortgagees,

1. (1726) 2 Wh. & T.L.C. 9th Ed. 648 : 25 E.R. 223.

joint tenants, and partners, on the other. In the former case, the presumption of personal incapacity to retain the benefit is treated as irrebuttable, inasmuch as the basis of the presumption is considered to be public policy. In the latter case, the presumption is treated as rebuttable, and depends upon the facts and circumstances of each case.

The above doctrine has been thus developed, in its application to partners. Good faith requires that a partner shall not secure an advantage to himself at the expense of the firm.

> " He is bound, in all transactions affecting the partnership, to do his best for the common body, and to share with his co-partners any benefit which he may have been able to obtain from other people and in which the firm is in honour and conscience entitled to participate."

In accordance with this principle, numerous decisions in England have laid down that one partner is not at liberty to acquire a gain or a benefit which he ought to have acquired, if at all, for the common advantage of the firm. With respect to renewal of leases, with which we are concerned in this appeal, Lindley sums up the authorities thus (page 385, tenth edition) :

> " It has been decided more than once, that if one partner obtains in his own name, either during the partnership or before its assets have been sold, a renewal of a lease of the partnership property, he will not be allowed to treat this renewed lease as his own and as one in which his co-partners have no interest."

In Halsbury, 2nd edition, Volume 24, at page 450, the rule is stated thus :

> " The renewal of a lease of the partnership property by one or more of the partners without the privity of the others enures for the benefit of all."

It has been held that this rule obtains equally whether the term of the partnership is definite or indefinite, and even when the lessors would have refused to renew to the partners who are not privy to the renewal. The rule will apply also when the intention to renew is communicated to the other partners, if the latter are prompt to assert their rights.

The law is substantially the same in India. It is contained in two sections of the Indian Trusts Act, namely, sections 88 and section 90. They run thus :

> " Section 88 : Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained."

> " Section 90 : Where a tenant for life, co-owner, mortgagee or other qualified owner of any property, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly contracted in gaining such advantage."

The following illustrations to section 88 relate to partners :

> " (*d*) *A*, a partner, buys land in his own name with funds belonging to the partnership. *A* holds such land for the benefit of the partnership.
>
> (*e*) *A*, a partner, employed on behalf of himself and his co-partners in negotiating the terms of a lease, clandestinely stipulates with the lessor for payment to himself of a lakh of rupees. *A* holds the lakh for the benefit of the partnership.
>
> (*f*) *A* and *B* are partners. *A* dies. *B* instead of winding up the affairs of the partnership retains all the assets in the business. *B* must account to *A's* legal representative for the profit arising from *A*'s share of the capital."

Section 258 of the Indian Contract Act, which has since been repealed, and which has been re-enacted as part of section 16 of the Partnership Act of 1932, had the following illustration :—

> " *A*, *B*, and *C* are partners in trade. *C*, without the knowledge of *A* and *B* obtains for his own sole benefit a lease of the house in which the partnership business is carried on. *A* and *B* are entitled to participate, if they please, in the benefit of the lease."

Now, this illustration is clearly based upon the ruling in the leading case of *Featherstonhaugh* v. *Fenwick*[1], and demonstrates the fact that the Indian law on the point is much the same as the law in England. It will, therefore, be useful to refer to some of the decisions in England made on facts more or less similar to the facts of the present case.

In *Featherstonhaugh* v. *Fenwick*[1], the facts were as follows: In the year 1783, Featherstonhaugh entered into partnership with one George Fenwick and two others in the business of manufacturing glass, for a term of 14 years from 13th February, 1783. The partnership also obtained from one Lambton a lease of glass-house and premises and free-stone quarry. The partners worked the stone quarry upon the same terms on which the manufactory was carried on. At the expiration of the partnership, on 13th February, 1797, all shares were, by purchase, vested in Featherstonhaugh and George Fenwick who became interested in equal moieties and continued to carry on the business without any new agreement. In 1801, Addison Fenwick, the son of George Fenwick, was admitted to a moiety of his father's interest. In September, 1804, George Fenwick and his son applied to the persons in charge of Mr. Lambton's estate for a renewal of the lease of the premises taken from him, making the application in their own names without any communication with Featherstonhaugh. An agreement was executed by them and the trustee of Lambton's estate for a renewal of the lease to them exclusively for a term of 8 years from 22nd November, 1804. On the 19th October, the Fenwicks informed Featherstonhaugh that they had obtained the renewal and gave him notice of their intention to dissolve the partnership on the 22nd November following. At this time, various contracts entered into by one of the Fenwicks in the name of the partnership with glass manufacturers were still subsisting. They offered to take the partnership property and utensils at a valuation, but their offer was refused and they continued the business with the partnership machinery and stock. Thereupon, Featherstonhaugh commenced an action, which was tried before Sir William Grant, M. R. Several contentions were raised on behalf of the plaintiffs, for example, that the partnership could not be dissolved without notice as stipulated in the original deed of partnership, and that the notice of dissolution was not sufficient. These contentions are not material in this case. Sir Samuel Romilly then contended that the renewal enured for the benefit of all the partners interested in the old lease, relying on the rule in *Keech* v. *Sandford*[2]. Sir William Grant dealt with this last contention thus:

"There is still remaining what I consider a separate question; whether the renewed lease formed any part of the partnership property at the time of the dissolution. . . . . It is clear, that one partner cannot treat privately, and behind the backs of his co-partners, for a lease of the premises, where the joint trade is carried on, for his own individual benefit; if he does so treat, and obtains a lease in his own name it is a trust for the partnership; and this renewal must be held to have been so obtained. Consider what an unreasonable advantage one partner would upon a different principle obtain over the rest. In this respect there can be no distinction, whether the partnership is for a definite or indefinite period . . . . . Is it possible to permit one partner to take such an advantage? When the application was made for a renewal, no notice of dissolution had been given; nor had the plaintiff notice of any intention of renewing the lease . . . . . This clandestine conduct was very unfair towards the plaintiff. The defendants had not intimated to him that they would not have any further connection with him; and that they intended to apply for a lease on their own account. They ought first to have given him notice; and to have placed him on equal terms with them. . . . . . Instead of that, they clandestinely obtained an advantage, which would enable them to dissolve the partnership on terms very unfavourable to the plaintiff and they evidently had that object in view."

The learned Judge also held that the circumstance that the representative of Lambton's estate was unwilling to admit the plaintiff into the agreement for renewal would not make any difference. It was therefore held that under the circumstances in which the new agreement was made, the lease must be considered as taken for the benefit of the partnership and was, therefore, partnership property at the time of the dissolution. The effect of this declaration would not, of course, entitle the

1. (1810) 17 Ves. Jun. 297 : 34 E.R. 115.
2. (1726) 2 Wh. and T.L.C. (9th Ed.) 648 : 25 E.R. 223.

plaintiff to the profits that might be made during the continuance of that lease. The plaintiff's interest was to his extent only, that in taking an account of the value of the partnership stock as it existed on the 22nd November, 1804 this lease should be included in the estimate of value as part of the joint property. An account was accordingly directed of the partnership property upon the 22nd November, 1804; the renewed lease to be considered as partnership property and to be sold. The other reliefs granted to the plaintiff there do not concern us.

The next leading case which is of assistance to us in the case of *Clegg* v. *Fishwick*[1] In that case, the plaintiff's husband being engaged in a partnership with other persons, they took a lease in 1828 of certain coal mines for the purpose of the partnership. He died in 1836. The partnership was carried on between the other partners and the plaintiff up to the year 1849. In that year, the old lease having expired, a new lease was taken by some of the other partners without the privity of the plaintiff. But they assumed to themselves the right of taking the exclusive benefit of the new lease, and denied that the plaintiff was entitled to any interest in it. Cottenham, L.C., upheld the plaintiff's claim to the new lease, and observed as follows :

" Now, when the contract for it was made, and the new lease was taken, the plaintiff had an equal interest with them, according to the share her husband was entitled to in the firm. The old lease was the foundation of the new lease, the tenant-right of renewal arising out of the old lease giving the partners the benefit of this new lease ; at least the law assumes it to be so. Without saying at all what circumstances there may be to interfere with that ordinary right, we know that the rule of equity is, that parties interested jointly with others in a lease cannot take to themselves the benefit of a renewal to the exclusion of the other parties interested with them."

It was held that the plaintiff was entitled to the new lease as part of the partnership property.

In *Clements* v. *Hall*[2], the same principle was applied, when, on the death of a partner a survivor renewed a lease which was the poperty of the partnership, and the representative of the deceased partner was held to be entitled to an interest in the new lease. Cranworth, L.C., tersely summed up the legal position thus :

" If the property of the partnership consists in part of leaseholds the representative of the deceased partner may treat the survivor as a trustee and if the survivor renews the lease he is considered to do so for the benefit of the partnership."

In *Clegg* v. *Edmondson*[3] on the facts, the plaintiffs were denied any right to a renewed lease obtained by the managing partners after notice of dissolution, because the plaintiffs with full knowledge of their rights allowed the managing partners to carry on a mining concern at their own risk for a long time without taking any steps to assert those rights by legal proceedings. They were therefore not permitted to assert them after long a lapse of time. But the general principle laid down in *Featherstonhaugh* v. *Fenwick*[4], was reiterated. Sir George Turner, L.J., in repelling an argument founded on the partnership being dissoluble at will, said :—

" The principle on which the Court proceeds in cases of this nature is the confidence which subsists between partners and that confidence exists whether the partnership subsists for a limited time or is dissoluble at will."

The learned Lord Justice was not prepared to say that in no case could a partner, during the continuance of the partnership contract for a new lease to be granted to himself without the new lease being held to be for the benefit of the partnership. The authorities did not warrant that position. He then observed :

". . . . but this, I think, is plain upon all the authorities, that it is very difficult for any partner to secure to himself to the exclusion of his co-partners the benefit of a lease so contracted for; and the difficulty is certainly greater where the contracting partners are, as in this instance they were, the managing partners. In order to give validity to such a transaction, all the parties ought to be placed upon an equal footing and it is difficult to see how this is to be accomplished in the case of managing partners."

1. (1849) 1 Mac. & G. 293 : 41 E. R. 1278.
2. (1857) 2 De G. and J. 173 : 44 E.R. 954.
3. (1857) 8 De G. M. and G. 785 : 44 E. R. 593 at 60.
4. (1810) 17 Ves. Jun. 297 : 34 E. R. 115.

Though the case of *Biss*[1], In re, did not relate to partners, there is a full discussion by the learned Judges of the Court of Appeal of general principles which would also apply to partners. Both Mr. T. L. Venkatarama Aiyar and the Advocate-General were willing to accept and adopt the law as enunciated in this case. Collins, M.R., drew the distinction already adverted to between a presumption of law which arises in the case of a trustee and a rebuttable presumption of fact in the case of mortgagees, joint tenants and partners. Romer, L.J., after refusing assent to a general proposition that if any person partly interested in an old lease obtains from the lessor a renewal, he must be held to be a constructive trustee of the new lease, whatever be the nature of the interest or the circumstances under which he obtained the new lease, also refused to limit the application of the equitable doctrine of constructive trust to cases where the old lease was renewable by agreement or custom or where the new lease was obtained by surrender or before the expiration of the old lease. He said :

"There may well be, and often is, an advantage for the purpose of obtaining a new lease, in being in the position of an old lessee ; and that advantage may be of appreciable value in the view of a Court administering equity, even though the landlord is under no obligation to grant a new lease to the old tenant."

He dealt with the case of partners thus :

"Take next the case of a partner obtaining a renewal of a partnership lease. Here apart from the fact that in ordinary cases concerning the carrying on of the partnership business he is an agent for the partners, he clearly owes a duty to his co-partners not to acquire any special advantage over them by reason of his position. And, therefore, as a rule, even if a partnership lease has come to an end, yet if that partner by virtue of his position obtains a renewed lease, he will be held to have acquired it on behalf of all the partners."

Warrington, J., in *Bevan* v. *Webb*[2], considered it as beyond dispute that the principle, that when a person in the position of a trustee holding as part of his trust property a lease takes a renewal of that lease, that renewed lease is treated as a graft or addition to the trust property, is equally applicable to the relations between partners. And if part of the assets of the firm consists of leasehold premises, one partner cannot take a new lease of those premises and then insist on keeping that for his own benefit.

That the general doctrine enunciated in *Keech* v. *Sandford*[3], is equally applicable to the case both of leases renewable by right or custom and of leases not so renewable is clear, and the renewed lease in both cases is *prima facie* looked at as a graft on the original interest and subject to the same trusts or limitations. Only, in some cases the person who obtains the renewal, is allowed, and in others, he is not allowed, to show that there is in the particular circumstances nothing inequitable in his claiming the renewed lease for his own benefit. *Vide* Parket, J., in *Griffith* v. *Owen.*[4]

The only Indian decision to which reference was made at length by both sides was a ruling of a Division Bench of this Court in *Ramalinga Reddi* v. *Ramalinga Setty*[5]. A mica mining business began with *A* and two others as partners in 1924. *A* acquired by assignment the share of one of them. On 7th October, 1925, the partnership took on lease for the purpose of opening mica mines a block of land for a term of five years. In 1929, *B* joined the partnership. Before the termination of the lease, on 10th June, 1930, *A* obtained a fresh lease in his own name for 10 years commencing from the date of the termination of the old lease. Early in October, 1930, *A* sent a notice to *B* asserting that the new lease was his own and asking him to come and settle the accounts of the partnership which, according to him, was terminated on 6th October, 1930, that is, the date of the termination of the old lease. The question which the Court was called upon to decide was whether the new lease formed part of the partnership assets. The learned Judges held that *B* was not entitled to claim an interest in the new lease or to insist that it should be treated as part of the assets of the old partnership. Varadachariar, J., who

1. (1903) 2 Ch. 40.
2. (1905) 1 Ch. 620 at 625.
3. 2 Wh. & T.L.C. (9th Edn.) 648 : 25 E.R. 223.
4. (1907) 1 Ch. 195 at 204.
5. (1938) 2 M.L.J. 790.

delivered the judgment of the Bench discussed the leading authorities in England and observed that the statute law in India had not substantially deviated from the rules of the English law. In his opinion, there was no absolute rule of law or irrebuttable presumption in respect of the renewal of a partnership lease by one of the partners, and in India a constructive trust can be held to arise only if the conditions of section 88 or section 90 of the Trusts Act were satisfied. The learned Judge proceeded to examine the evidence in the case to decide whether the partner availed himself of his character to obtain the new lease, and held that he did not. The evidence showed that far from imagining that the old lease gave any particular claim for renewal, the landlords started negotiations with others for a new lease, and even after *A* approached them for a new lease, they had no hesitation in entertaining a stranger's offer to negotiate a lease for himself. The negotiations were carried on by *A* openly and no advantage was clandestinely obtained. There was also nothing in the evidence to suggest that *A* was in the position of a managing partner. In view of these and other circumstances, the learned Judge agreed with the lower Court that *B* was not entitled to claim an interest in the new lease.

In the state of authorities discussed above, it may be conceded that there is no irrebuttable presumption of law that a renewal of a lease belonging to the partnership by one of the partners enures to the benefit of all the partners. A partner no doubt occupies a fiduciary position in relation to the other partners in the affairs of the firm, but he does not suffer under an absolute disability by virtue of his position to acquire any benefit or advantage for himself in any circumstances. There may be cases when a partner, during the continuance of a partnership, can secure a new lease to himself without the new lease being held to be for the benefit of the partnership. It would depend upon the facts and circumstances in each case. Section 88 of the Trusts Act consists of two parts. The condition laid down in the first part is that the partner or other person occupying a fiduciary position should gain for himself any pecuniary advantage by availing himself of his character. The condition in the second part is that he should gain for himself a pecuniary advantage by a dealing under circumstances in which his own interests are, or may be, adverse to those of the others.

Now, what are the facts and circumstances in the present case. Mr. T.L. Venkatarama Aiyar, the learned advocate for the appellants, relied upon the following facts : (1) Defendants 1 to 7 were in the position of the managing partners ; (2) for over three years prior to the date of the termination of the old lease, there was no distribution of the profits, and admittedly accounts were not settled. Nearly Rs. 90,000 of the partnership moneys were with defendans 1 to 7 ; (3) the Government adopted a policy of renewing old leases, if their working had been satisfactory ; and (4) no notice was given to the other partners of the application for renewal.

That the evidence discloses all these facts and circumstances there can be no doubt. According to the terms of the partnership deed, Ex. P-2, the first defendant, and the father of defendants 2 to 7 were the partners responsible for the management of the factory. This may be due to the reason that the licences stood in their name. But on that ground, the importance of their position cannot be minimised. The 3rd defendant, as D.W. 1, deposed as follows :—

"My father Appala Narasayya Chetti died on 23rd August, 1934, (Sic.) Till his death himself and the defendant 1 were managing the Badajanapara Salt Factory. After his death, myself and the defendant 1 were managing the business . . . . The other partners mentioned in Ex. P-2 did not take part in the management of our business and my father and the 1st defendant alone managed it since 1926."

Though the defendants 1 to 7 raised a plea that accounts had been settled in January, 1939, the plea was found to be false at the trial, and there was no attempt to revive that plea before us. It was admitted that large sums of money aggregating to over Rs. 90,000 belonging to the partnership were with defendants 1 to 7, and the profits were not divided among the partners. According to the 5th plaintiff, his was because it was agreed among them that the amount should be kept as a reserve fund to be utilised for a renewed lease. (*Vide* P.W. 2.)

As already mentioned, the Salt Department called for proposals for the renewals of leases that would expire during the course of the year 1942, and defendants 1 to 7 were informed that they should submit a petition for renewal for a further period of 25 years, if they required it (Ex. P-17-*a*). In the ordinary course of events, the other partners could not have any knowledge of the correspondence between the Government and defendants 1 to 7 as regards the renewal of the lease. There is no evidence that defendants 1 to 7 informed the other partners of their desire to obtain a new lease for their own individual benefit. No doubt, the only persons who could make an application for renewal were defendants 1 to 7 so far as the Salt Department was concerned, because they were the licencees. But actually, the money which was utilised to obtain the old lease and licence had been contributed by all the partners, and therefore all of them had interest in the old lease and the licence. It is not as if defendants 1 to 7 alone had the entire interest therein. In fact, the learned Advocate-General, during the course of the arguments, conceded that the other partners had such interest in the lease as members of a joint family would have in a lease taken for the benefit of the family in the name of the manager.

The learned Advocate-General contended that the legal title, so far as the lease and the licence were concerned, vested in the grantees, that is, defendants 1 to 7, and it was in a sense personal to the grantees. Though he was prepared to concede that the others had some interest, he confined this right to money and profit. They were not co-lessees, and the lease and the licence could not in law be deemed to be assets of the partnership. He referred us to clause 12 of Ex. P-16, the draft lease, which provided as follows :

"Nothing herein contained shall prevent the lessees at any time from taking any partner or partners into the business carried on by them under the present lease who may be approved by the Collector."

He sought to make a distinction between the business carried on by the partnership and the lease and licence which belonged according to him to the grantees. We are unable to accept his contention. On the facts of this case, it must be held that the lease itself was obtained by the first defendant and the father of defendants 2 to 7 as partners. This is not a case in which persons owning a leasehold interest in their own right entered into a partnership to carry on a business utilising the leasehold interest which they possessed, making a capital contribution of it, as it were. Though, so far as the Salt Department was concerned, only two persons and later the seven persons were the lessees, the rights and obligations *inter se* were those of partners. In Ex. P-2, it is recited that there was an agreement prior to the auction by the Salt Department that even if the sale was confirmed in favour of anyone of the five individuals, all should enjoy the profit or bear the losses thereof according to the shares mentioned therein. Section 12 of the Madras Salt Act runs thus :

"For the purposes of this Act, the licencee shall be taken to be the owner of the licence and of the salt works specified therein : provided that nothing herein contained shall affect the liability of the licencee towards any person who may have an interest in, or lien upon, such licence or salt works."

In the case before us, we are only concerned with the rights of third parties and not the rights of the Government. If, by reason of contractual relationship, the persons who became the successful bidders at the auction sale were under any legal liability, such liability can be the subject of adjudication in a Civil Court, without infringement of the provisions of the Salt Act or of the terms and conditions of the lease and the licence granted by the Salt Department. We hold that the old lease must be deemed to be a partnership asset belonging to all the partners, according to their shares.

It was next contended by the learned Advocate-General that the partnership was for a fixed term, namely, the period of the old lease, and it was for a single venture, and as the new lease was to commence only on 1st January, 1943, that is, after the cessation of the partnership, it could not become the asset of the old partnership. This contention of his must fail, because the doctrine of constructive trust in respect of the renewal of a lease applies even to a case when the

renewal is made after the termination of the partnership but before its assets have been sold (*vide* Lindley on Partnership, page 385). The fact that the renewed lease would commence after the termination of the partnership cannot make any difference, so far as the application of this doctrine is concerned, if the renewal was obtained either during the partnership or before its assets have been sold. There were similar facts in *Clegg* v. *Fishwick*[1] and *Clements* v. *Hall*[2]. In both these cases, the renewed lease commenced after the termination of the partnership. It is clear on the authorities that whether the partnership is for a limited time or is dissoluble at will the rule equally applies. (See *Featherstonhaugh* v. *Fenwick*[3].) It should not be overlooked that though the new lease was to commence from 1st January, 1943, the application for renewal was made, and the sanction of the Collector obtained, well before the termination of the partnership.

The learned Advocate-General tried to escape from the terms of section 88 of the Trusts Act by arguing that defendants 1 to 7 did not avail themselves of their position as partners but that they availed themselves only of their position as licensees. But this line of escape is not open to him, because, in respect of the old lease and the licence, defendants 1 to 7 were in the position of partners. It cannot be denied that it was because they held a subsisting lease that they obtained the new lease. We hold that the plaintiffs are entitled to the benefit of the renewed lease.

Lastly, the learned Advocate-General strenuously relied upon the fact that neither the lease nor the licence could be sold as an asset of the partnership, as such a sale is not permitted by the Madras Salt Act. That may be so. But this circumstance does not present to us any insuperable difficulty in moulding the decree properly and granting the proper relief to the appellants. It is quite true that defendants 1 to 7 cannot be compelled to continue the partnership against their will, so that the business of working the new lease may be carried on by all the parties jointly. It is also obvious that the appellants will not be entitled to a share in the profits that may be earned on account of the new lease. This was recognised in the earliest of the English case cited above, namely, *Featherstonhaugh* v. *Fenwick*[3]. The lease will only be included as part of the property belonging to the partnership subject to the rights of defendants 1 to 7.

The question, therefore, remains, what is the relief which the plaintiffs can obtain with respect to the new lease? Apart from the fact that they will not be entitled to the profits made on its account, to the making of which they have not contributed in any manner, there is another fact which introduces a complication, namely, that the lease cannot be sold as other assets of the partnership can be. In such cases, the only practicable course is to direct a value to be put upon the benefit of the lease, which value will be available for distribution between the partners, according to their shares. Lindley, at page 647, deals with unsaleable but valuable assets in the following manner :

> "If one of the partners holds an appointment on behalf of the firm which is not saleable, but the profits of which are by agreement to be accounted for by him to the partnership, the partner holding the appointment will be debited with its value ; for that is the only mode in which, upon a dissolution, such a source of gain can be dealt with. The same principle applies to other unsaleable but valuable assets, to which one partner has no exclusive right."

The same rule will apply to mines which are not saleable without the consent of the landlord. The case of *Smith* v. *Mules*[4], furnishes an instructive example of the application of the rule. In that case, there was a partnership between certain persons as solicitors, one of whom was entitled to offices or clerkships, the emoluments of which were to be shared by the partners. During the continuance of the partnership, the partner who held these offices and his son, who was also a partner, obtained other offices and clerkships. It was held that the partners who had acquired the said offices could not be allowed to retain the offices for their exclusive benefit.

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1. (1848) 1 Mac. and G. 293 : 41 E.R. 1278.
2. (1857) 2 De G. & J. 173 : 44 E.R. 954.
3. (1810) 17 Ves. Jun. 297 : 34 E.R. 115 at 120 and 121.
4. (1852) 9 Hare. 555 : 68 E.R. 633.

But inasmuch as from the nature of the offices, they could not be sold nor could any manager or receiver be appointed to carry them on, these partners were charged with the value of the offices in the partnership accounts. Appropriate directions were, therefore, given to the Master to set a value on the offices after making a reasonable allowance for conducting the business of the same.

In conclusion, we hold that the new lease obtained by defendants 1 to 7 in renewal of the old lease which formed the subject-matter of the partnership, must be held by them for the benefit of the other members of the partnership, who are entitled to share in the advantage gained by defendants 1 to 7. As the lease itself was executed after the termination of the partnership and as it is not the case of the appellants that any one other than defendants 1 to 7 had furnished the consideration for the new lease, the benefit of the renewal alone will be treated as an asset of the partnership which terminated on 31st December, 1942 and a value placed on it. The Commissioner appointed by the lower Court may, after taking such evidence as may be necessary, be directed to fix the value in the first instance. In arriving at a value, the liability of defendants 1 to 7 to furnish capital and incur the necessary expenses for carrying on the new business with its attendant risks and also possibilities of profits, are factors to be taken into account. The appeal is allowed to this extent. The contesting respondents will pay the appellants the costs of this appeal.

The memorandum of objections filed by respondents 1, 2, 4, 5 and 6 was not seriously pressed, except as regards ground 8, namely, that the lower Court erred in directing a sale of the good-will of the firm. We agree with the learned Advocate-General that the good-will of a partnership such as we are concerned with in this case, is merely notional and cannot be of any practical value. The learned Subordinate Judge himself was aware of this, because he authorised the good-will to be sold for what it was worth. We do not think that the contesting respondents should feel themselves aggrieved by this direction. There is no necessity to interfere with it. The memorandum of objections is dismissed. No order as to costs.

K.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL AND MR. JUSTICE RAJAGOPALAN.

R. Krishnamurthy .. *Appellant**

v.

S. Parthasarathy and another .. *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XV of 1946), *sections* 7 *and* 12 (4)—*Eviction application under section* 7 *for non-payment of rent—Determination of tenancy by notice to quit as required by section* 111 (h) *of the Transfer of Property Act, IV of* 1882—*Necessity—Question whether notice was necessary—Jurisdiction of Rent Controller and appellate authority to decide—Separate suit by defeated party questioning the decision—Barred by section* 12 (4) *of Madras Act, XV of* 1946.

Section 111 (*h*) of the Transfer of Property Act has no place in the scheme of procedure laid down in section 7 of Madras Act XV of 1946 and a notice to quit is not necessary before filing an application for eviction under section 7 of Madras Act XV of 1946. Even if such notice was necessary it would be merely one of the issues to be decided by the Rent Controller and would not in any way affect his jurisdiction to entertain the application for eviction. If the Rent Controller did not decide that question properly, the matter would have to be raised in appeal to the Court of Small Causes and would give the High Court no jurisdiction to entertain a suit by the defeated party ; for such a suit would be barred by section 12 (4) of Madras Act XV of 1946.

Decision of Subba Rao, J., in *Parthasarathy* v. *Krishnamoorthy*, (1948) 2 M.L.J. 391 reversed.

On appeal from the judgment and decree of Subba Rao, J.,[1] dated 31st August, 1948, in the exercise of the ordinary original civil jurisdiction of the High Court in C.S. No. 342 of 1948.

V. C. Gopalaratnam, *M. A. Srinivasan* and *M. A. Rajagopalan* for Appellant.

V. V. Srinivasa Aiyangar, *V. Devarajan*, *N. R. Raghavachari* and *P. Srinivasa Aiyangar* for Respondents.

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* O.S.A. No. 59 of 1948. 6th January, 1949.

1. (1948) 2 M.L.J. 391, reversed.

The Judgment of the Court was delivered by

Horwill, J.—The respondent is the occupier of the house No. 403, Mint Street, Madras, and the appellant is the owner of that house, who had leased it to the respondent on a month to month tenancy. The respondent failed to pay rent for July, 1947, before the end of August of that year; and so the appellant, without giving notice under section 111 (*h*) of the Transfer of Property Act, filed an application before the Rent Controller, Madras, under section 7 of Madras Act XV of 1946 for the eviction of the respondent. The Rent Controller, after giving notice to the respondent, came to the conclusion that the respondent had not paid his rent within the time allowed by section 7 (2) and so ordered his eviction. The question of the non-issue of notice under section 111 (*h*) of the Transfer of Property Act was not raised. The respondent exercised his statutory right of appeal under section 12 of the Act and filed an appeal in the Court of Small Causes, Madras. Again no reference was made to the failure of the appellant to give notice to quit. The appeal was dismissed. The respondent thereupon filed C.S. No. 342 of 1948 in this Court for a declaration that the order of the Rent Controller was *ultra vires*, in that no notice to quit had been given, such as is required by law under section 111 (*h*) of the Transfer of Property Act. The learned Judge held that notice under section 111 (*h*) of the Transfer of Property Act was necessary and that the Rent Controller had no jurisdiction to enquire into an application under section 7 of Act XV of 1946 where no notice to quit had been given and that therefore this Court had jurisdiction to entertain the suit, to give the declaration prayed for, and to set aside the order of the Rent Controller. Another question was raised with regard to a sub-tenancy; but we are not concerned with that in this appeal.

Two points arise for determination, (1) whether notice to quit was necessary, and (2) whether, if necessary, this Court had jurisdiction to entertain a suit to set aside the order of the Rent Controller.

Mr. V. C. Gopalaratnam has argued that Act XV of 1946 is self-contained and that in it are found all the provisions of law and procedure necessary for dealing with the cases between a landlord and tenant that came within the purview of this Act and so *pro tanto* repeals by implication the corresponding provisions of the Transfer of Property Act. There is something to be said for this argument; but in the view that we are taking, it is not necessary for us to consider this extreme contention. We shall therefore confine ourselves to a consideration of the narrower question formulated by the learned trial Judge: "Does section 7 of Act XV of 1946 by necessary implication abrogate or repeal section 111 (*h*) of the Transfer of Property Act?" Perhaps the more pertinent question would be: "Can an application for eviction be made to the Rent Controller before the tenancy has been determined by a notice to quit?"

Disregarding the words that are not applicable to the question which we are considering, the main paragraph of section 7 reads:

> "A tenant in possession of a building shall not be evicted therefrom . . . . before . . . . the termination of the tenancy, except in accordance with the provisions of this section."

Although this does not make it quite certain that a tenant can be evicted if the provisions of this section are complied with, it is clear that a tenant can be evicted before the termination of the tenancy, in other words, before the tenancy is determined. It perhaps does not necessarily follow that a notice to quit can be dispensed with, though it is difficult to see why such a notice should be sent if it is not necessary to determine the tenancy before filing an application before the Rent Controller. Section 7 (2) is in its terms positive, and its interpretation is therefore clearer. The sub-section says that if a landlord desires to evict his tenant he must apply to the Controller for a direction in that behalf. Upon the receipt of the application of the landlord, the Controller has to give to the tenant a reasonable opportunity of showing cause against the application. Having given that reasonable opportunity, he has to consider whether the tenant has done any of the acts or committed any of the defaults that come within the ambit of the various clauses of that sub-

section, the first of which is that he has not, by the last day of the month following that for which rent is payable, paid or tendered the rent. If the Controller is satisfied that the tenant has not paid, he shall make an order directing the tenant to put the landlord in possession of the building. So we see from this sub-section that the landlord who seeks to evict his tenant, as the appellant here did, must apply to the Controller and that when the Controller is satisfied, after hearing the tenant, that rent was not paid before the end of the month following that for which it was due, he has no option but to direct the tenant to put the landlord in possession. It seems to us that words cannot more clearly indicate what the duty of the Controller is. Sub-section (3) does not directly apply to the case now under consideration; but it gives some indirect indication of the scope of sub-sections (1) and (2). That sub-section deals with the case in which the landlord has no residential building of his own in the City or has no building in which to carry on his own business, and is therefore in need of the building in which the tenant is living for his own residence or to carry on his business. In such a case the Rent Controller shall pass an order that possession be given to the landlord. But there is an important proviso that if the tenancy has been for a term, the landlord will not be entitled to obtain possession until the term has expired. This proviso would not be necessary if the whole section were intended to apply only to tenancies that had been determined in one of the ways indicated by section 111 of the Transfer of Property Act.

Though the wording of section 7 is clear enough; yet it is argued that if this section be given its natural meaning, certain results would follow which the Legislature could not have contemplated. It is said that there was very keen competition by the general public for houses and a general attempt by landlords to charge extortionate rents, with the result that the Government was obliged to introduce provisions such as are found in this Act, in the first instance in the Defence of India Rules, and then again in this Act, to control rents; and so it is argued that if we give section 7 its natural interpretation, it would be contrary to the general spirit of the Act. The preamble runs:

"Whereas it is expedient to regulate the letting of residential and non-residential buildings and to control the rents for such buildings and to prevent unreasonable eviction of tenants therefrom in the Province of Madras."

Thus it is seen that the objects are (1) to regulate the letting of residential and non-residential buildings, (2) to control the rents for such buildings, and (3) to prevent unreasonable eviction of tenants. It is always dangerous to argue from hard cases; but even if we may take such into consideration, it does not seem to us unreasonable that the Legislature, in giving tenants a quasi-permanent tenure, should, at the same time, require that even tenants who hold under a long-term lease should pay their rents regularly and punctually, and that if they did not do so, they would be liable to eviction even before their terms had expired.

In order to interpret section 7 in accordance with what the learned Judge considered to be the general purpose of the Act and the requirements of section 111 of the Transfer of Property Act, he was constrained to interpret the word "before" read with "termination of the tenancy" as meaning before the term had expired but after the tenancy had been determined by forfeiture or in some other way. Mr. Srinivasa Ayyangar found it difficult to support such an unnatural interpretation of the expression "before the termination of the tenancy;" and so argued that the expression "before or after the termination of the tenancy" was intended to emphasize that a tenant could remain in possession even after the termination of the tenancy. Both of these interpretations strain and distort a plain and simple expression and do not accord with the provisions of sub-section (2) of section 7. As indicated earlier in our judgment, no question of conflict with section 111 of the Transfer of Property Act arises if section 7 deals with tenancies—that have not been determined as well as with those that have.

The learned Judge sought support for this interpretation of section 7 in a judgment of Somayya and Rajamannar, JJ., in *V. Vaidhianatha Iyer* v. *Dr. K. P. Chidam-*

baram and another[1]. In that case the learned Judges were interpreting rule 81 (*bb*) (*ii*) of the Defence of India Rules and dealing with an argument that the definition of " tenancy " given in the rules was *ultra vires*. The passage relied on by the learned Judge was this :

" When we speak of a suit by a landlord for eviction of a tenant, no doubt there is strictly an inconsistency, because if he were a tenant, the landlord could not evict him. For some reason or other, either by efflux of time or by the issue of a notice to quit or by forfeiture and re-entry, a tenant must have ceased to be a tenant before the landlord can claim to evict him."

In that case the tenancy had been terminated by a decree for eviction ; and the learned Judges did not therefore have to consider the question whether section 7 dealt with cases in which the tenancy has not been determined. Another case which the learned Judge thought, strengthened his argument was *Narayana Nair* v. *Kunhan Mannadiar*[2]. In that case the learned Judges were interpreting section 14 of the Malabar Tenancy Act, which is very similar to section 7 (1) of Act XV of 1946, but differs from it in three respects, (*a*) that the case related to a suit and not to an application before a Tribunal, (*b*) section 14 contains no words " before or after ", such as we find in section 7, and (*c*) it corresponds only to the negative portion of section 7 found in section 7 (1). The first of these is, perhaps, unimportant, because we must apply the ordinary law to proceedings before Tribunals as well as to proceedings in Court ; but the other directions are vital ones, which seem to us to make all the difference between the case under consideration by the learned Judges in *Narayana Nair* v. *Kunhan Mannadiar*[2] and the case under consideration before us. If section 7 (1) had stood alone, we might have hesitated to hold that notice to quit was not necessary, even though the expression " before or after" is found there.

We are therefore of opinion that section 7 must be given its plain meaning. If so, no question of attempting to reconcile Act XV of 1946 with the Transfer of Property Act arises. We are satisfied that section 111 (*h*) of the Transfer of Property Act has no place in the scheme of procedure laid down in section 7 of the Act. That is the answer to the first question that we have formulated.

The other question that arises in appeal is with regard to the jurisdiction o the Rent Controller to deal with this application in the absence of a notice to quit' on the assumption that a notice to quit was necessary. We agree with the learned Judge that this Court can entertain a suit to set aside an order of the Rent Controller if the Rent Controller exceeded the powers conferred on him. A Court or Tribunal can however be said to have no jurisdiction to entertain a suit or application only if it has no jurisdiction with regard to the subject-matter of the suit or application, *e.g.*, if a suit is valued beyond Rs. 3,000 the Court of a District Munsiff has no jurisdiction to entertain such a suit ; and if it does so, then the decree is entirely void. Again, if a Civil Court entertains one of those kinds of suits which are triable exclusively by a Revenue Court under the Madras Estates Land Act, then its decree, too, would be entirely void. But even these rules are subject to the qualification that if the jurisdiction of the Court depends upon the ascertainment of facts and the Court, upon the facts found, holds that it has jurisdiction, then the decree of that Court cannot be ignored or set aside in collateral proceedings. In *Ishan Chandra* v. *Moomraj Khan*[3], Ghose, J., remarked :

" There cannot be any question that a decree passed without jurisdiction is a nullity. But the expression ' jurisdiction ' has not unoften been used with ambiguity, and the distinction between a judgment where jurisdiction is assumed by the Court where there is absolute want of it, and where the Court in the exercise of its jurisdiction acted wrongly in disregard of the law, has not always been borne in mind. This want of discrimination in the use of the term has resulted in a good deal of confusion. The distinction between a defect of jurisdiction and an error or irregularity in procedure is pointed out in Hawes on the jurisdiction of Courts thus : "

Then follows this quotation from Hawes :

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1. C.M.A. No. 202 of 1945.
2. (1947) 2 M.L.J. 559.
3. A.I.R. 1926 Cal. 1101.

"In the former case the whole proceeding is *corum non judice*, and void ; in the latter the proceeding cannot be impugned in a collateral action, even though it be erroneous upon its face, and even though it relates to a fact which in a former stage of the proceeding might have been essential to confer jurisdiction. It is examinable only on a direct proceeding as by an appeal or by a proceeding in the nature of an appeal, and where there is no remedy of that kind, it concludes for ever."

We do not think that his proposition is seriously denied by Mr. Srinivasa Ayyangar ; and so it is unnecessary to discuss this matter at length, and a brief reference to the other cases cited will be sufficient. In *Chinnappareddi* v. *Srinivasa Rao Garu*[1], a distinction was drawn between an inherent want of jurisdiction, in which case a decree would be absolutely void, and want of jurisdiction on grounds to be determined by the Court itself, in which case the decree could not be set aside by collateral proceedings. In *Nageswara Iyer* v. *Ganesa Aiyar*[2], it was said that if the question which is alleged to create the want of jurisdiction is one which the Court is bound to decide, the matter is not one relating to jurisdiction ; if there is any error in the decision, it can only be remedied by an appeal or other proceeding known to law. In *Balakrishnayya* v. *Lingarao*[3], the following passage from *Chandrika Singh* v. *Rashbehary Singh*[4], is quoted with approval :

"It is only when a Judge or Court has no jurisdiction over the subject-matter of the proceeding or action in which an order is made or a judgment rendered, that such order or judgment is wholly void, and that the maxim applies that consent cannot give jurisdiction ; in all other cases, this objection to the exercise of the jurisdiction may be waived, and is waived, when not taken at the time the exercise of the jurisdiction is first claimed."

Here we are satisfied that there was no question of jurisdiction at all. If a lessor brings a suit for eviction, he has to prove the existence of a lease, the relationship of lessor and lessee between himself and the defendant, and the determination of the lease. If he fails to prove this, the plaint is not returned, because the suit is one which the Court has no jurisdiction to entertain ; but the suit is dismissed as revealing no cause of action. It is argued that the present case resembles that contemplated by section 80 of the Code of Civil Procedure and section 41 of the Presidency Towns Small Cause Courts Act ; but it is expressly stated in these provisions of law that suits of the nature referred to in them cannot be filed unless notice is given. In a suit by a landlord against his tenant for eviction, the determination of the tenancy is merely one of the constituents of the cause of action that the landlord has to prove against his tenant in order to succeed in the suit. We are of opinion that a tenant can waive notice to quit; but even if he cannot, notice has not to be proved as a condition precedent to the institution of the suit. Realising the difficulty of supporting the opinion of the learned Judge, that a want of notice raises a question of jurisdiction, Mr. Srinivasa Aiyangar seemed driven to argue that the Rent Controller is concerned only with the questions of eviction when the determination of the lease is admitted or has been established in a Court having jurisdiction, and not at all with questions whether leases have been determined or not ; and that he would have no jurisdiction to decide such questions. The difficulty in putting forward that contention, however, is again the wording of the main paragraph of section 7 (1), which, to quote it in full, is :

"A tenant in possession of a building shall not be evicted therefrom, whether in execution of a decree or *otherwise*, and whether before or after the termination of the tenancy, except in accordance with the provisions of this section."

If the Rent Controller had no jurisdiction to consider whether a tenancy had been determined or not, it would mean that a suit would have to be filed in ejectment and that only after a decree had been obtained, would an application before the Rent Controller be maintainable. If such were the case, the words "or otherwise" would be superfluous. Mr. Srinivasa Ayyangar however realised this difficulty ; and so argued that if an application were filed before the Rent Controller in which an allegation of notice were made which the respondent denied, then the Rent Controller would have jurisdiction to consider that question ; but that if no allega-

1. (1935) 69 M.L.J. 196.
2. (1942) 2 M.L.J. 198.
3. (1943) 1 M.L.J. 198.
4. (1907) I.L.R. 36 Cal. 193 at 197.

tion were made, then the Rent Controller would have no jurisdiction to entertain the application, but would have to return it, we are unable to accept this contention; for it seems to us that if the Rent Controller has jurisdiction to decide, on allegations made, whether a tenancy has been determined or not, he would have the same jurisdiction over this matter as a Court would in a suit by a landlord in ejectment upon the termination of the tenancy. Mr. Srinivasa Ayyangar concedes that if a landlord filed a suit in ejectment and failed to say that the tenancy had been determined, the Court would dismiss the suit and not return the plaint. In the same way, the Rent Controller would have to dismiss the application if it were not alleged in the affidavit that notice had been given or if it found, upon hearing the parties and considering the evidence, that notice had not been given. It would follow from this, therefore, that if notice to quit was necessary, it would be merely one of the issues to be decided by the Rent Controller and would not in any way affect his jurisdiction to entertain the application. That being so, if the Rent Controller did not decide that question properly, the matter would have to be raised in appeal to the Court of Small Causes and would give this Court no jurisdiction to entertain a suit by the defeated party; for such a suit would be barred by section 12 (4) of the Act.

Both for the reason that notice to quit was not necessary and for the reason that even if it was, this Court would not have jurisdiction to entertain a suit, this appeal is allowed and the suit dismissed with costs throughout. The costs of private printing will be added to the costs in the appeal.

K.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SATYANARAYANA RAO.

D. P. Merchant .. *Appellant**

v.

The Bank of Mysore, Limited .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XV of 1946), section 9—Petition for execution of order of eviction made under section 7—Objection that notice terminating tenancy was not given and so order was without jurisdiction—Not sustainable.

If before the Rent Controller the tenant failed to raise the objection that the tenancy was not determined by proper notice under the Transfer of Property Act (assuming that that is the correct legal position) he is thereafter precluded from raising the objection in execution of the order of eviction. The order was not on the face of it without jurisdiction and the tenant cannot resist execution by canvassing the correctness of the order passed by the Controller on grounds not raised before him.

The Rent Controller has jurisdiction to order eviction even in cases where the tenancy was not determined as required by section 111 of the Transfer of Property Act as section 7 of the Rent Control Act deals with tenancies that were determined as well as those that had not been determined. There is no conflict between section 7 of the Rent Control Act and section 111 of the Transfer of Property Act.

Decision in *Krishnamurthy* v. *Parthasarathy*, (1949) 1 M.L.J. 412, relied on.

Appeal against the order of the City Civil Court of Madras, dated 29th October, 1948, and made in E.P. No. 1838 of 1948, in L. Dis. No. 6868 of 1947, on the file of the House Rent Controller, Madras.

A. Nagarajan for Appellant.

N. Parthasarathi for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal by the tenant against an order of the City Civil Judge passed by him in execution of the order of the Rent Controller, dated 15th May, 1948, under section 7 of the Madras Buildings (Lease and Rent Control) Act of 1946. The order of the Rent Controller was passed under section 7 on the ground that the tenant failed to pay the rent due to the landlord. To enforce

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* A. A. O. No. 600 of 1948. 21st January, 1949.

the order, an execution petition was filed in the City Civil Court under section 9 of the Act and under that section the order is executable as if it were a decree passed by that Court. The tenant objected to the execution of the order on the ground that it was passed by the Rent Controller without jurisdiction, as the tenancy was not determined by a notice to quit under the provisions of the Transfer of Property Act. It is in evidence that the landlord who purchased the property on 26th September, 1946, gave a notice determining the tenancy on 30th September, 1946, and requiring the tenant to surrender possession of the property by the end of October, 1946. The tenant then raised the further contention that the landlord accepted rent after that notice and that therefore there was a fresh tenancy which required a fresh determination by a further notice. This contention was overruled by the learned City Civil Judge on the ground that in the reply which the tenant sent through his advocate on 8th October, 1946, to the landlord he agreed to be governed by the provisions of the Rent Control Act and therefore he was not entitled to take advantage of the provisions of the Transfer of Property Act and contend that the tenancy should be determined.

As section 9 of the Act has the effect of making the order of the Rent Controller a decree passed by the City Civil Court, Madras, which is the executing Court, it is not open to the tenant in execution of the decree to raise the contention that the order passed by the Rent Controller was invalid. No question of want of jurisdiction arises, merely because a notice to quit was not issued. In the case of a suit by a landlord to eject a tenant without a notice determining the tenancy, if the tenant raised no objection to the passing of a decree, it would not be open to such a tenant in execution of the decree to raise the contention that the judgment was wrong. It is open to the tenant to raise in the suit objections such as want of notice, and if he does not raise the objection in proper time, he would be precluded from raising the objection thereafter. If that is the position in the case of a decree passed in a suit, I see no reason for treating the order of the Rent Controller which is a decree under section 9 of the Act on a different footing. If, before the Rent Controller, in answer to the petition filed by the landlord for eviction the tenant failed to raise the objection that the tenancy was not determined, assuming that that is the correct legal position, he is thereafter precluded from raising the objection in execution. The decree was not on the face of it without jurisdiction, and the tenant really seeks now to canvass the correctness of the order passed by the Rent Controller on grounds not raised before him. The learned City Civil Judge should therefore have disposed of the objection of the tenant on this short ground.

Even apart from this, I think there are no merits in the objection. It has now been finally decided in *Krishnamurthy* v. *Parthasarathy*[1], that section 7 of the Rent Control Act deals with tenancies that were determined as well as those that have not been so determined and that there is no conflict between section 7 of the Rent Control Act and section 111 of the Transfer of Property Act. In this view, it would be seen that if the conditions of section 7 of the Rent Control Act are satisfied, the Rent Controller has jurisdiction to order eviction even in cases where the tenancy was not determined as required by section 111 of the Transfer of Property Act.

Further, in this case, there was a notice to quit, and the landlord, as pointed out by the learned City Civil Judge, accepted rent only after he had received reply from the tenant that he would be governed by the Rent Control Act. The learned Judge is right in his view that no fresh notice determining the tenancy was required in such circumstances.

For these reasons, I think the decision of the lower Court is correct, and this Civil Miscellaneous Appeal should be dismissed with costs.

K.S. *Appeal dismissed.*

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1. (1949) 1 M.L.J. 412.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

S. Rajam Ayyar .. *Petitioner**

v.

Pavanambal. .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XV of 1946), *section* 12 (1) *and* (4)—*Subordinate Judge appointed as appellate authority under section* 12 (1) *is a* persona designata *and not a Court—Revision to High Court under section* 115, *Civil Procedure Code, against his order—Competency.*

On a question whether a revision would lie to the High Court against an order passed by a Subordinate Judge appointed as appellate authority under section 12 (1) of the Madras Act (XV of 1946),

Held, that the Subordinate Judge was appointed *persona designata* as the appellate authority and that he was not a Court subordinate to the High Court and as such his order will not be open to revision by the High Court under section 115, Civil Procedure Code.

Abdul Wahid Sahib v. *Abdul Khadar Sahib*, (1947) 1 M.L.J. 207 and *Chinniah Thevar* v. *F.M. Badsha*, (1948) 1 M.L.J. 314, followed.

Krishna Nair v. *Valliammal*, (1949) 1 M.L.J. 74, distinguished.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the judgment of the Court of the Subordinate Judge of Cuddalore, dated 7th September, 1948, in C.M.A. No. 16 of 1948, preferred against the order of the House Rent Controller, Tindivanam, dated 25th February, 1948, in H.R.C. No. 71 of 1947.

N. Arunachalam for Petitioner.

T. E. Ramabhadrachariar for Respondent.

The Court delivered the following

JUDGMENT.—The simple point which arises in this petition is whether a revision lies to the Court against an order passed by a Subordinate Judge appointed under section 12 (1) of Madras Act XV of 1946 as the appellate authority for purposes of the Act. In the present case the Subordinate Judge of Cuddalore reversed, in an appeal to him, an order passed by the House Rent Controller and directed the eviction of the petitioner. The point has already been clearly decided by two single Judges of this Court who were in agreement. Yahya Ali, J., in *Abdul Wahid Sahib* v. *Abdul Khader Sahib*[1], held that District and Subordinate Judges appointed under section 12 by notification were not Courts and that such a District or Subordinate Judge was a *persona designata*, not being a Court subordinate to the High Court. Taking this view, Yahya Ali, J., dismissed an application under section 24 of the Civil Procedure Code for transfer of an appeal before the District Judge of Bellary to the file of another Court. Clark, J., in *Chinniah Thevar* v. *F. M. Badsha*[2], agreeing with the view taken by Yahya Ali, J., held that no revision could be entertained by the High Court under section 115 of the Civil Procedure Code against an order passed on appeal by such an appellate authority. A recent decision by Panchapakesa Ayyar, J., in *Kirshna Nair* v. *Valliammal*[3], has been placed before me in which, it is urged, a different view has been taken. In that case the facts were a little different, as the appellate authority originally notified was the Chief Judge of the Small Cause Court and this was subsequently changed to the " Court of Small Causes " in order to enable other Judges of the Small Cause Court also to deal with such appeals. In those circumstances the view taken was that the second Judge of the Small Cause Court did not act as a *persona designata*, but as a Judge of the Small Cause Court and as a part of the Small Cause Court which was subordinate to the High Court. The distinction appears to me to be rather fine. None of these decisions have considered the scope of section 12 (4) which specifically seeks to oust the jurisdiction of the High Court in revision. This clause reads as follows :

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* C.R.P. No. 1397 of 1948. 1st February, 1949.

1. (1947) 1 M.L.J. 207.
2. (1948) 1 M.L.J. 314.
3. (1949) 1 M.L.J. 74.

"The decision of the appellate authority and subject only to such decision, an order of the Controller shall be final and shall not be called in question in any Court of Law whether in a suit or other proceeding or by way of appeal or revision."

If the Subordinate Judge as the notified appellate authority is *persona designata* and not a Court, there can be no doubt that section 12 (4) is *intra vires* and rules out any remedy by suit or by way of appeal or revision. I have no hesitation in the present case in holding, in agreement with Yahya Ali, J., and Clark, J., that the Subordinate Judge was appointed *persona designata* as the appellate authority and that he was not a Court subordinate to the High Court, a condition necessary for the revisional powers under section 115 of the Civil Procedure Code to be invoked. This revision petition is not maintainable. Even if it was, having heard both sides, I can see no ground for any interference in revision. The petition is dismissed with costs.

The learned advocate for the respondent agrees to give two months' time for the petitioner to vacate the premises where a longstanding grocery business has been conducted. This will be made an order of Court, by consent.

K.C. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MACK.

Nagireddi Pothuraju .. *Petitioner**

v.

Missula Veera Venkata Satyanarayana .. *Respondent.*

Partnership—Sale of going concern—Power of Court—Preponderating interest in a going concern in one of the partners—His right to purchase the shares of other partners deserving of consideration.

Though in a dissolution of a partnership the Court has power to sell even a going concern, if one of the partners has a greatly preponderating interest in the concern, then his interests should be considered and any proposal submitted by him for purchase of the shares of minor partners should be given serious consideration.

Sayers v. *Sayers*, (1876) A.C. 174, followed.

Where of the two contending parties, the plaintiff and the first defendant, the first defendant's claim to a preponderating interest amounting to 4/5th share in a going concern, namely a rice mill, had been well established and the remaining 1/5th share alone was found to belong to the plaintiff, on the question whether in order to ascertain and determine the value of the plaintiffs 1/5th share the entire mill should be brought to sale in public auction even when the first defendant was willing to purchase plaintiff's share at his own valuation,

Held, that in the circumstances the Court would not be justified in ordering the sale of the mill in open auction.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Vizagapatam, dated 13th September, 1948, in I.A. No. 39 of 1948 in O.S. No. 57 of 1935.

S. Ramamurthi for Petitioner.

P. Suryanarayana for Respondent.

The Court delivered the following

JUDGMENT.—This is a petition to revise an order passed by the Additional Subordinate Judge, Vizagapatam, directing the sale of a rice mill in open auction on an application filed by the respondent who was the plaintiff in a suit for dissolution of a partnership firm, whose only business was the running of this rice mill. The suit was filed in 1935 and first dismissed on the ground that the plaintiff was not a partner. The plaintiff, however, succeeded in an appeal, A.S. No. 43 of 1940 judgment in which was delivered in February, 1941. Since then, the matter is said to have been pending before a Commissioner appointed to take accounts. In 1948, the plaintiff applied for the sale of the mill, which is now under lease to a third party by the first defendant for Rs. 4,000 for a period of one

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* C.R.P. No. 1656 of 1948. 1st February, 1949.

year. The first defendant claims to have purchased the interests of the other partners and to hold a preponderant interest in the mill amounting to a 4/5th share. The plaintiff's right to a 1/5th share has been declared and the learned Subordinate Judge proceeded on this basis. Though he strove to bring the parties together and make them agree to some reasonable method of determining the value of the plaintiff's 1/5th share, he was unable to do so and directed the sale of the entire mill in open auction, overruling the strenuous protests of the first defendant. The plaintiff in his affidavit in support of his application valued the mill at Rs. 30,000 whereas the first defendant valued it only at Rs. 15,000. The first defendant appears to be genuinely anxious about retaining the mill for himself and also purchasing the plaintiff's share; and with this end in view he went to the length of accepting the petitioner's valuation of the mill at Rs. 30,000 and offering to pay him Rs. 6,000 as his 1/5th share. Even this the plaintiff refused on the ground that if the mill was sold in public auction, it was likely to fetch even more than the valuation he put on it in his affidavit.

One of the objections taken by the first defendant is that the learned Subordinate Judge did not go into one of his contentions, namely, that the site on which the mill stood belonged to him, though the mill building was a partnership asset. It is common ground that the preliminary judgment in the partition suit did not determine this point. It is not adverted to in the lower Court's order, although it appears as one of the grounds of objection in the counter and is also made a ground for revision. Until this point is decided, a sale of the entire mill and the site will merely lead to future complications. I have heard the parties at length and I am satisfied that the plaintiff is taking an unreasonable attitude in going to the length of rejecting the offer by the first defendant to accept even his own valuation of the mill.

In *Sayers* v. *Sayers*[1], some principles applicable to the present case have been laid down. That was a dispute between a 1/8th partner and a 7/8th partner in a music hall which was a going concern. Lord Cairns (the Lord Chancellor) made the following observation on those facts which appear to me relevant to the present case :

"It appears to me that, looking at the nature of this business, and looking at the very small interest which was taken in it by the respondent, it would certainly not be desirable in this case to have a sale or to bring these premises to the hammer for the purpose of ascertaining what sum ought to be given for them."

No doubt, the Court in a suit for dissolution of partnership has power to sell even a going concern. But when one partner has a greatly preponderating interest in the concern, his interests should be considered and any proposal submitted by him for the purchase of the shares of minor partners should be given serious consideration. In the present case, the first defendant has, I think, established his *bona fides* in going to the length of accepting the petitioner's own valuation of the mill at Rs. 30,000 given in his affidavit in support of his application. Neither side was able to agree on any independent person to value the mill. I do not think that in the circumstances the learned Subordinate Judge acted in accordance with settled principles in directing the entire mill to be sold in Court auction at the instance of this minor partner. I have carefully considered the conflicting positions and I direct in modification of the lower court order as the most equitable solution the 1/5th share of the plaintiff to be sold in open auction with first defendant's starting bid of Rs. 6,000, which the first defendant's learned advocate says he is still willing to pay, namely, 1/5th of the plaintiff's own valuation of the mill. If there is any higher bidder, the plaintiff will benefit. This arrangement will not prejudice him in the least as he will be assured of his share of the mill on his own valuation. The Commissioner who is taking accounts in the suit will accordingly hold the sale of plaintiff's one-fifth share in the mill as expeditiously as possible. His remuneration will be the same as that fixed by the Subordinate Judge.

1. (1876) A.C. 174.

I direct the first respondent to pay the petitioner the costs of this petition with minimum advocate's fee.

Incidentally, the Commissioner is directed to complete his accounts in this very long pending suit which was filed in 1935. It is high time that this long pending litigation received a final disposal.

K.C. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

M. S. Ramayya .. *Appellant**

v.

The District Board, Coimbatore .. *Respondent.*

Madras Local Boards Act (XIV of 1920)*—Rules framed under, rule* 5*—Requirements of—Action against officer or servant of the Local Board—Charge against him, if should state proposed action—Punishment—Interference by High Court in second appeal.*

All that is required to be done under rule 5 of the rules relating to the appointment and punishment of officers and servants of the Local Boards framed by the Provincial Government under sections 70, 72 and 199 of the Madras Local Boards Act is to inform the person concerned in writing the grounds on which it is proposed to take action against him. The rule does not require that the proposed action should be intimated to him. What is required to be communicated is that it is proposed to take action and not the nature of the punishment. There is a distinction between the expression " proposed to take action " in rule 5 and the expression " the action proposed to be taken " occurring in section 240 (3) of the Government of India Act. Though under the latter Act the punishment proposed has to be communicated along with the charge, it is not necessary under rule 5 of the rules framed under the Local Boards Act to state in the charge the proposed punishment. Hence a charge against a Headmaster of District Board School cannot be said to be defective because the punishment of dismissal which was ultimately awarded to him was not mentioned in it and communicated to him even at the outset.

As under the rules the punishment is left to the discretion of the President of the District Board it is not open to the High Court in second appeal to consider and interfere with the punishment alone, if there is no other error of law.

Appeal against the decree of the Court of the Subordinate Judge of Coimbatore dated 1st October, 1946, in A.S. No. 235 of 1946 preferred against the decree of the Court of the District Munsiff, Kollegal, dated 7th January, 1946, in O.S. No. 137 of 1944.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Appellant.

T. V. Ramanatha Aiyar and *W. S. Krishnaswami Naidu* for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff is the appellant. He was the Headmaster of the Board Higher Elementary School, Kamakarai, run and managed by the respondent, the District Board of Coimbatore. On certain charges framed against him and proved, the District Board by its order dated 19th November, 1941, reduced the salary of the plaintiff permanently from Rs. 30 to Rs. 25. Against this order of the District Board he preferred an appeal to the Director of Public Instruction and along with his appeal petition he enclosed a photostat copy of a letter addressed by one Mayana Gowda to the Deputy Inspector of Schools, one Mr. Sundara Rao and dated 21st April, 1941, to establish that there was a conspiracy between one of his subordinates, Mari Gowda, whose relation was Mayana Gowda, and the Deputy Inspector of Schools, Mr. Sundara Rao. The Director of Public Instruction modified the order of the District Board debarring the plaintiff from being Headmaster at any time but reducing his pay to Rs. 25 for one year only instead of permanently. The Director of Public Instruction wanted a copy of the report of the result of the investigation which the President of the District Board represented to the Director of Public Instruction that he intended to conduct in order to find out how the plaintiff managed to get the photostat copy of the said

* Second Appeal No. 897 of 1947. 21st January, 1949.

letter. The President of the District Board took up the enquiry and framed charges which were communicated to the plaintiff on 3rd February, 1944. The plaintiff was asked to submit his explanation and also to answer a questionnaire enclosed with the letter of the President dated 3rd February, 1944. The plaintiff never appeared before the President, even though the District Board undertook to meet his travelling expenses and evaded giving any explanation to the charges and submitting the answers to the questionnaire. The President therefore found him guilty of the charges that were framed against him and the plaintiff was dismissed from service with effect from 7th February, 1944. Ex. P-27 dated 17th March, 1944, contains the proceedings of the President of the District Board, Coimbatore.

The plaintiff instituted the suit out of which this second appeal arises to set aside the order of dismissal and for re-instatement. The plaintiff alleged that the charges framed against him were baseless and that the punishment inflicted upon him was *mala fide*. The Courts below dismissed the plaintiff's suit on the ground that he had failed to establish that the enquiry by the President was not legal and that the charges were unfounded. The lower appellate Court found that notwithstanding the offer of the District Board to meet the travelling expenses of the plaintiff and his witnesses he had refused to be present at the enquiry and refused to disclose the source from which he obtained the photostat copy of the letter. According to the opinion of the learned Subordinate Judge, the several replies sent by the plaintiff to the President of the District Board in answer to the charges that were communicated to him were not only impertinent but were even provocative. It was also found that the procedure laid down was properly followed and that there was no violation of any of the rules laid down for an enquiry. In the result, he agreed with the District Munsiff in dismissing the suit.

In this second appeal, the learned advocate for the appellant placed before me the correspondence and the evidence about the charges. I have no hesitation in agreeing with the conclusion of the learned Subordinate Judge that the attitude of the plaintiff throughout was highly impertinent, if not provocative. There is no ground for complaint so far as the enquiry before the President of the District Board is concerned. The plaintiff never submitted any explanation as to how he was able to obtain a photostat copy of a letter which should have been in the hands of the Deputy Inspector of Schools. He examined P.W. 1, a karnam, to prove that he showed the letter to him (the plaintiff) and that he took a photostat copy of that letter. But the Deputy Inspector of Schools gave evidence to the effect that he never received that letter. From this evidence it follows that the letter was somehow intercepted by the plaintiff or P.W. 1 or both and that a photostat copy was taken and sent to the Director of Public Instruction along with the memorandum of appeal. Such therefore is the conduct of the plaintiff and from the evidence on record the only conclusion possible is that not only was he impertinent in his replies to the President of the District Board, but that he is guilty of underhand methods to obtain possession of a letter to the Deputy Inspector of Schools. I therefore agree with the finding of fact that no *mala fides* in the conduct of the enquiry has been established by the plaintiff and that the charge is well founded.

It is next argued on behalf of the appellant that the charge was defective in that notice of the proposed action was not given in that charge to the plaintiff and that therefore the dismissal was illegal. Under section 240 (3) of the Government of India Act, it has been provided in the case of a member of the civil service that he should not be dismissed from the service or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken against him. This section has now been authoritatively interpreted by the Privy Council as requiring that along with the charge a member of the civil service should also be informed of the particular action that was proposed to be taken against him, *viz.*, whether it was proposed to dismiss him or reduce him in rank. It is not enough merely to indicate that one or other of the punishments would be awarded to him if the charges were established. The language of the rule under

which an enquiry is to be held in the case of the servants of the District Board is different. Rule 5 of the rules relating to the appointment and punishment of officers and servants of the Local Boards framed by the Provincial Government under sections 70, 72 and 199 of the Madras Local Boards Act states :

" No order of dismissal, of removal, of reduction, of suspension not being one pending inquiry or withholding increments or promotion, including stoppage at an efficiency bar shall be passed on an officer or servant of a local board (other than an order based on facts which have led to his conviction in a Criminal Court) unless he has been informed in writing of the grounds on which it is proposed to take action and has been afforded an adequate opportunity of defending himself. The grounds on which it is proposed to take action shall be reduced to the form of a definite charge or charges, which shall be communicated to the person charged together with a statement of the allegations on which each charge is based and of any other circumstances which it is proposed to take into consideration in passing orders on the case. . . . ."

The rest of the rule is not relevant. It will be seen on a comparison of the language of section 240 (3) of the Government of India Act with the language of rule 5 that all that is required to be done under the latter rule is to inform in writing the grounds on which it is proposed to take action and such grounds should be reduced to writing and communicated to the person concerned. The rule does not require that the proposed action should be intimated. What is required to be communicated is that it is proposed to take action and not the nature of the punishment. The distinction between the expression " proposed to take action " and the expression " the action pro osed " was noticed by the Privy Council in *High Commissioner for India* v. *I. M. Lall*[1]. Under rule 55 of the rules framed under section 96 (*b*) of the Government of India Act, 1919, in the case of an enquiry into the conduct of civil servants it was there provided that the grounds on which it is proposed to take action should be reduced to writing and as under rule 5 (Madras Local Boards Act) the grounds on which it was proposed to take action should also be communicated. While discussing the effect of section 240 (3), their Lordships of the Judicial Committee pointed out in *High Commissioner for India* v. *I. M. Lall*[1] :

" In their opinion, sub-section 3 of section 240 was not intended to be, and was not, a reproduction of rule 55 which was left unaffected as an administrative rule. Rule 55 is concerned that the civil servant shall be informed 'of the grounds on which it is proposed to take action ', and to afford him an adequate opportunity of defending himself against charges which have to be reduced to writing ; this is in marked contrast to the statutory provisions of 'a reasonable opportunity of showing cause against the action proposed to be taken in regard to him.' In the opinion of their Lordships, no action is proposed within the meaning of the sub-section until a definite conclusion has been come to on the charges, and the actual punishment to follow is provisionally determined on."

Under section 240 (3), therefore, it is incumbent upon the person who is charged with the duty of conducting the enquiry to make up his mind even at the time of settling the charges the punishment intended to be awarded if the charges are established and he should along with the charges intimate the punishment also. In other words, the proposed action to be communicated should contain not only the charges but the punishment for those charges intended to be awarded if proved. Under rule 55 of the old rule relating to civil servants, the language of which is analogous to rule 5 framed by the Local Government under the Local Boards Act, it is not necessary for the person conducting the enquiry to make up his mind regarding the action, that is, the punishment proposed to be awarded if the charges are established. All that is required to be communicated to the person about whose conduct it is proposed to enquire, is the grounds on which the action is proposed to be taken. I am therefore unable to agree with the contention that the charge in the present case is defective because the punishment of dismissal which was ultimately awarded to the plaintiff was not mentioned in the charge and communicated to him even at the outset. The point that the charge was defective was not raised in the Courts below ; but as it is a pure question of law appearing on the face of the charge, I allowed it to be argued.

It is urged on behalf of the appellant that the punishment awarded is severe. Sitting in second appeal it is not open to me to consider and interfere with punishment alone if there is no other error of law. The punishment under the rules is

1. (1948) 2 M.L.J. 55 at 60 : L.R. 75 I.A. 225 : 1948 F.L.J. 23 (P.C.).

left to the discretion of the President of the District Board and even if I feel that the punishment is excessive, I have no power to interfere with it. It is, however, for the President, District Board, to consider, if the plaintiff applies to him whether the ends of justice will not be met by awarding a lesser sentence than dismissal. It may be possible for the District Board, if on re-consideration they think fit to re-entertain the plaintiff, to transfer him to a place free from factions.

The second appeal is dismissed with costs.

Leave to appeal is refused.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

Alla Subba Reddi .. *Petitioner**

v.

Vanga Koti Reddi and another ... *Respondents.*

Civil Procedure Code (V of 1908), *Order* 41, *rule* 33—*Relief under—Availability only in pending appeal —Right to apply under rule* 33 *of Order* 41 *after pursuit and failure of other remedies.*

The relief which can be granted under rule 33 of Order 41, Civil Procedure Code, can only be granted in a pending appeal and not in an appeal which had been already disposed of. Though the latitude of the discretion vested in the Court under that provision of law is very large, the discretion is invokable only in a pending appeal.

The concluding words of rule 33 of Order 41, namely, "although such respondents or parties may not have filed any appeal or objection" shows that where a party has pursued such a remedy but failed he could not apply under the rule.

Petitions under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the judgments and orders of the Court of the Subordinate Judge, Tenali, dated 29th June, 1946, in I.A. No. 1585 of 1945 in A.S. No. 153 of 1944 and in I.A. No. 1586 of 1945 in A.S. No. 154 of 1944 respectively.

K. Krishnamurthi for Petitioner.

V. V. Sastri (Amicus Curiæ) for Respondents.

The Court delivered the following

JUDGMENT.—I am of opinion that these civil revision petitions must fail. The point raised is one with reference to the power of the Court under Order 41, rule 33, Civil Procedure Code, which the learned Subordinate Judge of Tenali refused to exercise by his orders under revision.

I shall state a few facts in order to make the legal position arising for decision clear. There were two suits each one of which was by a different plaintiff, against the same two defendants, for damages for malicious prosecution. It was alleged in the plaint in each suit that the two defendants had conspired to initiate a criminal prosecution. The cause of action alleged in each suit was, it may be taken, identical. The suits were decreed by the trial Court and two sets of appeals were taken to the appellate Court by each of the two defendants in the suit. One set of appeals, that is, by the petitioner before me was dismissed for default and the C.M.A.s preferred to this Court against the order of refusal to set aside the dismissals for default were also dismissed by this Court. The other set of appeals by the other defendants in the two suits shared a better fate. They were allowed after the dismissals for default of the appeals by the petitioner before me but before the dismissal by this Court of the C.M.A.s preferred by him. A few days after the dismissal of his C.M.A.s by this Court the petitioner applied under Order 41, rule 33 of the Civil Procedure Code in the appeals of the other defendant which had by then been disposed of in his favour. The petitioner made the request to the

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* C.R.P. Nos. 1392 and 1393 of 1946. 11th February, 1949.

appellate Court in those appeals that he may be added and that the same relief may be granted to him as had been granted to the appellant in those appeals. The learned Subordinate Judge rejected the request.

In my opinion the learned Subordinate Judge is right. Assuming as contended by Mr. Krishnamurthi, the learned advocate for the petitioner, that the party applying under Order 41, rule 33 of the Civil Procedure Code need not have been a party originally to the appeal in which he applies, assuming that it would be enough if he was a party to the suit out of which the appeal has arisen, in which he seeks to apply, (vide *Thirumalachariar* v. *Athimoola Karayalar*[1]). I have no doubt however that the relief which can be granted under Order 41, rule 33, Civil Procedure Code, can only be granted in a pending appeal, not in an appeal already disposed of. It is true that the latitude of the discretion vested in the Court under that provision of law is very large under the Full Bench ruling of this Court reported in *Subramania Chettiar* v. *Sinnammal*[2], but the discretion is invokable obviously only in a pending appeal. Further, the party applying for relief in the present case already pursued his remedy by way of his own appeal which ended rather unfortunately for him in the dismissal for default which even more unfortunately became final by reason of the dismissal of the C.M.A.s preferred to this Court. The concluding words of the rule, namely, "although such respondents or parties may not have filed any appeal or objection" seem to suggest that where he pursued such a remedy but failed he could not apply under this rule. In view of these difficulties in the way of the petitioner his revision petitions are dismissed.

As the respondents in each civil revision petition were not represented by counsel, I asked for the assistance of Mr. V. V. Sastri as *amicus curiæ* when the last civil revision petitions came on for hearing before me. Mr. V. V. Sastri has appeared as requested. I thank him for the assistance rendered by him. No costs.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

Kasi Ammal, minor by mother and guardian Kanchi Ammal .. *Appellant**

v.

Ramasami Reddiar and another .. *Respondents.*

Evidence Act (I of 1872), section 112—Proof of non-access—What would amount to.

It cannot be said that if a husband proves "non-access" in the sense that he never had intercourse with his wife, he should prove further that he had no opportunity of having intercourse with her. Though a husband might have had an opportunity of intercourse with his wife, if he proves to the satisfaction of the Court that notwithstanding such opportunity he had no actual co-habitation with his wife, he establishes "non-access" within the meaning of section 112 of the Evidence Act.

The rule that the evidence of the husband is not admissible in bastardy proceedings does not apply to India and hence the evidence of the husband cannot be ruled out.

Hanumantha Rao v. *Ramachandrayya*, (1944) 1 M.L.J. 285 : I.L.R. 1945 Mad. 53, relied on.

Appeal against the decree of the Court of the Subordinate Judge of Tuticorin dated 8th August, 1945, in A.S. No. 12 of 1945 preferred against the decree of the Court of the District Munsiff, Koilpatti, in O.S. No. 190 of 1943.

V. Ramaswami Aiyar and *R. M. Halasyam* for Appellant.

T. L. Venkatarama Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal raises the question of the paternity of the second plaintiff. The first plaintiff is the mother of the second plaintiff. The

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1. (1932) 65 M.L.J. 15.

2. (1930) 59 M.L.J. 634 : I.L.R. 53 Mad. 881 (F.B.).

* S.A. No. 430 of 1946. 8th December, 1948.

first plaintiff and the first defendant were married 24 or 25 years before the suit. The second plaintiff was born on the 23rd June, 1926, as Ex. P.-1 the birth extract shows. The two plaintiffs filed the suit out of which this second appeal arises for recovery of maintenance and for provision for the marriage expenses of the second plaintiff. They also impugned the validity of a gift deed executed by the first defendant in favour of the second defendant as being a sham and nominal document intended to defeat the maintenance rights of the plaintiffs. The main defence of the first defendant was that a few months after the marriage the first plaintiff attained puberty and ever since was leading an unchaste life. She first came into contact with one Ammu Reddiar with whom she lived as wife for a period of six years, during which period the second plaintiff was born and thereafter the two plaintiffs and Ammu Reddiar migrated to Singapore and came back six years later. After their return to India the first plaintiff came into contact with another person and ever since lived with him as his wife. For these reasons he contended that he was not liable to pay maintenance to the two plaintiffs and make any marriage provision for the second plaintiff. The Courts below have concurrently found that the first defendant's case is true and that the first plaintiff was leading an unchaste life as pleaded by the first defendant and that the second plaintiff, the daughter, was the illegitimate child of the first plaintiff and that the first defendant was not her father. There is no appeal by the first plaintiff attacking the finding against her. The second appeal was filed only by the second plaintiff. The learned Subordinate Judge accepted the evidence adduced on behalf of the defendant and rejected the oral evidence adduced on behalf of the plaintiff, to establish that till two years prior to suit she was living continuously in the house of the first defendant and that it was during that period that the second plaintiff was born.

The only point argued on behalf of the plaintiff is that the learned Subordinate Judge did not pay attention to the presumption under section 112 of the Evidence Act. The argument is that under section 112 of the Evidence Act there is a presumption that a child born in lawful wedlock is the legitimate child of the husband of the woman. This presumption can be rebutted only by proof by the husband that he had no opportunity of intercourse. The word "access" was construed by several decisions. An authoritative interpretation of the word is to be found in the judgment of the Privy Council in *Karpaya Servai* v. *Mayandi*[1], their Lordships pointed out in that case :—

"It was suggested by counsel for the appellants that 'access' (in the section implied actual co-habitation, and a case from the Madras reports was cited in support of this contention. Nothing seems to turn upon the nature of the access in the present case, but their Lordships are satisfied that the word means no more than opportunity of intercourse."

The Madras decision referred to in this passage apparently was the decision of Venkatasubba Rao, J., in *Jagannatha Mudali* v. *Chinnasami Chetti*[2]. There the learned Judge interpreted the word to mean sexual intercourse. This view is therefore no longer tenable and in the later decisions of this Court in *Krishnappa* v. *Venkatappa*[3], *Hanumantha Rao* v. *Ramachandrayya*[4], the view of the Privy Council was followed.

The argument of Mr. Ramaswami Aiyar for the appellant, however, was that it was not enough for the husband to prove that he had no actual co-habitation with the plaintiff during the material period, but that he must also prove that he had no opportunity of intercourse with the first plaintiff. The finding of the learned Subordinate Judge was as follows :

"The evidence of the 1st defendant and his 1st, 4th and 5th witnesses stands on a much better footing and is more in keeping with the probabilities and so believing that evidence and disbelieving the evidence of the 1st plaintiff and her witnesses I find that she is an unchaste wife with whom the first defendant has nothing to do and that her daughter the second plaintiff is illegitimate."

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1. (1933) 66 M.L.J. 288 : I.L.R. 12 Rang. 243 at 251 P.C.).
2. (1931) 61 M.L.J. 878 : I.L.R. 55 Mad. 243.
3. (1943) 2 M.L.J. 108.
4. (1944) 1 M.L.J. 285 : I.L.R. 1945 Mad. 53.

I interpret this finding to mean that the first defendant never had an opportunity of intercourse with the first plaintiff, though it was elicited in the evidence that the first plaintiff was living with Ammu Reddiar in the village of the 1st defendant in a different house, and that during that period the plaintiff was born. In view of the evidence adduced on behalf of the first defendant that he never went to Ammu Reddiar's place or to the place where this woman lived which was accepted by the Courts below and also in view of his evidence that after the marriage he never touched this woman, the finding of the learned Subordinate Judge must be understood to mean that though they were living in the same village, the first defendant had no opportunity of intercourse. The one method of proving that a man had no opportunity of intercourse is to conclusively establish that he had no intercourse with the woman. If he is able to establish to the satisfaction of the Courts that he had no intercourse with the woman I fail to see why it should be incumbent upon him to prove further that he had no opportunity of an intercourse. In my view the finding therefore of the learned Subordinate Judge amounts to saying that the first defendant had no opportunity of intercourse with the first plaintiff at the material period. There is no warrant for the contention urged on behalf of the appellant that if a man proves non-access in the sense that he never had intercourse with the woman he should prove further that he had no opportunity of having intercourse. He might have had an opportunity, but if he proves that he had no actual co-habitation with the woman during the period, in my opinion he discharges the burden of proving non-access within the meaning of section 112 of the Evidence Act. Of course the section has to be interpreted and applied as pointed out in *Mayandi Asari* v. *Sami Asari*[1], with reference to the facts and the circumstances of each case in order to find out whether really there was an opportunity of intercourse or not. If he had an opportunity of intercourse, but notwithstanding such opportunity, if the husband proves to the satisfaction of the Court that he had no intercourse in my opinion he establishes thereby non-access within the meaning of section 112 of the Evidence Act. As pointed out in *Hanumantha Rao* v. *Ramachandrayya*[2], the rule in *Russell case*[3], that the evidence of the husband is not admissible in bastardy proceedings does not apply to India and the evidence of the husband cannot be ruled out. There is no decision which goes to the length of holding that in a case where the husband establishes that he had no actual co-habitation with the wife at any time it does not amount to proof of "non-access" within the meaning of section 112 of the Evidence Act.

I am therefore of opinion that the decision of the learned Subordinate Judge is correct. The second appeal fails and is dismissed with costs. No leave.

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

Kunda Chenchurama Reddi .. *Appellant**

v.

Chintalapalli Ademma .. *Respondent.*

Limitation Act (IX of 1908), Article 142—Applicability—Adverse possession for twelve years by several persons in succession not claiming from one another— If bars true owner.

Adverse enjoyment of immoveable property for over twelve years, whether by a single person or by several persons in succession, even though they do not claim from one another, provided it is continuous and without a break, bars the true owner under Article 142 of the Limitation Act.

Ramayya v. *Kotamma*, (1921) 42 M.L.J. 319 : I.L.R. 45 Mad. 370, followed.

A declaratory decree pure and simpliciter or even a decree for possession not effectively executed cannot satisfy the requirement of proof of possession within 12 years of suit which is laid down by Article 142.

1. (1931) 61 M.L.J. 874 : I.L.R. 55 Mad. 292.
2. (1944) 1 M.L.J. 265 : I.L.R. 1945 Mad. 53.
3. (1924) A.C. 687.

* S.A. No. 675 of 1946. 4th February, 1949.

Appeal against the decree of the Court of the Subordinate Judge, Nellore, dated 1st November, 1945, in A.S. No. 57 of 1945, preferred against the decree of the Court of the District Munsiff, Nellore, dated 17th July, 1944, in O.S. No. 681 of 1942.

Kasturi Seshagiri Rao and *Kasturi Sivaprasada Rao* for Appellant.

K. Umamaheswaram for Respondent.

The Court delivered the following

JUDGMENT.—The subject-matter of the suit out of which this second appeal arises is an extent of 40 cents of the southern 3 acres, 75 cents, belonging to the plaintiff in S. No. 240 of the Pottempavdu village of the total extent of 4 acres, 75 cents. Alleging trespass on the 40 cents somewhere about 1938 on the part of the defendant, the owner of S. No. 241 lying to the south of S. No. 240, the plaintiff sued to recover possession of the 40 cents and mesne profits thereon. According to the plaintiff, it became possible for the defendant to trespass, because he happened to have become the lessee of the plaintiff's property under Ex. D-2 for a term of seven years and could abuse his possession as such lessee so as to annex a portion of the leasehold to his own property. The plaintiff alleged also that out of 3 acres, 75 cents, an extent of 3 acres, 60 cents, was mentioned in Ex. D-2 as the subject-matter of the demise on account of the fraud which the defendant played. In answer to the action the defendant put the plaintiff to proof of her title and of her possession within 12 years prior to suit and denied the trespass alleged. The learned District Munsiff of Nellore who tried the suit dismissed it, giving effect to the pleas raised by the defendant. On appeal the learned Subordinate Judge of Nellore decreed the suit except with reference to an extent of 15 cents. This extent of 15 cents had been decreed to this very plaintiff against this very defendant in an earlier litigation on 25th August, 1930. But the decree became inexecutable by time-bar, and the defendant remained in possession of that extent all along. The learned Subordinate Judge therefore held that the plaintiff was disentitled to relief in respect of that extent, and that in respect of the remainder there was a clear admission of the plaintiff's title and possession in Ex. D-2 entitling her to a decree. I may add that the learned Subordinate Judge did not displace the finding recorded by the learned District Munsiff against the case of trespass in 1938 pleaded by the plaintiff.

Against the decree of the learned Subordinate Judge the defendant has filed this second appeal. There is no question now with reference to the 15 cents. As regards the remaining 25 cents the appellant's grievance is, firstly, that undue effect has been given by the learned Subordinate Judge to the recitals of Ex. D-2 about the plaintiff's title and possession, and secondly, that irrespective of the defendant's proof or failure of proof of his own adverse possession the plaintiff was bound to fail for want of proof of her possession within 12 years prior to suit under Article 142 of the Limitation Act, even assuming the trespass of 1938 alleged by the plaintiff to be true.

The further admitted facts of the case which I need mention are these. The plaintiff executed a deed of trust in 1928 in favour of certain third parties in respect of her entire 3 acres, 75 cents in S. No. 240. Those parties remained in possession thereof after the plaintiff's execution of the trust deed till the plaintiff who repudiated the trust later became eventually entitled to possession as against them by virtue of the decree passed in her favour in O.S. No. 156 of 1940 on the file of the Court of the District Munsiff of Nellore. The result was that, notwithstanding the recitals of Ex. D-2 abovementioned, the parties in possession at the time of Ex. D-2 being the trustees there was no possession got by the defendant from the plaintiff pursuant thereto, because there was no possession with her to be given by her to the defendant.

The recitals of Ex. D-2 being therefore false, I am of opinion with reference to the first contention of the appellant that they were wrongly used by the learned

Subordinate Judge against the defendant as negativing his adverse possession. Being false, they cannot, I think, be used whether for negativing adverse possession of the defendant or for finding the plaintiff's possession within the statutory period.

With reference to the second contention of the appellant, in order to escape the bar of Article 142 of the Indian Limitation Act which would *prima facie* cover a case like the present under the Full Bench ruling of this Court reported in *Official Receiver, East Godavari* v. *Govindaraju*[1], Mr. Umamaheswaram, the learned advocate for the respondent, attempted many lines of argument before me. He contended in the first instance, rather boldly that the plaintiff must be taken to have proved her possession within 12 years prior to suit, because the possession of the trustees was in law hers. That, in my opinion, is absolutely and obviously impossible. The trustees were in possession in their own right and adversely to the plaintiff and not on behalf of the plaintiff, so much so that in fact the plaintiff had to file her suit, O.S. No. 156 of 1940, in order to evict them from the property in question.

The learned advocate next contended that if during the wrongful possession of one trespasser the true owner filed a suit and obtained a decree against him, any dispossession of that trespasser by another trespasser during the pendency of the suit would be unavailing against the plaintiff suing the later trespasser within 12 years of the decree. The argument was that the decree obtained by the true owner against the first trespasser would operate *proprio vigore* to give back possession in the eye of law to the true owner which, if proved to be within 12 years prior to the suit against the later trespasser, would save such a suit from the bar of limitation under Article 142. In support of this contention the learned advocate relied principally on the statement of law to be found at page 1706 of the 6th edition of Mitra's Commentary on the Indian Limitation Act and the case in *Ram Kishore Gangopadhya* v. *Bandikaratan Tewari Chowdhry*[2], cited in the foot-note in support thereof. My attention was also drawn in this connection to the decision of the Privy Council reported in *Agency Co.* v. *Short*[3], as showing that in cases of successive trespassers limitation ceases to run against the lawful owner of land after the intruder has relinquished his possession. Reference was also made to the observations of the learned Judges in *Janakinata Saha* v. *Baikunthanath Chattik*[4], to the effect that,

"When the possession passes from the first to the second trespasser, there is a constructive restoration, even if a momentary restoration, of the true title to possession."

It is unnecessary for me to deal with this line of argument of counsel for the respondent any further than to say that it can have no application to the facts of the case before me. Here no dispossession of the first trespasser by the second, that is, by the defendant in the present suit, took place during the pendency of a suit by the true owner against the former. The suit against the first trespasser (O.S. No. 156 of 1940) was in the present case in fact only subsequent to the alleged trespass of 1938 by the second and not prior. Nor is there any room in the circumstances of the present case for the inference of a relinquishment of possession by the first intruder or for the application of any principle of constructive restoration of possession to the true owner.

The next argument submitted by the learned advocate was based upon Heaton J.'s statement of the law in the last paragraph of his judgment in *Vasudeo Atmaram Joshi* v. *Eknath Balkrishna Thite*[5]. But it must be pointed out, in regard to one part of that statement, *viz.*, that Article 142 has no application to claims which neither in terms nor in substance are claims to possession, made necessary by reason of dispossession or discontinuance of possession, that although that part of the statement of the law has been adopted by Madhavan Nair, J., sitting as a single Judge in *Periaya Jeeyangarasami* v. *Esoof Sahib*,[6] it cannot be regarded as good law after the Full Bench ruling of this Court in *Official Receiver, East Godavari* v. *Govindaraju*[1]. The decision of the Full Bench has in terms overruled *Periya*

1. (1940) 2 M.L.J. 190 : I.L.R. 1940 Mad. 953 (F.B.).
2. (1886) I.L.R. 13 Cal. 203.
3. (1888) 13 A.C. 793.
4. (1922) 70 I.C. 602 at 604.
5. (1910) I.L.R. 35 Bom. 79 at 92.
6. (1924) 21 L.W. 398.

Jeeyangarasami v. *Esoof Sahib*[1], and laid down clearly and categorically that in suits for ejectment, against a person in occupation of immoveable property, the plaintiff cannot rest his case on title alone, and that Article 142 applies to such suit so as to make it incumbent upon the plaintiff to prove that he has exercised acts of ownership by being in possession within 12 years of suit. Nor am I satisfied that the other part of Heaton, J.'s statement of the law is any the sounder. Says the learned Judge :

> " It was indeed urged that it is a general principle that anyone suing in ejectment must prove possession within 12 years and the authorities seem to bear out that contention but the reason for this is that possession is commonly the effective assertion of title which is relied on and the cases accordingly deal with that particular kind of assertion of title. But it is not the only one ; there is another which in some cases is equally good ; and that is an assertion of title made in Court and established by a decree. That is good against those who are party defendants to the suit, and if the same title is re-asserted and made good, as here in a later suit against other opposing parties, it is good against them also, and entitles to possession whether the title-claimant has or has not been in possession within 12 years ; unless the opponent can defeat the title by adverse possession. There is no such defect in this case."

That a declaratory decree pure and simpliciter cannot stop the running of time by adverse possession under Article 144 has been ruled by the decision of the High Court of Madras in *Singaravelu Mudaliar* v. *Chokkalinga Mudaliar*[2], and that of the Privy Council in *Subbaya Pandaram* v. *Muhammad Mustapha Maracayar*[3]. It is difficult, then, to see how on principle such a decree or even a decree for possession not effectively executed can satisfy the requirement of proof of possession within 12 years of suit which is laid down by Article 142.

The last line of argument advanced before me for the respondent is founded on decisions of the kind illustrated by *Ram Lakhan Bai* v. *Gajadhar Rai*[4], and *Ademma* v. *Penchulu Reddi*[5], on the one hand and *Secretary of State for India in Council* v. *Debendra Lal Khan*[6], on the other, which are cases mutually converse and go to show that in cases under Article 144 there can be no tacking on of adverse possession on the part of successive independent trespassers while in the case of successive trespassers in privity with each other or one another there can be such tacking on. But these decisions, it need hardly be observed, are thoroughly irrelevant to a case like the present governed by Article 142.

None of the lines of argument submitted for the respondent is consequently of any avail to him. The case is, in my opinion, governed by the ruling in *Ramayya* v. *Kotamma*[7], that,

> "Adverse enjoyment of immoveable property for over 12 years, whether by a single person or by several persons in succession, even though they do not claim from one another, provided it is continuous and without a break bars the true owner under Article 142 of the Limitation Act."

That ruling, with which I respectfully agree, notwithstanding the doubt expressed by a single Judge of this Court, Chandrasekhara Aiyar, J., in *Ademma* v. *Penchulu Reddi*[5], is based on the sound and sensible observations of Kay, L.J., in *Willis* v. *Earl Howe*[8] that if the contrary were the correct view of the law, the effect would be that if a series of occupiers, not claiming under one another, kept out the real owner, say, for 100 years, time would run against him only from the moment when the last of such occupiers entered into possession. In any case, that ruling is binding on me sitting as a single Judge and concludes the present case against the respondent. Reference may in this connection be made also to the statement of the law to be found in Chitale's Commentaries on the Indian Limitation Act, 2nd edition, page 2395, to which my attention has been drawn by Mr. Sivaprasada Rao for the appellant. In the result the second appeal

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1. (1924) 21 L.W. 398.
2. (1922) 43 M.L.J. 737 : I.L.R. 46 Mad. 525.
3. (1923) 45 M.L.J. 588 : L.R. 50 I.A. 295 : I.L.R. 46 Mad. 751 (P.C.).
4. (1910) I.L.R. 33 All. 224.
5. (1946) 1 M.L.J. 87.
6. (1933) 66 M.L.J. 134 : L.R. 61 I.A. 78 : I.L.R. 61 Cal. 262 (P.C.).
7. (1921) 42 M.L.J. 319 : I.L.R. 45 Mad. 370.
8. (1893) 2 Ch. 545.

succeeds and I allow it. The decree of the learned Subordinate Jude is set aside, and the decree of the learned District Munsiff is restored with costs to the defendant throughout. (No leave).

K.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Akkal Naicker .. *Petitioner**

v.

Kumarasami Reddiar .. *Respondents.*

Limitation Act (*IX of* 1908), *section* 14 *and Article* 182 (5)—*Applicability—Decree passed by District Munsiff as Small Cause Judge in* 1939—*Successive execution petitions on the Original Side of same Court in* 1941 *and* 1942 *successively dismissed and last execution petition pending in* 1945—*Decree-holder realising mistake and filing execution petition on Small Cause Side—Limitation.*

A District Munsiff sitting as a Small Cause Judge passed a decree for a sum of money on 19th January, 1939, and the decree-holder filed successive execution petitions on the Original Side of the same Court. The first of them filed on 1st September, 1941, was dismissed for default of prosecution on 25th September, 1941. The second filed on 15th July, 1942, was dismissed on 19th February, 1943. A third application was filed on 17th July, 1943, and after various interlocutory and other orders, this was pending on 3rd September, 1945, when the decree-holder realised his mistake and filed an execution petition in the Small Cause Side. On a question of limitation,

Held : (1) the decree-holder is entitled to invoke the aid of section 14 of the Limitation Act and thereby deduct the period during which the three execution petitions were pending before the Original Side of the District Munsiff's Court, because he was *bona fide* prosecuting petitions for the same relief which the Court, in which they were prosecuted could not give on account of want of jurisdiction.

But since the decree was passed on 19th January, 1939, and the correct execution petition was filed only on 3rd September, 1945, a period of six years, seven months and fifteen days had elapsed and deducting two years, nine months and odd during which the petitions on the Original Side were actually pending there is a gap of three years and ten months and odd and that being more than three years as provided under Article 182 (5) of the Limitation Act, the application for execution is barred by time. It cannot be contended that the successive applications on the Original Side should be deemed to be continuations of the earlier applications as each of the three applications were distinct and separate.

Petition under section 25 of Act IX of 1887 praying that the High Court will be pleased to revise the order of the Court of the District Munsiff, Sattur, dated 11th October, 1946, in E.A. No. 42 of 1945 in S.C.S. No. 311 of 1938.

M. Natesan for *V. Ramaswami Aiyar* for Petitioner.

V. P. Sarathi (*Amicus Curiæ*) for Respondent.

The Court delivered the following

JUDGMENT.—This is an application to revise the order of the District Munsiff of Sattur in E.A. No. 42 of 1945 in S.C. No. 311 of 1938. The learned District Munsiff dismissed the application on the ground that the petitioner is not entitled to invoke the aid of section 14 of the Limitation Act, and, if it is so, the petition is barred by limitation.

Shortly stated, the facts are these. The learned District Munsiff, sitting as a Small Cause Judge passed the decree against the respondent for a sum of money on 19th January, 1939, in favour of the petitioner who was decree-holder plaintiff. The petitioner filed successive execution petitions on the Original Side of the same Court. The first of them on 1st September, 1941, being E.P. No. 341 of 1941. This was dismissed for default of prosecution on 25th September, 1941. Thereupon another application E.P. No. 292 of 1942, was filed in the same Original Side of the District Munsiff's Court on 15th July, 1942. This application again was dismissed on 19th February, 1943. A third application, E.P. No. 230 of 1943, was then filed on 17th July, 1943, and after various interlocutory and other orders, this application was pending on 3rd September, 1945 when, the petitioner realising that he had made a mistake in invoking the aid of the Original Side of the District Munsiff's Court for executing the decree filed the present application out of which the civil revision petition has arisen.

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*C.R.P. No. 233 of 1947. 8th February, 1949.

According to the learned District Munsiff, the petitioner is not entitled to invoke the aid of section 14 of the Limitation Act; and for that purpose he relied upon a decision of this Court in *Satyanarayana v. Kajireddi*[1], and another of the Patna High Court reported in *Bishundeo Narain Missir* v. *Raghunath Prasad Missir*[2]. Mr. Natesan, appearing for Mr. V. Ramaswami Aiyar for the petitioner, invites my attention to the observations contained in Rustomji's Limitation Act, Vol. I, page 254 as also to the decision of this Court in *Ramier* v. *Muthukrishna Iyer*[3], where Ramesam, J., at pages 816-817 states that in matters like this section 14 of the Limitation Act is applicable. A decision of the Bombay High Court in *Pandu* v. *Jamnadas*[4], on which the author Rustomji based his observation was also cited before me. In view of these authorities, it seems to me that the learned District Munsiff was wrong in holding that the petitioner was not entitled to invoke the aid of section 14 of the Limitation Act and thereby deduct the period during which the three execution petitions were pending before the Original Side of the District Munsiff's Court, because he was *bona fide* prosecuting petitions for the same relief which the Court in which they were prosecuted could not give on account of want of jurisdiction. So on that point the learned District Munsiff who decided the case, is wrong. But there is another hurdle which the petitioner has to surmount before he is entitled to succeed, and that is, that since the decree was passed on 19th January, 1939, and the present application was filed only on 3rd September, 1945, the period that elapsed is six years, seven months and 15 days. Out of this period the pendency of the three aforesaid applications in the District Munsiff's Court which became infructuous was only two years, nine months and odd. Therefore, the petitioner has to account for a period of three years, ten months and odd and being more than three years as provided under Article 182, clause (5) of the First Schedule of the Limitation Act, the present application is barred by limitation.

Mr. Natesan contended that each of the subsequent applications should be deemed to be continuations of the earlier applications so that from the date 1st September, 1941, on which he presented the first infructuous application till 3rd September, 1945, when the proper application was filed before the learned District Munsiff as a Small Cause Court, the period that elapsed ought to be considered as the period during which he has been diligently prosecuting in a Court and praying for a relief which he could not get on account of want of jurisdiction in that Court. No authority has been brought to my notice to show that an infructuous application which was filed in a wrong Court and dismissed by that Court can be considered to be continued by another infructuous application filed in the same Court and for the same relief some time later. It is not even pretended that the second application, E.P. No. 292 of 1942, is a continuation of the earlier application because there is no mention of such an intention in the second petition and the Court is not asked to revive the moribund application and restore it to life. In these circumstances, it seems to me, that each of these three applications were distinct and separate and ought to be treated as such and the later ones cannot be treated as continuations of the earlier applications. Therefore, however regrettable it is that a judgment-debtor who is legally bound to pay his creditor escapes scot-free, the provisions of law have to be enforced and I am constrained to hold that the application is barred by limitation and that the order of the District Munsiff, for the reasons given by me, is correct on the merits. The petition is therefore dismissed.

I must express my thanks to Mr. V. P. Sarathy who agreed to read the papers, appear as *amicus curiæ* and argue the case before me. I am much indebted to him for that help.

K.S. *Petition dismissed.*

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1. (1945) 2 M.L.J. 427.
2. (1939) I.L.R. 19 Pat. 354.
3. (1932) 62 M.L.J. 687: 55 Mad. 801 (F.B.).
4. (1924) 26 Bom.L.R. 470.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

Marneedi Satyam .. *Appellant**

v.

Masimukkula Venkataswami and others .. *Respondents.*

Practice—Second appeal—Question whether sale in favour of plaintiff was real or nominal—Concurrent findings in lower Courts—No material error—Interference in second appeal—Burden of proof—Importance of—Affidavit evidence—Admissibility.

The question whether the sale by the original owner in favour of the plaintiff's father was real and operative or nominal and fraudulent is in root analysis a question of fact and a concurrent finding of the Courts below will not be interfered with in second appeal unless the conclusion is so far vitiated by material error as to merit reversal or re-consideration.

The question of burden of proof ceases to be a matter of any particular importance after adduction of evidence on both sides, and the Court is entitled to accept the case of one of the parties as proved, not merely on the positive evidence adduced by him but also on the discrepancies and lacuna in the evidence of the other side. A Court can base its conclusion not merely on the effect of the evidence taken as a whole but it may also draw adverse inference against a party who being in a position to adduce better evidence deliberately abstains from doing so.

Affidavit evidence is not permitted except (*a*) when there is an agreement between parties that evidence may be taken by affidavit or (*b*) under Order 19, rule 1 of the Code there is an order of Court that particular facts may be proved by an affidavit or that the affidavit of any witness may be read at the hearing. Such evidence can be acted upon as admissible evidence only if it is relevant. Though there may be waiver of an objection as to admissibility, the relevancy of the evidence would still be matter for the consideration of Courts.

Appeal against the decree of the Court of the Subordinate Judge, Kakinada, dated 31st December, 1945, in A.S. No. 123 of 1945 preferred against the decree of the Court of the District Munsiff, Kakinada, dated 17th March, 1945, in O.S. No. 311 of 1944.

K. Bhimasankaram for Appellant.

P. Somasundaram and *P. Suryanarayana* for Respondents.

The Court delivered the following

JUDGMENT.—The subject-matter of the suit out of which this second appeal arises is a tiled house and site sought to be recovered by the plaintiff (the appellant before me) on the basis of a sale deed in favour of his father executed by one Suranna, the original owner, on 30th August, 1924. The defendants-respondents resisted the action on the ground of a sale deed in their favour by the decree-holder auction purchaser in a suit instituted by a creditor of Suranna, who had obtained an attachment before judgment of the property in question on the very date of Suranna's sale deed in favour of the plaintiff's father. The main issue for trial in the present suit was whether the sale deed in favour of the plaintiff was nominally executed in fraud of the creditors of Suranna, as alleged by the defendants. The trial Court and the lower appellate Court both having held against the plaintiff on this issue, he has preferred this second appeal in which having heard arguments on 18th January, 1949, I reserved judgment. I have since considered the matter over again in order to satisfy myself whether I can give effect to the contentions of the learned advocate for the appellant. Mr. Bhimasankaram contended firstly that due weight was not given by the learned Subordinate Judge to the rule of *onus probandi* applicable to the case, and secondly that Ex. D-18 (*b*), the affidavit of a living person not called into the box, ought not to have been accepted and acted upon.

As regards the first contention I have no hesitation in repelling it. The learned Subordinate Judge is, in my opinion, right in holding that the burden of proof, if it lay on the defendants, according to the decision of the Privy Council reported in *Mina Kumari Bibi* v. *Bijoy Singh Dhudhuria*[1], ceased to be a matter of any particular importance after adduction of evidence of both sides, as ruled by the Privy Council in the case reported in *Mohamed Aslam Khan* v. *Khan Sahib Mian Feroz Shah*[2]. The

* Second Appeal No. 627 of 1946. 27th January, 1949.

1. (1916) 32 M.L.J. 425 : L.R. 44 I.A. 72 : I.L.R. 44 Cal. 662 (P.C.).

2. (1932) 63 M.L.J. 694 : L.R. 59 I.A. 386 : I.L.R. 13 Lah. 687 (P.C.).

learned Subordinate Judge was entitled to accept the case of the defendants as proved, not merely on the positive evidence adduced by them but also on the discrepancies and lacuna in the evidence on the side of the plaintiff adverted to in paragraphs 4, 5, 9 and 10 of the appellate judgment. Dealing with a case in which the question for consideration was whether the onus under section 118 of the Indian Negotiable Instruments Act was discharged by the defendant in that case, Varadachariar, J., makes the following observations in the decision reported in *Narayana Rao* v. *Venkatappayya*[1], with which I respectfully agree :

> " It has to be borne in mind that when evidence has been adduced on both sides, the question of onus is a material or deciding factor only in exceptional circumstances (cf. *Yellappa Ramappa Naick* v. *Tippanna*[2] and that even the onus under section 118, Negotiable Instruments Act, need not always be discharged by direct evidence adduced by the defendant : *Mohamed Shariff Khan* v. *Muhamad Moozzum Alikhan*[3], *Singer Kunwar* v. *Basdeo Prasad*[4] and *Bishambar Das* v. *Ismail*[5]. Not merely can the Court base its conclusion on the effect of the evidence taken as a whole but it may also draw adverse inference against a party who being in a position to adduce better evidence deliberately abtains from doing so ; *Murugesa Pillai* v. *Gnana Sambanda Pandarasannadhi*[6], *Gurusami Nadar* v. *Gopalasami Odayar*,[7] and *Raghavendrarao* v. *Venkatasami Naicken*[8].

The second of Mr. Bhimasankaram's contentions, is, however, in my judgment at any rate to a certain extent correct. Ordinarily, the evidence of any person must be given orally in open Court in the presence and under the personal direction and superintendence of the Judge under Order 18, rule 4 of the Civil Procedure Code except in cases of examination by interrogatories under Order 11, Civil Procedure Code or on commission under Order 26, Civil Procedure Code. Affidavit evidence is not permitted except (*a*) where there is an agreement between parties that evidence may be taken by affidavit, *Warner* v. *Mooses*[9], *Narayana* v. *Lakshmayya*[10], or (*b*) where under Order 19 rule 1, Civil Procedure Code, there is an order of Court that particular facts may be proved by an affidavit, or that the affidavit of any witness may be read at the hearing. Section 1 of the Indian Evidence Act no doubt says that the Act is not applicable to the affidavits presented to Courts, but that does not mean that any affidavit of any person can go in as evidence *proprio vigore* without necessity for him to enter the witness box. The only basis, therefore, on which Ex. D-18 (*b*) can be acted upon as admissible evidence is that it should be capable of being regarded as a statement in writing complying with the conditions prescribed by section 32 of the Evidence Act. In fact, the matter contained in Ex. D-18 (*b*) is not of the *relevant* kind falling within any of the clauses of section 32 ; nor is there any proof of circumstances such as would render it *admissible*. It may be that an objection as to admissibility is susceptible of waiver but not so an objection as to relevancy. Even if Ex. D-18 (*b*) went in without any demur at the trial the question of the relevancy of its contents, according to the requirements of section 32 of the Evidence Act, would still be a matter open to consideration here. Judged by such requirements, Ex. D-18 (*b*) ought to have been ruled out of consideration by the lower appellate Court.

The question involved in the case—whether the sale of the original owner in favour of the plaintiff's father was real and operative or nominal and fraudulent—is however in root analysis a question of fact, on which the Courts below concurred in their conclusion against the plaintiff. I am not satisfied that their conclusion is so far vitiated by material error as to merit reversal or re-consideration.

The second appeal is accordingly dismissed with costs.

The appellant will have to pay the court-fee on the memorandum of second appeal. No leave.

V.P.S. *Appeal dismissed.*

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1. (1937) 1 M.L.J. 543 : I.L.R. 1937 Mad. 299 at 311.
2. (1928) 56 M.L.J. 587 : L.R. 56 I.A. 13 : I.L.R. 53 Bom. 213 (P.C.)
3. (1922) 79 I.C. 464.
4. (1930) 124 I.C. 717.
5. A.I.R. 1933 Lah. 1029.
6. (1917) 32 M.L.J. 369 : L.R. 44 I.A. 117: I.L.R. 40 Mad. 402 (P.C.).
7. (1919) 36 M.L.J. 568 : I.L.R. 42 Mad. 629.
8. (1929) 30 L.W. 966 at 971.
9. (1880) 16 Ch. 100 at 101.
10. (1939) 2 M.L.J. 399.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAGESA SASTRI.

Tirumalai Aiyangar .. *Appellant**

v.

Arunachala Thevar and another .. *Respondents.*

Civil Procedure Code (V of 1908), section 64 and Order 21, rule 57—Attachment before judgment—Execution petition for sale of attached property "struck off"—If a dismissal for default—Effect on attachment before judgment—Private sale of attached property in the meanwhile and subsequent sale of same in execution of decree in suit in which it was attached—Execution sale, if prevails over earlier private sale—Attachment of undivided share in ignorance of prior partition—Attachment, if can be deemed to be of the share of the judgment-debtor.

Where there was an attachment before judgment, on an application to execute the decree passed in the suit, the order was " defendant's notice returned unserved for want of proper address and residence. Petition may be renewed with correct address. Struck off. Attachment will subsist." Subsequently another execution petition was filed for the sale of the attached property, which was ordered and the decree-holder purchased the property and the sale was confirmed. But the same property had been in the meanwhile purchased under a private sale. On a question as to which sale would prevail,

Held, in the circumstances, that the attachment before judgment had not ceased to exist and the sale in pursuance of the attachment must prevail over the private sale.

Where the attachment is of an undivided share in ignorance of a partition among the members of the family, the attachment must be deemed to be of the share of the judgment-debtor who was one of the members of the family.

Appeal against the decree of the Court of the Subordinate Judge, Ramnad at Madura, dated 12th April, 1946, in A.S. No. 105 of 1945 presented against the decree of the Court of the District Munsiff, Srivilliputtur, dated 28th December, 1944, in O.S. No. 258 of 1943.

R. Gopalaswami Aiyangar for Appellant.

K. S. Desikan for Respondents.

The Court delivered the following

JUDGMENT.—The defendant is the appellant. Respondents 1 and 2 filed the suit for declaration of their title to item No. 2 of the plaint schedule and for an injunction or alternatively for possession of the same. The said item is an extent of 68 cents in the southernmost portion of the northern half of S. No. 455/1, the total extent of which is 4 acres and 8 cents. One Narayana Rao and his two brothers owned the northern portion of S. No. 455/1, to the extent of two acres and 5 cents. It is not quite clear whether the extent really is 2 acres 4 cents, or 2 acres 5 cents. In 1921 there appears to have been a partition, in and by which the southernmost portion was allotted to Narayana Rao. There was an attachment before judgment of Narayana Rao's interest in 2 acres and 5 cents belonging to himself and his brothers in common in O.S. No. 248 of 1932. The attachment was apparently on the footing of an undivided coparcenary interest of Narayana Rao in the family properties. The fact that there had been a partition was not known to the plaintiff in that action who got the attachment. In 1935 all the three brothers sold the entire property to the present respondents for a sum of Rs. 600. The patta appears to have been a joint patta all along. There is no reference in the sale deed to the partition of 1921 or to separate possession and enjoyment of separate portions of the property by the three brothers. *Prima facie* it looks as if it is a conveyance by all the three brothers of what was joint property for raising funds to meet family expenses. In 1942 the present appellant filed E.A. No. 49 of 1942 for execution of the decree which he had obtained against Narayana Rao by sale of the property which had been attached before judgment. On 5th March, 1942, the following order was passed on that application :

" Defendant's notice returned unserved for want of proper address and residence. The petition may be renewed with correct address. Struck off. The attachment will subsist."

Subsequently, the appellant filed another execution petition,

* Second Appeal No. 1453 of 1946. 19th January, 1949.

E.P. No. 300 of 1942, for sale of the attached property. This was ordered and he purchased the property on 12th March, 1943. The sale was confirmed on 16th April, 1943.

The question in dispute in this second appeal relates to the competing title of respondents 1 and 2 who purchased under the private sale of 1935 and of the appellant who purchased in execution of his decree in O.S. No. 248 of 1932. Two points are raised and argued in this second appeal. The first relates to the question whether the property which was purchased by the respondents is the property which was attached before judgment. The second point is whether the attachment had come to an end by reason of the order in E.P. No. 49 of 1942. The respondents' title to the properties can be defeated only by reference to section 64 of the Civil Procedure Code.

On the first point, the learned District Munsiff held that the property purchased by the respondents was not the property which had been attached by the appellant, because what was attached was an undivided one-third interest in 2 acres and 5 cents belonging in common to Narayana Rao and his two brothers, whereas what was purchased was a specific plot of 69 cents in the southernmost portion of the said field which had been allotted to Narayana Rao under the partition in 1921. The learned District Munsiff relied on the decision in *Hargulal Singh* v. *Muhammad Raza Khan*[1]. On appeal, the learned Subordinate Judge disagreed with this view and held that the purchased property must be deemed to be the same as the property which was attached. He distinguished the case in *Hargulal Singh* v. *Muhammad Raza Khan*[1], where what was attached was altogether a different interest in the property from what was subsequently sold, the two interests being separate and of different values. That was really a case where the properties must be deemed to have been distinct and different. It is not possible to take the same view of the property in question in the present case. It is only a different form of the right, title and interest of Narayana Rao which was attached and which was sold. No doubt, there was an error or a misdescription in describing the nature and interest of Narayana Rao in the property when it was attached; but in the circumstances of the case I agree with the learned Subordinate Judge in holding that the property purchased by the respondents was in fact and also must be deemed in law to be the identical property which had been attached earlier by the appellant.

On the second point whether the attachment before judgment had come to an end by virtue of the order, dated 5th March, 1942, in E.P. No. 49 of 1942 which I have extracted above, the Courts below have held that by virtue of Order 21, rule 57, the attachment ceased. Although the order stated that the attachment will subsist, it will be really contrary to the provisions of the proviso to Order 21, rule 57, if the same should be held applicable. The learned advocate for the appellant argues that the present order is not one really where there has been a dismissal for default of the decree-holder entailing the penal consequences of the cessation of the attachment. The order itself, it may be noted, does not definitely indicate that it was dismissed for default of the decree-holder. Such indications as are contained in the order would seem to be more in favour of the view that the Court was really adopting a procedure which, though condemned several times before, would still seem to be persisting in the lower Courts. The expression used is "struck off" and it is one which the Code of Civil Procedure does not warrant. There are clear indications that the learned Subordinate Judge did not mean to dismiss the execution petition for default of the decree-holder, but was merely adjourning it in truth though closing it for statistical purposes, because he says: "the petition may be renewed with correct address"; and adds "the attachment will subsit." No doubt, there is a reference to the fact that the notice was returned unserved for want of proper address and residence. Even so, the correct order would have been one ordering fresh notice and not dismissing the execution

1. (1890) I.L.R. 13 All. 119.

petition as if for default. That is not a case where the decree-holder has not paid batta though notice was ordered and in consequence there was no service. Apparently, some particulars were given: either they were not full or some were incorrect. It is not even found whether the decree-holder did it deliberately or knowingly. Under these circumstances, I am not prepared to read this order as a dismissal for default within the meaning of Order 21, rule 57 of the Civil Procedure Code. I therefore hold that the attachment before judgment had not ceased to exist. If that is so, the sale in pursuance of the attachment, in favour of the appellant must prevail over the private purchase by the respondents.

In the result, the second appeal is allowed and the suit is dismissed with costs throughout.

Leave refused. *Appeal allowed.*

V.P.S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

G. Natesan and others .. *Petitioners**

Companies Act (VII of 1013), *section* 282—*Gist of offence under—Auditors and directors signing balance-sheets of banking company—When criminally liable.*

Unless there are false statements in the balance-sheets of material particulars wilfully made by the auditor and the directors knowing them to be false they cannot be held guilty of an offence under section 282 of the Companies Act. The duty of an auditor is verification and not detection. An auditor has nothing to do with the prudence or imprudence of making loans with or without security. He must of course take care that he does not bring into the balance-sheet at face value a debt that is not a good one.

One cannot attribute any wilful negligence or dishonesty to directors who are men of position and responsibility if they depend upon and trust the permanent officials and the managing director of the company so far as working of the company is concerned in signing the balance-sheets. Unless the prosecution shows *mala fides* or want of good faith on the part of the directors or auditors they cannot be held to be criminally liable.

Petitions praying that in the circumstances stated in the Memorandum of grounds filed therewith, the High Court will be pleased to quash the charges framed against the petitioners herein in C.C. Nos. 91, 92 and 93 of 1946 on the file of the Court of the Sub-Divisional Magistrate, Kumbakonam.

V. Rajagopalachari, K. V. Ramachandra Aiyar, K. S. Champakesa Aiyangar, K. S. Desikan, and *N. Rajagopala Aiyangar* for Petitioners.

Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf the the Crown.

The Court made the following

ORDER.—These groups of applications arise out of three calendar cases Nos. 91, 92 and 93 of 1946 on the file of the Sub-Divisional Magistrate, Kumbakonam. In C.C. No. 91 of 1946 there are nine accused, of whom eight were the directors of a banking company known by the name of the Sankara Ramanuja Siddantha Paripalana Nidhi, Limited, Kumbakonam and they are being prosecuted for an offence under section 282 of the Indian Companies Act for having wilfully made certain statements false in material particulars knowing the same to be false, in the balance-sheet of the company for the year ended 31st December, 1938. The remaining accused was an auditor of the said company. In C.C. No. 92 of 1946 there are seven accused of whom six were directors and one the auditor and they are prosecuted for a similar offence under section 282 of the Indian Companies Act in connection with the balance-sheet for the year ended 31st December, 1939. In C.C. No. 93 of 1946, again there are nine accused persons of whom eight were the directors and one the auditor and the offence enquired into against them is one under section 282 of the Indian Companies Act relating to the balance-sheet for

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*Cr.M.Ps. Nos. 1416, 1418, 1420, 1502, 1504, 1506, 1557, 1559, 1560, 1561, 1565, 1566 and 1567 of 1948. — 1st October, 1948.

the year which ended with 31st December, 1946. Crl. M.P. Nos. 1416, 1418 and 1420 of 1948 have been filed by the auditor-accused in the three calendar cases to quash the charge framed against him in each of them. Crl.M.P. Nos. 1502, 1504 and 1506 of 1948 are by the 2nd accused in all the three calendar cases for quashing the charge framed against him under the same section 282 of the Indian Companies Act.

Crl.M.P. Nos. 1565, 1566 and 1567 of 1948 are the three petitions filed by the 3rd accused in all the three calendar cases for quashing the charge framed against him under section 282 of the Indian Companies Act for a similar offence. Crl.M.P. No. 1557 of 1948 is by the 4th and 7th accused respectively in C.C. No. 91 of 1946 for quashing the charge framed against them for the offence under the provisions of section 282 of the Indian Companies Act. Crl.M.P. No. 1559 of 1948 is by the 4th accused in C.C. No. 93 of 1946 for quashing a similar charge and Crl.M.P. Nos. 1560 and 1561 of 1948 are by the same individual who was the 5th and 6th accused respectively in C.C. Nos. 92 and 93 of 1946 for quashing similar charges framed against him.

As all these petitions are connected and intertwined with each other and they arise out of similar transactions it will be more profitable and convenient to deal with all of them by the same order. In fact the learned counsel appearing in these various cases have agreed on the main outlines of their arguments and the leading argument was by Mr. V. Rajagopalachari on behalf of the auditor-accused in the miscellaneous petitions. The other learned counsel while adopting in all essential aspects the arguments of Mr. V. Rajagopalachari have placed before the Court certain further arguments, relating to each of the director-petitioners separately. It will be, therefore, useful to give a brief resume of the genesis of the transaction which culminated in the proceedings against the Nidhi concerned of which the various accused were the directors and the auditor.

The Sankara Ramanuja Sidhantha Paripalana Nidhi, Limited, Kumbakonam, was a limited liability company doing banking business and incorporated under the Indian Companies Act. During the relevant dates the various accused persons were respectively the directors of the company. In April, 1941, the business of the company was suspended and on 9th January, 1942, as a result of the order passed by this Court in O.P. No. 202 of 1941 it was ordered to be compulsorily wound up. In the meanwhile on 5th October, 1941, an interim auditor had been appointed to scrutinise the accounts of the company and he had submitted his report, Ex. P-13 on 5th November, 1941. After the winding up of the company and the Official Receiver taking charge of its business, a misfeasance summons under section 235 of the Indian Companies Act by application No. 2337 of 1944 had been taken out and P.W. 2 in the lower Court was appointed auditor to scrutinise the accounts, the balance-sheets and the various other documents relating to the working of the company and submit a report regarding the way in which the affairs of the company had been going on. Ex. P-13 is the report, dated 14th March, 1945, submitted by P.W. 2 and thereafter the matter was referred to the Registrar of Joint Stock Companies for taking action under the appropriate provisions of the Indian Companies Act. The Registrar of the Joint Stock Companies after taking the necessary legal opinion filed the three complaints out of which the three calendar cases arose, under section 237 for offences under section 282 of the Indian Companies Act. After examining the witnesses tendered for the prosecution in all the three cases which were tried together the learned Sub-Divisional Magistrate has framed the charges which are now sought to be quashed on the ground that the evidence let in does not disclose that any offence has been committed at all.

It is unnecessary to set out in any detail what ought to be the contents of a balance-sheet for that matter is statutorily found in section 132 of the Indian Companies Act. The duties of an auditor with respect to the scrutiny of the accounts, etc., of the company are also defined in section 145 of the Companies Act. According to the prosecution, the auditor in these cases in signing the various balance-

sheets wilfully made false statements in material particulars knowing the same to be false and the same is the gravamen of the complaint against the directors also. It becomes, therefore, necessary to consider whether there were false statements, of material particulars wilfully made by the accused knowing them to be false. If all or any of these ingredients do not exist the accused cannot be held guilty of an offence under section 282 of the Indian Companies Act. The arguments of the learned counsel ranged over a wide field regarding the duties and powers of an auditor and the responsibilities of an ordinary director in a banking company for demonstrating that there is no tittle of evidence regarding any of the ingredients necessary for an offence under section 282 of the Indian Companies Act. The counsel for the petitioners invited my attention to the evidence especially of P.Ws. 1 and 2. The other witnesses examined, namely, P.Ws. 3 to 5 are merely formal proving the various documents filed in the lower Court. The charges framed deal with three different matters each of which according to the prosecution makes the accused persons guilty of the offence under section 282.

The first of them is that there are defects and omissions in the classification of loans and securities and their verification. This is explained by elaborating that in the balance-sheets of the three years, loans which according to the auditor were unsecured had not been specifically mentioned as such. Secondly, in these balance-sheets the debts have not been separately demarcated as good, bad or unrealizable. Thirdly, the balance-sheets did not disclose what were the amounts borrowed by the directors from the company or advanced to the directors during the course of the respective years and lastly, it is stated that the accrued but unrealized interest on the various loans has not been disclosed as an asset. The contention of the Public Prosecutor is that these matters have to be specifically and clearly shown in the balance-sheet and the failure to do so would make the petitioners guilty of the offence, complained against.

I shall deal with each of these heads separately and in seriatim. Exhibit P-2 is the report of the auditor, P.W. 2 and the evidence of the witness is based entirely upon this document. In schedule 33 at page 154 of Exhibit P-2 it is stated on 7th April, 1941, a sum of Rs. 28,737 out of the loans advanced in the year 1938 on the security of the produce of grains was outstanding without being guaranteed by any existing security. Similarly on the same date a sum of Rs. 11,454 is seen as outstanding out of the loans on the produce advanced in the year 1939. Likewise a sum Rs. 36,959 was seen outstanding on 7th April, 1941 out of the produce loans granted in the year 1940. P.W. 2 states that so far as produce loans were concerned he verified all the loans which were in the town and to which he was taken and he treated them as existing assets. He treated as unsecured loans such of them about which there is no evidence that the Nidhi had any control over the produce which formed the primary security. He came to this conclusion as he did not have any evidence that there was any such security and on asking for the records they were not forthcoming. Since there was nothing to show that the original stock was ever replaced, he came to the conclusion that these outstanding loans were unsecured ones on 7th April, 1941. Again he states, that with regard to the produce loans, he examined the promissory-notes, pledge chits and appraising forms and found them satisfactory so far as the documents were concerned. He inspected the physical stocks in the bank, but he did not contact any person who had taken loans on security of stocks outside the town and did not verify those stocks as he was told by the clerk Krishnamachari that there was no necessity to do so but he did not take a statement from the clerk. P.W. 2 also stated that he cannot say that the stock or produce was not in existence on the dates of the balance-sheets in question and the reports of the auditors on those balance-sheets are not correct. In view of this state of evidence, it is impossible to say that the produce loans outstanding are unsecured. P.W. 2 admits that he did not inspect the various places where produce was stored or stocked to satisfy himself about their existence or not. Unless it is shown by the prosecution that the produce as such did not exist and that the loans were falsely entered as secured, a criminal Court will not be justified in framing a charge on

this evidence. In fact after the admission by P.W. 2 that he could not say that the stock or produce was not in existence on the dates of the balance-sheets in question or that the report of the auditor on those balance-sheets was not correct the lower Court had no jurisdiction to frame a charge that the produce loans were unsecured. It is not shown that on the date of the balance-sheets, the produce did not exist as I have stated already. It was the duty of P.W. 2 before he submitted his report containing the allegation that the produce loans were unsecured to have examined at least one or two of such borrowers and ascertain whether on the date of his investigation the security of the produce did or did not exist. The learned Public Prosecutor invites my attention to paragraph 20 of the report, Exhibit P-2 wherein it is stated by P.W. 2 that in the case of produce loans there is no positive evidence that there was a pledge in the real sense of the word, the Nidhi having full possession of the produce. It is also stated that there is no evidence that there was any inspection as to the continued existence of the produce in good condition and the auditor simply came to the conclusion that because paddy stocked in one and the same place without any movement or other interference for more than a year and a half would not be in good condition, it is necessary to infer that there was no pledge in most of the cases and that the Nidhi probably had a floating charge on the produce, if such produce existed at the time of the advance of the loan. Even if it were a floating charge it was obligatory upon the auditor to have ascertained whether in the godown at the time of his report there existed sufficient quantity of produce to cover the amounts lent by the company to any particular individual. Not having made any attempt to ascertain the existence or otherwise of such produce it is not open to the auditor to say that there was no pledge in the real sense of the term and as I have already remarked, in view of the definite admission made by P.W. 2, that he cannot say whether the stock or produce was in existence or not, he is not justified in saying so. This item of charge ought not to have been framed by the lower Court. The auditor was dealing with a set of circumstances in April 1941 and according to him he makes a report about what should have been done in 1938, 1939 and 1940. In the absence of any verification by the auditor, the charge as regards the unsecured nature of loans being false in the various balance-sheets cannot be sustained. It has not been shown that the statements in the balance-sheets are in any respect false, and much less false to the knowledge of the auditor and the directors.

Before discussing the legality and validity of the other charges framed against the petitioners it is necessary to advert without much elaboration to the powers and duties of an auditor of a company as well as the directors of such an institution. Section 145 of the Indian Companies Act, as referred to already, is a statutory enactment defining the powers of an auditor. This provision is to a large extent based upon the observations and dicta contained in the well-known decisions of the English Courts. In re *London and General Bank (No. 2)*[1], Lindley, L.J., observes as follows :—

" It is no part of an auditor's duty to give advice, either to directors or shareholders, as to what they ought to do. An auditor has nothing to do with the prudence or imprudence of making loans with or without security. It is nothing to him whether the business of a company is being conducted prudently or imprudently, profitably or unprofitably. It is nothing to him whether dividends are properly or improperly declared, provided he discharges his own duty to the shareholders. His business is to ascertain and state the true financial position of the company at the time of the audit, and his duty is confined to that. But then comes the question, How is he to ascertain that position ? The answer is, By examining the books of the company. But he does not discharge his duty by doing this without inquiry and without taking any trouble to see that the books themselves shew the company's true position. He must take reasonable care to ascertain that they do so. Unless he does this his audit would be worse than an idle farce. Assuming the books to be so kept as to show the true position of a company, the auditor has to frame a balance-sheet shewing that position according to the books and to certify that the balance-sheet presented is correct in that sense. But his first duty is to examine the books, not merely for the purpose of ascertaining what they do shew, but also for the purpose of satisfying himself that they shew the true financial position of the company."

1. (1895) 2 Ch. 673 at 682.

This case has been considered in *Kingston Cotton Mill Company* (*No.* 2), In re[1] and Lindley, L.J., in the Court of Appeal affirms and reiterates what was laid down in the earlier case and observes as follows :—

"I now come to the real question in this controversy, and that is, whether the appellants have been guilty of any breach of duty to the company. To decide this question it is necessary to consider (1) what their duty was ; (2) how they performed it, and in what respects (if any) they failed to perform it. The duty of an auditor generally was very carefully considered by this Court in *London and General Bank*, (*No.* 2), In re[2] and I cannot usefully add anything to what will be found there. It was there pointed out that an auditor's duty is to examine the books, ascertain that they are right, and to prepare a balance-sheet shewing the true financial position of the company at the time to which the balance-sheet refers. But it was also pointed out that an auditor is not an insurer, and that in the discharge of his duty he is only bound to exercise a reasonable amount of care and skill. It was further pointed out that in any particular case a reasonable amount of care and skill depends on the circumstances of that case ; that if there is nothing which ought to excite suspicion, less care may properly be considered reasonable than could be so considered if suspicion was or ought to have been aroused. These are the general principles which have to be applied to cases of this description. I protest, however, against the notion that an auditor is bound to be suspicious as distinguished from reasonably careful. To substitute the one expression for the other may easily lead to serious error.

The company's articles of association contain special regulations relating to auditors ; see articles 129-140 ; but they do not impose upon the auditors any more onerous duties than those I have already mentioned ".

The learned Lord Justices in the Court of Appeal accepted the arguments of Mr. Haldane, as he then was, that a mere error of judgment on the part of an auditor is not enough. Lopes, L.J., also considers this question in the same strain as Lindley, L.J., and observes at page 288 in *Kingston Cotton Mill Company* (*No.* 2), In re :[1].

"They are very fully described in *London and General Bank* (*No.* 2), In re[2] to which judgment I was a party. Shortly they may be stated thus :—It is the duty of an auditor to bring to bear on the work he has to perform that skill, care and caution which a reasonably competent, careful and cautious auditor would use. What is reasonable skill, care, and caution must depend on the particular circumstances of each case. An auditor is not bound to be a detective, or, as was said, to approach his work with suspicion or with foregone conclusion that there is something wrong. He is a watchdog but not a bloodhound. He is justified in believing tried servants of the company in whom confidence is placed by the company. He is entitled to assume that they are honest, and to rely upon their representations provided he takes reasonable care. If there is anything calculated to excite suspicion he should probe it to the bottom ; but in the absence of anything of that kind he is only bound to be reasonably cautious and careful."

Both these cases were again considered in very great detail in *City Equitable Fire Insurance Co.*, In re.[3] At page 483 Romer, J., as he then was, refers in detail to the observations of Lindley, L.J., that an auditor has nothing to do with the prudence or imprudence of making loans with or without security. He must, of course, take care that he does not bring into his balance-sheet at face value a debt that is not a good one. At page 509 Pollock, M.R., in confirming the judgment of Romer, J., in the Court of Appeal refers to and accepts the dictum contained in *Kingston Cotton Mill Company* (*No.* 2), In re[1], and further observes that in the words of Sargant, L.J., the duty of an auditor is verification and not detection. The learned Master of the Rolls discussed the matter in great detail and came to the conclusion as was done by the Court of Appeal 30 years prior to that date. These principles are so well established in English Courts and have been consistently followed in our Courts that there can be no dispute regarding them. Applying these principles to the facts of the present case, on the evidence of P.W. 2, I am not able to find that the auditor accused in this case has in any way failed to act according to the strict confines of the duty imposed upon him. On the other hand, even according to the evidence of P.W. 2, the auditor has done what is expected of him.

The next question is whether the balance-sheets in question have disclosed the nature of the bad and doubtful debts of the company. According to the articles and memorandum of association as well as the evidence before the lower Court the Sankara Ramanuja Siddhantha Paripalana Nidhi is a banking company in

1. (1896) 2 Ch. 279 at 284.
2. (1895) 2 Ch. 673.
3. (1925) 1 Ch. 407.

accordance with the provisions of section 277-F of the Indian Companies Act. P.W. 1 in his cross-examination admits that the Nidhi is doing banking business. Form F which shows the necessary and essential requisites of the balance-sheet of a banking company has been amended by Act XXX of 1943 as a result of the observations in some of the decisions of the Bombay High Court.

Before the amendment there was a notification dated 16th January, 1937, by the Government of India in the same terms as is now contained in Act No. XXX of 1943 directing alteration in the Form F, Schedule III. That being the case and since it is admitted that this is a banking company in the balance-sheet of which it is not necessary to show such debts I do not think that there was any wilful omission in the balance-sheet so far as this item is concerned.

The next point for consideration is whether it is obligatory to show in the balance-sheet what exactly would be the accrued interest in a particular year. Schedule 14 of Ex. P-2 at page 81 contains according to P.W. 2, the amount of accrued interest for the years 1933 to 1940. It is found therefrom that the balance-sheets of the concerned years, namely, 1938 to 1940 do not show that any interest accrued was taken credit of for determining the dividends payable to the share-holders. In this connection it is necessary to consider the admissions made by P.W. 2 in his cross-examination. He says:

> " Accrued interest on book debts need not be shown separately and practice varies. Till the end of 1935 the Nidhi took credit for all interest accrued on debts. Then they made a change of policy and wanted to adopt the goal of cash basis for interest receipts. This basis is sound for the distribution of profits."

Later on, he further admits that the share-holders were informed that the accrued interest on certain loans were not to be taken credit for unless actually credited, and this statement is reiterated in every balance-sheet till 31st December, 1939. Again this admission goes on to state that it is well known to the share-holders and the public that all accrued interest were not taken to the balance-sheet though P.W. 2 states that in his opinion it is not a sound policy. He has necessarily to admit that he could not attack the *bona fides* of this policy. Further, two of the balance-sheets in question have a note appended, that accrued interest has not been taken into consideration. In this state of circumstances, it is very difficult to see how any Court can say that either the directors or the auditor have in any way wilfully concealed any material fact about accrued interest from the balance-sheet. In *Newton* v. *Birmingham Small Arms Company, Ltd.*[1], Buckley, J., while discussing a similar matter observed as follows :—

> " If the balance-sheet be so worded as to shew that there is an undisclosed asset, whose existence makes the financial position better than that shewn, such a balance-sheet will not, in my judgment, be necessarily inconsistent with the Act of Parliament. Assets are often by reason of prudence estimated and stated to be estimated, at less than their probable real value. The purpose of the balance-sheet is primarily to shew that the financial position of the company is at least as good as there stated, not to shew that it is not or may not be better. The provision as to not disclosing the internal reserve fund in the balance-sheet is not, I think, necessarily fatal to these special resolutions."

Later on the learned Judge observes that if the auditor reports to the share-holders that in the balance-sheet there was such a reserve fund, that would be sufficient. In this case, the note appended showing that the accrued interest has not been taken into consideration in fixing the dividend, is sufficient to bring home to the share-holders the existence of such an asset. I am decidedly of opinion that this item of charge has necessarily no basis whatever.

It has then to be considered whether the fact that the loans taken by the directors in any particular year, if the same had been paid off during the course of the same year, should be specifically and separately mentioned in the balance-sheet. It is not disputed that there is a statement in the balance-sheet regarding loans taken by the directors in a given year outstanding at the end of each year ; and it is admitted, that whatever was outstanding at the end of the year by way of loans to the directors has been mentioned in each year's balance-sheet. P.W. 2, again, admits in cross-examination,

1. (1906) 2 Ch. 387.

"I do not think the balance-sheet is falsified by the non-mention in the balance-sheet, of the volume of loans issued to the directors at any time during the year. I do not think the omission is due to *mala fides* but it was due to ignorance."

In addition he agrees

"that the balance-sheet is not a history of individual transactions closed during the year; except those of the directors whose history must be mentioned in the balance-sheet even if the transaction is closed. Loans to directors ought not to be entered in the left hand column and it is not brought into the total and its non-mention will not affect the correctness of the balance-sheet."

My attention has not been drawn by the learned Public Prosecutor to any provision of law or any observation in a decision to the effect, that the loans taken by a director, in a particular year, which were repaid by him before the end of the year, should be mentioned as a separate item in the balance-sheet even though the business had been closed. It is no doubt necessary in order that the balance-sheet may be a true and correct one, that all the necessary information regarding the financial status of the company and its working has to be given to the share-holders and that the balance-sheet should contain how much money was outstanding as being loans to the directors at the end of a particular year; but in my opinion it is unnecessary to show the volume of business transacted with a director or directors, if the loans have been duly repaid within the course of the year. It is just possible, that a director or directors may be doing individually and separately business on a very large scale, and during the course of such business, large amounts may have to be borrowed from a bank, of which he or they happen to be directors; but if the loans are properly paid off during the course of the year and they are not outstanding when the year ends, it is unnecessary to encumber the balance-sheet by showing details of all closed up transactions that had taken place during the intervening period. Such being the case it is not possible to say that any criminal offence has been committed by the directors or the auditor in not mentioning the details of the loans given to the directors.

In discussing the general liability of the directors for the so-called false statements referred to in the charge, it is necessary to consider what exactly the legal position of the directors is, *vis-a-vis* the company, with regard to the criminal liability for their actions. In a recent case reported in *Pullin Chandra Daw* v. *Emperor*[1], Chakravarthi, J., referred to the decision of the Privy Council reported in *Srinivas Mall* v. *Emperor*[2], where their Lordships quoted with approval the proposition laid down in an earlier case that:

"Unless the statute, either clearly or by necessary implication, rules out *mens rea* as a constituent part of a crime, a person should not be found guilty of an offence against the criminal law unless he has got a guilty mind."

The learned Judge after quoting this passage observes as follows:

"Be that as it may, it appears to us that the language used by section 282 itself does import an element of *mens rea* when it speaks of the relevant statement being known to be false."

The decision in *City Equitable Fire Insurance Company*, In re[3], discusses the meaning of the term "Wilful" in relation to the actions of the directors of a company. In *Doss* v. *Connell*[4], in considering whether in the circumstances of a particular case the directors were guilty of wilful negligence Leach, C.J. and Varadachariar, J., have followed the dictum of Romer, J., in *City Equitable Fire Insurance Company*, In re[3], regarding the duties of directors and as to what amounts to wilful negligence. In adverting to the question whether a director is justified in trusting the officials of the company this Court referred to the observations of Lindley, M.R., in Re *National Bank of Wales, Limited*[5], in the following terms:

"Business cannot be carried on upon principles of distrust. Men in responsible positions must be trusted by those above them, as well as those below them, until there is reason to distrust them. We agree that care and prudence do not involve distrust; but for a director acting honestly himself

1. A.I.R. 1948 Cal. 190.
2. (1947) 2 M.L.J. 328 (P.C.).
3. (1925) 1 Ch. 407.
4. (1937) 2 M.L.J. 848: I.L.R. 1938 Mad. 292.
5. (1899) 2 Ch. 629 at 673.

to be held legally liable for negligence, in trusting the officers under him not to conceal from him what they ought to report to him, appears to us to be laying too heavy a burden on honest business men."

They have also relied upon the observations of Lord Davey in *Dovey* v. *Cory*[1]:

"I think the respondent was bound to give his attention to and exercise his judgment as a man of business on the matters which were brought before the Board at the meetings of which he attended and it is not proved that he did not do so."

It seems to me that these *dicta* are applicable to the actions of the petitioners herein. The accused in this case are men of position and responsibility and, some of them are, I am given to understand, members of the bar enjoying fairly good practice. One cannot attribute any wilful negligence or dishonesty to men in such positions if they depend upon and trust the permanent officials and the managing director of the company so far as the working of the company is concerned. The prosecution has not been able to show any *mala fides* or want of good faith on the part of any of these accused. All that might be laid at their door is perhaps the blame—if that could be called a blame at all—that they placed trust upon the permanent servants of the company. It seems to me that they are not guilty of any false statement of any material particular wilfully made and knowing the same to be false. Even accepting as fully correct and true, the oral and documentary evidence placed before the lower Court, I do not think that there are any materials, whatever, on which the charges can be framed under section 282 of the Indian Companies Act. This is a case of entire absence of evidence and the learned Sub-Divisional Magistrate was not justified in framing charges on the materials placed before him.

I would, therefore, quash all the charges and discharge the accused in the various petitions.

K.S. —— *Charges quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMASUNDARAM.

Mohammed Ibrahim Maracayar .. *Petitioner**

v.

Ismail Maracayar, power-of-attorney agent of Fathima Bi .. *Respondent.*

Penal Code (XLV of 1860), *sections* 504 *and* 95—*Ingredients of the offence under section* 504—*Letter written by father from the moffusil to daughter in Madras constituting insult to her and to her husband—If constitutes an offence under section* 504—*Desirability of applying section* 95, *Indian Penal Code, to cases of this kind.*

A mere insult, however gross it may be, is not sufficient to bring the case within the provisions of section 504 of Indian Penal Code.

Subbiah v. *Venkatasubbamma,* (1942) 2 M.L.J. 101, relied on.

To constitute an offence under section 504, Indian Penal Code, there must be a likelihood of the breach of the peace as a result of the provocation caused by the alleged insult, and the likelihood of the breach of the peace must be immediately after the provocation or so soon afterwards that it must form part of *res gestæ*.

A letter written by a father from the moffusil to his daughter in Madras though it may constitute an insult to the daughter and her husband would not constitute an offence under section 504, Indian Penal Code.

Apart from this, it is a case in which the Magistrate should apply the principle of section 95, Indian Penal Code, as it is a domestic quarrel between the father and daughter.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to quash the proceedings in C.C. No. 2328 of 1948 on the file of the Special Honorary Presidency Magistrate of the Court of the Presidency Magistrates, Egmore, Madras.

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1. (1901) A. C. 477 at 492.

* Cr. M. P. No. 2398 of 1948. .. 16th February, 1949.

V. T. Rangaswami Aiyangar and *A. Nagarajan* for Petitioner.

C. Narasimhachari and *V. C. Veeraraghavachari* for Respondent.

The Crown Prosecutor (*S. Govind Swaminathan*) on behalf of the Crown.

The Court made the following

ORDER.—The accused is the petitioner herein. The petition is to quash the proceedings in C.C. No. 2328 of 1948 on the file of the Special Honorary Magistrate of Egmore.

The complainant is the daughter of the petitioner herein. There were some misunderstandings between her husband and her father over some money transaction and when a claim was made for the return of the moneys alleged to have been advanced by the complainant, the petitioner herein wrote a letter to his daughter in which he has stated that as he has got only old and torn shoes he has placed an order for better ones and that as soon as he gets them he will send them over to her and her husband. He also stated that old ones may not be satisfactory and therefore he was arranging to send new shoes. On this, the complainant's husband as her power-of-attorney agent, has filed the complaint against the petitioner for an offence under section 504, Indian Penal Code.

The petitioner has filed this revision petition to quash the proceedings on the ground that *prima facie* the contents of his letter to his daughter would not constitute an offence under section 504, Indian Penal Code. This letter was written from Vellore where the petitioner resides to his daughter at Madras.

Section 504 of the Indian Penal Code runs as follows :

"Whoever intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

Now the question is whether the letter written from Vellore to the daughter in Madras falls within the scope of the section. It is bad taste for the father to write such a letter to his daughter. That the letter undoubtedly constituted an insult to the daughter or her husband, cannot be disputed. But it is doubtful that the petitioner intended or knew it to be likely that the insult will provoke either his daughter or her husband, to break the public peace or to commit any other offence. To break the public peace the complainant or her husband will have to leave his or her house, go to the railway station, and take a train, go to Vellore and go to the house of the petitioner and if by chance he is absent, wait for him and then assault him. This is not the kind of breach of peace that is contemplated in the section. The likelihood of the breach of the peace must be immediately after the provocation or so soon afterwards that it must form part of *res gestæ*.

This section, as pointed out by Horwill, J., in *Subbiah* v. *Venkatasubbamma*[1] is often misused and this is one of those cases where the observation of Horwill, J., applies with great force. As pointed out in that judgment, the lower Courts often think that a mere insult, however gross it may be, is sufficient to bring the case within the provisions of section 504 of the Indian Penal Code. That is not so has been laid down in *Subbiah* v. *Venkatasubbamma*[1].

Apart from this, this is a case in which the Magistrate should have applied the principle of section 95 of the Indian Penal Code. This is a domestic quarrel between the father and the daughter and the daughter should never have taken this to a Criminal Court. The petition is allowed and the proceedings in C. C. No. 2328 of 1948 in the lower Court are quashed.

V.S. *Petition allowed and proceedings quashed.*

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1. (1942) 2 M.L.J. 101.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Dr. Edward Mathuram and others .. *Appellants**

v.

G. T. S. Abdul Latiff Sahib and others .. *Respondents.*

Civil Procedure Code (V of 1908), *Order* 21, *rule* 89—*Deposit by a prior purchaser from the judgment-debtor of some items sold in execution sale—Statement in affidavit that the deposit was without prejudice to petitioner's contentions in another appeal and to his right to recover the amount deposited in case of his success in that appeal—Deposit, if a conditional one disentitling depositor to have the sale set aside.*

A previous purchaser from the judgment-debtor of some properties sold in execution applied under Order 21, rule 89, Civil Procedure Code, to have the sale set aside and in making the deposit stated in his affidavit that the deposit was " without prejudice " to his contentions in another appeal and his right to recover the amount deposited in case of his success in that appeal. On a contention that the deposit was not unconditional and was made under protest and so was not a valid deposit under Order 21, rule 89.

Held, that the deposit was not a valid deposit under the law and as the applicant wanted to keep the dispute open, he cannot claim the benefit of rule 89 of Order 21 and have the sale set aside.

Kummakutti v. *Neelakandan Nambudri,* (1930) 59 M.L.J. 893 : I.L.R. 53 Mad. 943, referred to and *Krishna Iyer* v. *Arunachalam Chettiar,* (1935) 69 M.L.J. 349 : I.L.R. 58 Mad. 972 (F.B.), relied on.

Appeal against the order of the District Court, Tiruchirapalli, dated 5th August, 1946, in E. A. No. 394 of 1945 in O. S. No. 5 of 1932.

S. V. Venugopalachari for Appellants (Petitioners).

S. Amudachari for Respondents (Respondents).

The Court delivered the following

JUDGMENT.—When this petition was taken up for hearing it was noticed that the order of the lower Court is appealable under Order 43, rule (1) (*j*) of the Civil Procedure Code and when that was discovered, Mr. Venugopalachari for the petitioner filed an application for leave to convert the civil revision petition into a civil miscellaneous appeal. As the civil revision petition itself was filed before the expiry of the period of limitation and as no question of bar of time arises and since the court-fee in the civil revision petition was more than what would have to be paid in a civil miscellaneous appeal, I allowed the petition and the civil revision petition was converted into a civil miscellaneous appeal, the jurisdictional value of which being below Rs. 5,000 it is permissible to have the civil miscellaneous appeal disposed of by a single Judge. It is on the basis that the proceedings before me are in the nature of a civil miscellaneous appeal that I dispose of the case now.

The appellants herein were the decree-holders who obtained a decree for a sum of money against the judgment-debtor. Properties were attached and sold in pursuance of that decree whereupon the first respondent herein claiming to be a previous purchaser of some items of properties from the judgment-debtor filed an application under Order 21, rule 89, Civil Procedure Code, for setting aside the sale. Along with the deposit of the necessary amount, an application supported by an affidavit was filed. Paragraph 6 of the affidavit is in the following terms :

" Without prejudice to my contentions in the appeal and my right to recover it from the decree-holders in the event of my success in appeal, I am paying towards the decree lest the sale of the properties should be confirmed the amount due under the decree . . . . . in full."

The decree-holder objected to this deposit by means of a counter in which it was stated that the deposit was not unconditional and unreserved and was made under protest. In such circumstances, the decree-holder urged that the deposit was not valid under Order 21, rule 89, and therefore the sale should not be set aside. The learned District Judge was of opinion that it was an unconditional deposit even though the paragraph referred to above stated that the person who deposited the money reserved his right to claim the amount in the case of his success in another

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* A. A. O. No. 56 of 1949.
(C. R. P. No. 1403 of 1946 converted).

11th February, 1949.

appeal. A Full Bench decision of this Court in *Krishna Aiyar* v. *Arunachalam Chettiar*[1] was cited before the learned Judge, but the learned Judge distinguished that decision by stating that the intention of the person who deposited the money was only to attack the validity of the sale and such a mere intention will not disentitle him to take steps under Order 21, rule 89 to have the sale set aside. I am afraid the learned Judge has not properly understood the import of the Full Bench decision above referred to. Beasley, C.J., in the Full Bench was following a decision of Venkatasubba Rao, J., in *Kummakutti* v. *Neelakandan Nambudri*[2]. In the latter case, Venkatasubba Rao, J., observes at page 947 as follows :

> " If the debtor wants to keep a dispute open, he cannot claim the benefit of the section."

What the respondent has done in the lower Court is exactly what was interdicted by Venkatasubba Rao, J. The respondent in paragraph 6 of the affidavit states that he wants to keep alive the dispute regarding the validity of the assignment in his favour and if he succeeded in the appeal which was then pending, he would be entitled to claim the money back which has been how deposited. It is very difficult to see how this can be considered as an unconditional deposit. Mr. Amudachari for the respondent contends that what the Full Bench lays down is only that the person who deposits the money cannot contend that the money should not be paid over to the decree-holder without security. It is only if a condition is put upon the payment out of the money to the decree-holder that the principles enunciated in the Full Bench will be applied. I am unable to agree with Mr. Amudachari that such a distinction can be drawn with regard to the observations of Beasley, C.J., at page 976 of *Krishna Aiyar* v. *Arunachalam Chettiar*[1]. In discussing the facts of that particular case, reference was made to the circumstance that the deposit in that case was subject to a condition or under protest and that it was not meant to be taken by the decree-holder unconditionally. In the present case also, the respondent does not say that the money when drawn out by the decree-holder would remain the decree-holder's property. The respondent reserved to himself the right to call back the money and claim it in the event of his success in the appeal that was pending. In my view, the learned District Judge erred in not applying the Full Bench decision to the facts of the present case and since the deposit under Order 21, rule 89 is not valid under the law, the order of the lower Court setting aside the sale is wrong.

The appeal is allowed and the order of the learned District Judge is set aside. The sale stands and is therefore confirmed. The appellants will get their costs from the respondents both here and in the Courts below.

V.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN.

Tiruchendur Sivathwaja Matam through Huqdars and others .. *Appellants**

v.

Sami Bhattar and others .. *Respondents.*

Hindu Law—Inheritance—Bandhus—Male and female—Preference—Brother's daughter and brother's daughter's son—Preference—Hindu Law of Inheritance (Amendment) Act (II of 1929)*—Principle underlying—Extension—Permissibility.*

In Madras Presidency a male bandhu is entitled to preference over a female bandhu even though the latter is nearer in degree.

As between brother's daughter's son and a brother's daughter, the brother's daughter's son has a preferential claim.

Rajah Venkata Narasimha Appa Rao Bahadur v. *Rajah Surenani Venkata Purushothama Jagannatha Gopala Rao Bahadur*, (1908) 18 M.L.J. 409 : I.L.R. 31 Mad. 321, followed.

It may be that the logic that underlay that statutory change in the order of inheritance introduced by the Hindu Law of Inheritance (Amendment) Act, 1929, may justifiably be extended to provide

1. (1935) 69 M.L.J. 349 : I.L.R. 58 Mad. 972 (F.B.).
2. (1930) 59 M.L.J. 893 : I.L.R. 53 Mad. 943 at 947.

* S. A. No. 725 of 1946. 4th February, 1949.

for propinquity and not sex as the deciding factor for establishing rights of inheritance ; but the statutory provisions specifically enumerating specific classes of heirs cannot be extended in that manner by Courts. It is for the Legislature to decide whether a brother's daughter should be given precedence over a brother's daughter's son.

Appeal against the decree of the Court of the Subordinate Judge of Tirunelveli in A. S. No. 194 of 1945, preferred against the decree of the Court of the District Munsiff, Ambasamudram, in O. S. No. 381 of 1944.

K. S. Desikan for Appellants.

T. L. Venkatarama Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The short point for determination was whether the brother's daughter or the brother's daughter's son was the preferential heir to the estate of the late Subbiah Bhattar. The Hindu Law of Inheritance (Amendment) Act (II of 1929) enumerates certain classes of heirs specifically and gives them a defined place in the order of preference for purposes of inheritance. It may be that the logic that underlay that statutory change in the order of inheritance may justifiably be extended to provide for propinquity and not sex as the deciding factor for establishing rights of inheritance ; but the statutory provisions specifically enumerating specified classes of heirs cannot be extended in that manner by Courts. It is for the Legislature to decide whether a brother's daughter should be given precedence over a brother's daughter's son.

Act II of 1929 as the basis of the appellants' claim does not avail. There can be no other legal basis either. The learned advocate for the appellants very rightly admitted that the question should really be concluded by *Rajah Venkata Narasimha Appa Rao Bahadur* v. *Rajah Surenani Venkata Purushothama Jagannatha Gopala Rao Bahadur*[1]. It is well-settled law in this presidency that a male *bandhu* is entitled to preference over a female *bandhu*, even though the latter is nearer in degree. An attempt to challenge the correctness of that decision failed before Ramesam, J., in *Avadai Ammal* v. *Ramalinga Reddiar*[2]. In any event, *Rajah Venkata Narasimha Appa Rao Bahadur* v. *Rajah Surenani Venkata Purushothama Jagannatha Gopala Rao Bahadur*[1], being the decision of a Bench binds me, and that, as I have pointed out above, concludes the question at issue.

The second appeal fails and is dismissed with costs. No leave.

V.S. —————— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

A. M. A. Murugappa Chettiar and others .. *Appellants**

v.

Arunachala Goundan and others .. *Respondents.*

Execution sale—Sale proceeds rateably distributed between creditors—Sale as to one item void—Right of auction purchaser to sue for refund—Limitation—Starting point—Limitation Act (IX of 1908), *Article* 97.

The purchaser in an execution sale had deposited the price (which was distributed among various decree-holders who claimed rateable distribution) and was put in possession of the properties. The sale of one of the lots was set aside at the instance of the Official Receiver in the insolvency of one of the debtors. The application for refund of the purchase money by the auction purchaser was dismissed and he filed the present suit for the recovery of the amounts drawn by the various decree-holders.

Held, (*i*) as the sale of one of the lots was held to be a nullity the purchaser is entitled to sue for the recovery of the purchase money paid by him.

Macha Koundan v. *Kottora Koundan*, (1935) 69 M.L.J. 750 : I.L.R. 59 Mad. 202 (F.B.), followed. *Narasinji Vannechand Firm* v. *Narasayya*, (1945) 1 M.L.J. 312 : I.L.R. (1945) Mad. 789, distinguished.

1. (1908) 18 M.L.J. 409 : I.L.R. 31 Mad. 321. 2. (1925) 97 I.C. 314.

* S. A. No. 565 of 1946. 5th January, 1949.

(ii) The proper article applicable for purposes of limitation is Article 97 of the Limitation Act as the cause of action to institute the suit accrued and arose only when the plaintiff was dispossessed and not when the sale was found to be void.

Rajah of Venkatagiri v. *Sobhanadri Appa Rao*, (1943) 2 M.L.J. 645 : I.L.R. 1944 Mad. 663, referred to.

Appeal against the decree of the Court of the Subordinate Judge of Coimbatore, dated 24th August, 1945, in A. S. No. 103 of 1945, preferred against the decree of the Court of the District Munsiff of Coimbatore in O. S. No. 1123 of 1943.

K. V. Ramachandra Aiyar for Appellants.

V. C. Veeraraghavan for Respondents.

The Court delivered the following

JUDGMENT.—Defendants 2 to 5 are the appellants in this second appeal. The first respondent instituted the suit to recover various sums of money from the different defendants. In execution of the decree in O. S. No. 1614 of 1933 of the District Munsiff's Court, Coimbatore, the plaintiff purchased a four-fifth share in two lots of property. That decree was obtained by defendants 1 to 5 against one Sinnia Goundan and his four sons. Sinnia Goundan was adjudicated an insolvent in I. P. No. 180 of 1933, Sub-Court, Coimbatore, prior to the institution of the suit; and the suit was instituted against him with the leave of the insolvency Court, and his four sons were also impleaded as parties to the suit. A decree for money was passed in that suit on the 21st March, 1934. Two lots of property were brought to sale on the 19th March, 1935, and the two lots were purchased in the auction sale held on that date by the plaintiff, lot I for a sum of Rs. 1,030 and lot II for Rs. 376, *i.e.*, in these lots only the sons' interests, namely four-fifth was sold and purchased. The sale was duly confirmed on 1st September, 1936, and the plaintiff obtained delivery of possession. The sale price deposited by the plaintiff in Court was distributed between the various decree-holders who claimed rateable distribution. Defendants 1 to 5 received Rs. 308, the sixth defendant Rs. 412 and the seventh defendant Rs. 310. On an application filed by the Official Receiver in the insolvency Court to set aside the sale or, in the alternative, to pay the sale proceeds into his hands on the ground that the property was the exclusive property of Sinnia Goundan, the first Court upheld the sale; but this decision was reversed on appeal by the District Court on the 19th September, 1938. It was held by that Court that the sale was a nullity and the sale was, therefore, set aside. After this order of the District Judge, the plaintiff was dispossessed from the property on the 1st February, 1942. The order of the District Judge setting aside the sale was confirmed only to lot I and the sale in respect of lot II was not disturbed. After the plaintiff was dispossessed from lot I, he applied in I. A. No. 32 of 1942 for refund of the purchase money which he paid in respect of lot I. That application was unsuccessful in the first Court and also in the appellate Court and it was pointed out by the appellate Judge that the only remedy of the plaintiff was to institute a suit to recover the money and that he was not entitled to recover the amount in the application. After these proceedings, the plaintiff instituted the present suit on the 20th November, 1943, against defendants 1 to 7 for the recovery of the amounts drawn by them by applications under section 73 of the Civil Procedure Code, amounts which represented the sale proceeds of lot I.

Two objections were raised by defendants to the suit, one, that the suit was not maintainable and second, that the suit was barred by limitation. These contentions were overruled by both the Courts and the plaintiff's suit was decreed. Hence this second appeal.

The same contentions have again been raised in the second appeal. In cases where a Court auction sale is found to be a nullity and no title passed under such sale to the auction purchaser, it was finally established by the Full Bench of this Court in *Macha Koundan* v. *Kottora Koundan*[1] that if the sale was held to be a nullity after it was confirmed, the auction purchaser will be entitled to sue to recover

1. (1935) 69 M.L.J. 750 : I.L.R. 59 Mad. 202 (F.B.).

the purchase price paid by him. In view of this decision of the Full Bench, the contention that the suit is not maintainable is not tenable.

It was however contended on behalf of the appellants that as the sale with reference to lot II was not disturbed it must be held that on the principle of the decision in *Narasinji Vannechand Firm, Guntur* v. *Narasayya*[1], that the plaintiff auction purchaser was not entitled to sue. The principle of that decision is that if under the sale no interest passed, though not the entire interest that was brought to sale, the auction purchaser would not be entitled to claim a refund for the reason that the sale cannot be good in part and bad as regards the rest. In that case, it would be noticed that the sale was of 4 acres 2 cents of agricultural lands and out of this extent the sale in respect of the entire extent except 1 acre 2 cents was set aside on the ground that the judgment-debtors had no saleable interest. The entire sale was not set aside in that case and therefore it was pointed out that there was no total failure of consideration but only failure of consideration in part. It was pointed out that the Full Bench did not lay down that if there was failure of consideration only in respect of part of the property sold, a suit would still lie to recover a proportionate part of the consideration. In the present case the property was sold in two lots. It is the sale of lot I that was held to be ineffective to convey any title to the auction purchaser. It is not, therefore, a case where the sale of an item failed in part but was good as regards the rest. The principle, therefore, of the decision in *Narasinji Vannechand Firm, Guntur* v. *Narasayya*[1] does not apply to the present case. The first objection regarding the maintainability of the suit, must, therefore, be overruled.

The second question argued was that the suit was barred by limitation ; and that the proper article of the Limitation Act applicable to a case of this description is Article 62 and that time began to run from the date of receipt of the money which was more than three years prior to the date of suit. Reliance was placed in support of this position upon the decision of Cornish, J., in *Sivaramaraju* v. *Secretary of State for India in Council*[2]. In this case it must be remembered that until 1st February, 1942, the plaintiff continued to be in possession of the property notwithstanding the declaration by the appellate Court that the sale was a nullity. He was not therefore in a position to sue for refund of the purchase money. The position of the plaintiff is analogous to the position of the plaintiff in the case reported in *Raja of Venkatagiri* v. *Sobhanadri Appa Rao*[3]. In that case also the sale though a voluntary one, was void but the purchaser continued in possession of the property and it was held that his suit claiming refund of the price paid by him was within time as the cause of action to institute the suit accrued and arose only when he was dispossessed and not when the sale was found to be void. I do not see any reason for not following and applying the principle of this Bench decision to the facts of the present case. The only ground of distinction that was pointed out was that in that case the sale was a private sale whereas in the present case the sale is a Court auction sale. I see no difference in principle so far as the question of limitation is concerned between the two cases. King, J., in *Rudrayya* v. *Subbarayappa*[4] applied to the facts before him Article 96 as in that case it was found that all the parties were under a mistake as regards the right to the property. A similar view was taken by Horwill, J., in *Mylavaram Nagayya* v. *The Penukonda Co-operative Town Bank, Ltd., by President*[5]. I may however point out that the learned Judge in considering the question whether Article 97 applied or not made certain observations in the course of the judgment which seem to be somewhat inconsistent with the view of the same learned Judge in the Bench decision in *Raja of Venkatagiri* v. *Sobhanadri Apparao*[3] which was perhaps not brought to the notice of the learned Judge. In a very early case in *Appavoo Odayan* v. *District Board of*

1. (1945) 1 M.L.J. 312 : I.L.R. 1945 Mad. 789.
2. (1934) 68 M.L.J. 630.
3. (1943) 2 M.L.J. 645 : I.L.R. 1944 Mad. 663.
4. A.I.R. 1941 Mad. 742.
5. (1946) 2 M.L.J. 231.

Tanjore[1], this Court applied Article 97 to a suit by a purchaser in respect of a Rent Sale under the Madras Rent Recovery Act to recover purchase money after the sale was set aside. Failure of consideration for the sale accrued only when the property was taken possession of by the original owner and not earlier. I therefore think that the view of the Courts below that the suit was not barred by limitation is correct.

The second appeal fails and is dismissed with costs. No leave.

V.P.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE RAGHAVA RAO.

Theruvath Vittil Muhammadunny .. *Appellant**.

v.

Melepurakkal Unniri and another .. *Respondents.*

Madras Non-Residential Buildings Rent Control Order (1942), *Clause* 8—*Scope and effect of—Institution of a suit in Civil Court for possession and passing of a decree, if prohibited.*

There is nothing in Clause 8 of the Madras Non-Residential Buildings Rent Control Order, or in any of the other clauses of the Order expressly prohibiting the institution of a suit for possession or prohibiting a Civil Court from passing a decree for possession. Nor is there anything in Clause 8, which takes away, by necessary intendment, the ordinary jurisdiction of a Civil Court to entertain a suit by a landlord for recovery of possession of his property in the occupation of a tenant. Hence, the jurisdiction of a Civil Court to entertain and pass a decree in a suit for eviction by a landlord against his tenant is not expressly or impliedly taken away by the provisions of the Madras Non-Residential Buildings Rent Control Order.

Mahmood v. *Kerala Corporation Ltd.*, (1945) 1 M.L.J. 44, dissented from. *V. R. R. Swami Aiyar In re*, (1946) 1 M.L.J. 134; *Satyanarayana* v. *Satyanarayana.* (1946) 1 M.L.J. 135; *Madhava Kurup* v. *Muhammnd Sukri Sahib*, (1948) 2 M.L.J. 359, referred to.

Appeal against the order of the Court of the Subordinate Judge of Ottapalam, dated 18th October, 1946, in A. S. No. 83 of 1946, preferred against the decree of the District Munsiff, Chowghat, in O. S. No. 596 of 1944.

K. Kuttikrishna Menon for Appellant.

S. Venkatachala Sastri and *N. Sundara Aiyar* for Respondents.

The Court delivered the following

JUDGMENT : *The Chief Justice.*—This appeal originally came on before Horwill, J., who considered it desirable that it should be heard by a Division Bench in view of the conflict between decisions of this Court.

The appeal is against an order of the Subordinate Judge of Ottapalam remanding a suit to the District Munsiff of Chowghat for disposal on the merits. The suit was filed by the first respondent for eviction of the appellant (first defendant) from a building that had been leased to him by the first respondent's predecessor in 1936. There were also prayers for arrears of rent and for recovery of damages in respect of an annexe to the building constructed by the first respondent. The appellant deposited into Court the entire arrears of rent and interest claimed in the suit, and therefore that part of the plaintiff's claim was satisfied. Following the decision in *Mahmood* v. *Kerala Corporation Ltd.*[2], the District Munsiff held that the suit, so far as it related to eviction, was not maintainable, because of the provisions of the Madras Non-Residential Buildings Rent Control Order, 1942, hereinafter referred to as the Rent Control Order. On appeal, the learned Subordinate Judge, following certain decisions of this Court subsequent to *Mahmood* v. *Kerala Corporation, Ltd.*[2], held that the suit was maintainable and passed an order of remand as mentioned above.

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1. (1907) 17 M.L.J. 298.
2. (1945) 1 M.L.J. 44.

* A. A. O. No. 311 of 1947. 10th February, 1949.

The relevant provision of the Rent Control Order is Clause 8, the material portions of which are as follows :

"(1) A tenant in possession of a non-residential building shall not be evicted therefrom, whether in execution of a decree, or otherwise and whether before or after the termination of the tenancy, except in accordance with the provisions of this clause ;

* * * * * *

(2) A landlord wishing to evict a tenant in possession shall apply to the Controller for a direction in that behalf."

The Controller shall make an order of eviction only if he is satisfied that one or other of the conditions mentioned is satisfied. These conditions briefly are, non-payment of rent, absence of readiness and willingness to pay a fair rent in future, sub-letting except under certain circumstances and user of the building for a purpose other than that for which it was leased, and absence of occupation of the building for a continuous period of four months without reasonable cause. Then follow provisions for execution of an order for eviction passed by the Controller.

Before dealing with the several decisions on the effect of this clause, let us examine its plain language. Sub-clause (1) lays down that a tenant shall not be *evicted* from a non-residential building of which he is in possession. "Evict" literally means "expel by legal process". Eviction consists in the physical act of throwing out the tenant from the building which he is occupying. This sub-clause therefore, prevents the tenant from being thrown out. One of the methods of such eviction is by the process of execution of a decree for possession. The sub-clause makes it clear that even this method is prohibited. The eviction can only be in accordance with the provisions of Clause 8. There is nothing in this clause, or in any of the other clauses of the Order expressly prohibiting the institution of a suit for possession, or prohibiting a Civil Court from passing a decree for possession. No doubt, even though a decree for possession is passed, it may be not be capable of execution by the Civil Court. But the passing of the decree itself is not in terms prohibited.

Is there any such prohibition which can be necessarily implied ? Is there anything in this clause which takes away, by necessary intendment, the ordinary jurisdiction of a Civil Court to entertain a suit by a landlord for recovery of possession of his property in the occupation of a tenant ? As their Lordships of the Judicial Committee pointed out in *Secretary of State for India* v. *Mask and Co.*[1] :

"It is settled law that the exclusion of the jurisdiction of the Civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied."

I fail to see any such clear implication to oust the jurisdiction of the civil Courts.

The earliest decision dealing with this question is that of Chandrasekhara Aiyar, J., in *Mahmood* v. *Kerala Corporation Ltd.*[2], where the learned Judge held that there was an ouster of the jurisdiction of Civil Courts. His reasoning was as follows :

"Mr. Venugopalachari ingeniously contended that there could be no objection to a decree being passed in this suit though after the decree it might be that he might have to go before the Controller to get possession. This argument fails to take note of two answers. One is that when a special tribunal is indicated for obtaining a particular relief, it is that tribunal that has got exclusive jurisdiction to grant that relief, and to that extent the jurisdiction of Civil Courts is ousted. Secondly, even if it is held that the Court has jurisdiction to grant a decree for eviction it cannot be called upon to indulge in a mere pastime and pass orders which would be *brutum fulmen* and which cannot be carried into effect without resort being had to other persons or tribunals in whom a discretion is vested to decide if eviction is to be ordered or not. The remedy of the plaintiff is to go before the Controller."

Neither of the two grounds on which the learned Judge based his conclusion commends itself to me. No doubt, when a special tribunal is indicated for obtaining a particular relief, that tribunal has got exclusive jurisdiction to grant that relief. But then that relief must be a relief not available to a party under general law. Further, the relief for which the special tribunal, namely, the Controller, is indi-

1. (1940) 2 M.L.J. 140 : L.R. 67 I.A. 222 : I.L.R. 1940 Mad. 599 at 614 (P.C.).

2. (1945) 1 M.L.J. 44.

cated, is the relief of eviction, that is, the actual throwing out of the tenant. That may only mean that a Court which passed the decree may not have jurisdiction to execute the decree for possession. But I fail to see how the jurisdiction of the Civil Court to entertain a suit and to pass a decree for possession is necessarily ousted. I cannot agree with the learned Judge that a decree for eviction which cannot be executed for a certain time, in this case during the continuance of the Rent Control Order, can be called *brutum fulmen* or that, passing a decree for eviction which cannot be at once executed, would be indulging in a mere pastime. One can easily give instances of cases in which the decrees duly passed by competent Courts cannot be immediately executed. But that fact has never been understood to mean that there is an implied ouster of jurisdiction of the Court to entertain and dispose of the suit. This decision of the learned Judge was expressly dissented from by Byers, J., in the two decisions in *V. R. R. Swami Aiyar* In re[1], and *Satyanarayana* v. *Satyanarayana*[2]. He held that the language was not such as to deprive the Civil Courts of their power to entertain suits for eviction and to adjudicate upon them. His conclusion is thus tersely expressed :

> " It cannot be said that these words are wide enough to deprive the Civil Courts of their jurisdiction to pass decrees ; all that the rule contemplates is the control of the relief of eviction."

Apparently, it was in view of these latter decisions that Panchapagesa Sastri, J., observed as follows in a recent decision, vide *Madhavakurup* v. *Muhammad Sukri Sahib*[3] :

> " It must now be taken to be well settled that a decree in ejectment could be passed by a Civil Court and all that the order provides is that during the subsistence of the order, the Civil Court cannot execute the decree but the landlord will have to take appropriate steps under the provisions of the order."

There are certain general considerations which, in our opinion, support this view, namely, that the order does not take away the jurisdiction of a Civil Court to entertain a suit by a landlord against the tenant and pass a decree therein for possession. Many of these considerations are found set out in an unreported decision of Wadsworth, J., in *Sannidhi Veeraraghavalu* v. *Fathima Bibi Saheba*[4]. These are such considerations : (1) The cause of action for an application to the Controller would be quite different from the cause of action for a suit in the Civil Court ; (2) The grounds on which the Controller can order an eviction may be quite different from those on the strength of which the Civil Court would grant a decree ; (3) The failure by the plaintiff to claim a decree for eviction in the Civil Court on grounds which would not justify eviction by the controller might result in grave complications by way of limitation for a suit filed after the Control order ceases to operate ; (4) The period during which the execution of a decree is prohibited is limited. The order itself is only for a short duration ; and when it is repealed or it expires, a decree of a Civil Court can be executed in the ordinary way immediately thereafter.

Having regard to all these considerations and to the language of Clause 8 of the order, I am of opinion that the jurisdiction of a Civil Court to entertain and pass a decree in a suit for eviction by a landlord against his tenant is not expressly or impliedly taken away by the provisions of the Rent Control Order.

The Civil Miscellaneous Appeal is therefore dismissed with costs.

Raghava Rao, J.—I respectfully agree with my Lord in his reasoning as well as in his conclusion. I wish only to add a few words with reference to one particular view-point expressed by Chandrasekhara Aiyar, J., in *Mahmood* v. *Kerala Corporation Ltd.*[5]. Possibly, the learned Judge had in mind the observation of Lord Hobhouse in *Bossu Kumar* v. *Dhun Singh*[6], which I shall presently refer to, in making his observations in the case of *Mahmood* v. *Kerala Corporation Ltd.*[5] that even if it is held that the

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1. (1946) 1 M.L.J. 134.
2. (1945) 1 M.L.J. 135.
3. (1948) 2 M.L.J. 359.
4. S.A. No. 80 of 1946.
5. (1945) 1 M.L.J. 44.
6. (1888) L.R. 15 I.A. 211 : I.L.R. 11 All. 47, at 56 (P.C.).

Court has jurisdiction to grant a decree for eviction it cannot be called upon to indulge in a mere pastime and pass orders which would be *brutum fulmen*. The observation of Lord Hobhouse that :

> " It would be an inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation under peril of losing his property if he does not."

was made in connection with the discussion of a question of limitation which arose in the case before their Lordships of the Privy Council and has since been considered in a number of later decisions of the High Courts in India. According to the interpretation placed upon that observation of the learned Lord by these later decisions it will be too much for any litigant to contend that where the rights as between himself and his adversary have been subjected to adjudication by a competent Civil Court, limitation for other suits between the parties based on such rights should be computed from the date of their final determination. It has been further ruled by these later decisions of the High Courts as well as by decisions of the Privy Council, that Courts have, in fact, no power on considerations of hardship or equity to invent new grounds of exemption from the bar of limitation not recognised by the statute. It seems to me, therefore, that the principles laid down by these decisions are *a fortiori* applicable to a question of limitation which may arise, as pointed out by Wadsworth, J., in his unreported decision in S. A. No. 80 of 1946, in relation to a suit in the ordinary Civil Court based on grounds of eviction under the general law, which are by no means identical with the grounds constituting the cause of action for an application to the Controller.

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE RAGHAVA RAO.

Ahmed Ali & Co. .. *Applicants.**

v.

The Commissioner, Corporation of Madras .. *Respondent.*

Madras City Municipal Act (IV of 1919), *Schedule IV, Rule* 15 (a)—*Appeal under—If maintainable without payment of the tax which is the subject-matter of appeal.*

The language of rule 15 in Schedule IV of the Madras City Municipal Act is imperative and the Court of Small Causes would have no jurisdiction to entertain an appeal unless the requirements contained in Clause (*ii*) of Rule 15 (*a*) is satisfied, namely the payment of the tax due under the order appealed against.

Case stated under Rule 17 of Schedule IV of the Madras City Municipal Act. 1919, by the Court of Small Causes, Madras, in M. T. A. No. 9 of 1947, on its file,

P. Srinivasa Aiyangar for Applicants.

Messrs. John and Row for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—This case comes up on a reference by the Court of Small Causes under Rule 17 of Schedule IV to the Madras City Municipal Act in an appeal filed to that Court against the decision of the Taxation Appeals Committee relating to the levy of property tax on premises No. 19, Angappa Naick Street, George Town, Madras, on the appellants. The material half years in question are the second half year 1945-46 and the first half year 1946-47. The demand for these two half years was made at the rate of Rs. 74-15-11 per half year on the basis of the annual valuation of the property at Rs. 864. The tax due for these two half years was paid in accordance with the demand on 28th February, 1946 and 7th August, 1946, respectively. Later on, the property tax assessment registers of the Corporation were amended and the annual valuation of the property was enhanced from Rs. 864 to Rs. 5,460. Thereafter the Corporation

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* Case Referred No. 19 of 1948. 1st February, 1949.

called upon the appellant to pay for the two half years aforesaid the difference of tax between Rs. 74-15-11 and Rs. 611 claiming the same as "escaped assessment." The appellants appealed to the Taxation Appeals Committee contending that the levy was illegal because under rule 3 of Schedule IV to the City Municipal Act, the enhanced rate was payable only for the half years succeeding the amendment of the tax registers and not for the preceding half years, as there had been a demand before the amendment. They also denied that section 137-B of the Act had any application to their case. The decision of the Taxation Appeals Committee went against them. Thereupon they filed an appeal to the Court of Small Causes, Madras, under rule 15 (*a*) of Schedule IV to the Act. Under that provision no appeal shall be heard by the said Court, unless (*ii*) the petition of appeal was presented within 14 days from the date of the decision and the tax has been paid for the said period. Admittedly, the appellants did not pay the tax which had been demanded of them and which formed the subject-matter of their appeal and which was covered by the order appealed against by them. The Chief Judge of the Court of Small Causes held that by reason of the omission to pay the tax under this clause, the appeal was incompetent. He also held against the appellants on the main question of law, namely, whether as a result of the subsequent amendment to the property tax assessment books the excess tax was leviable for the two half years in which there had already been a demand and payment of the tax as demanded. At the instance of the appellants, the Court of Small Causes referred to this Court the two following questions of law for decision :

"(1) Whether after property tax in respect of a property has been demanded and paid for any half year it is found as a result of subsequent amendment of property tax assessment books, that more should have been levied for that half year, is the case governed by section 137-B or by rule (3) of schedule IV to the City Municipal Act?

(2) Whether under rule 15 in schedule IV to the Act, an appeal filed to this Court is maintainable without payment of the extra amount of tax demanded in the circumstances abovementioned"?

In our opinion there can be only one answer to the second question, namely, that without payment of the tax which is the subject-matter of the appeal, the appeal is not maintainable under rule 15. The language of rule 15 is imperative and the Court of Small Causes would have no jurisdiction to entertian an appeal unless the requirements contained in clauses (*i*) and (*ii*) of rule 15, sub-rule (*a*), are satisfied. The learned counsel for the appellants contended that as he has paid what according to him is the tax legally due for the two half years in question, he has complied with the requirements of clause (*ii*). We cannot agree. There is no room for doubt as to the requirement of clause (*ii*) and that is payment of the tax due under the order appealed against. The appellants admittedly have not paid this tax. The appeal was therefore incompetent and must have been dismissed *in limine* on that ground.

Having regard to our answer to question 2, it is not necessary to pronounce an opinion on question 1. The appellant will pay the costs of the reference, advocate's fee Rs. 50.

V.S. *Reference answered regarding one of the questions referred.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO AND MR. JUSTICE PANCHAPAKESA AYYAR.

Mulugu Nagamma .. *Appellant**

v.

Mudigonda Aghorapathi Sastri and others .. *Respondents.*

Limitation—Vendor's failure to keep up the express and implied covenants of title and quiet enjoyment—Suit for damages by vendee—Limitation runs only from the date of actual physical dispossession.

The right of a vendee to sue his vendor for damages on the ground that the vendor failed to keep up the express and implied covenants of title and quiet enjoyment, arises only when there is

*Appeal No. 357 of 1947. 3rd February, 1949.

actual physical dispossession of the vendee. The right would not be affected by limitation as long as the vendee remained in possession of the property and time will begin to run against him only from the date of actual dispossession, even though his right to remain in possession might have been lost by a decree against him.

Appeal against the decree of the Court of the Subordinate Judge of Tenali, dated 20th September, 1946, in O. S. No. 16 of 1946.

V. Rangachari and *K. V. S. Ranganadhachari* for Appellant.

P. Somasundaram and *P. Suryanarayana* for Respondents.

The Judgment of the Court was delivered by

Panchapakesa Ayyar, J.—This is an appeal against the judgment and decree of the Subordinate Judge of Tenali in O. S. No. 16 of 1946. The facts were briefly these. The deceased father of the defendants sold eight items of property to the plaintiff's son on 14th August, 1916, for a sum of Rs. 3,000. The vendee got possession of the properties and enjoyed them. On 6th November, 1924, he executed a will in favour of his mother, the plaintiff, and died soon afterwards. Thereafter, the plaintiff enjoyed the properties. She sold item 8 and a portion of item 7 to strangers. At the time of the sale by the father of the defendants to the plaintiff's son, he had only one son, namely, the first defendant; the other defendants are sons subsequently born to him. The first defendant filed O. S. No. 42 of 1935, asking for a partition of his one-seventh share of all the family properties, including these eight items, impleading his father and the other defendants and also the plaintiff in O. S. No. 16 of 1946 and other alienees. The Court gave a preliminary decree for partition on 3rd August, 1937, in favour of the defendants, holding that the sale deed dated 14th August, 1916, was fully supported by consideration but was binding on the sons only to the extent of the proved antecedent debts, namely, Rs. 585 and that the sale was not binding on their half share to the remaining extent. As regards the 8th item, it dismissed the suit as abated. The alienated portion of item 7 had not been included in the suit. The Court directed the sons, the defendants in this suit, to pay a moiety of the binding portion of the consideration, namely, Rs. 292-8-0. It awarded mesne profits to the sons only from the date of the deposit of the binding portion of the consideration. The quantum of the mesne profits was left over to be decided subsequently. This decree was confirmed in appeal on 21st December, 1938, in A. S. No. 377 of 1947. The defendants in this suit deposited the amount due from them under the decree in the partition suit, on 21st December, 1939, and thereby became entitled on that date to the recovery of possession of items 1 to 7; but, actually, they recovered possession of items 2 to 7 only on 21st April, 1944, and of item 1 on 6th July, 1944. They had filed a petition in 1941 (I. A. No. 269 of 1941) for a final decree in the partition suit, O. S. No. 42 of 1935.

The plaintiff brought the present suit for recovering Rs. 11,281-6-8 as damages, since she was dispossessed of items 1 to 7 (a half share of the properties sold on 14th August, 1916) in 1944, owing to the vendor's failure to keep up the express and implied covenants of title and quiet enjoyment. By the time she brought the suit, the vendor was dead, and the defendants were sued as they were said to be bound, under the theory of pious obligation, to discharge the debt covered by the damages claimed.

The defendants contested the suit on various grounds, like limitation, excessive damages claimed, misjoinder of parties, etc. Their contest will be clear from the issues. The learned Subordinate Judge framed the following issues:

"(1) Whether the alleged covenant, for quiet enjoyment pleaded in para 3 (*c*) of the plaint is true, valid and binding upon defendants?

(2) Whether such a covenant is implied under law?

(3) Whether the suit claim is a 'debt' enforceable against sons under Hindu Law?

(4) Whether the suit claim is extinguished after the death of Virabhadrasastri (father of the defendants)?

(5) Whether the suit is barred by time?

(6) What is the market value of the properties at the time when the plaintiff was dispossessed?
(7) To what conpensation or damages, if any, is the plaintiff entitled?
(8) Whether the suit is bad for misjoinder of parties?
(9) To what relief?

After discussing the evidence before him, the learned Subordinate Judge found issues 1 to 4 and 8 in favour of the plaintiff; but, on issue 5, he found that the suit was barred by limitation as the amount due by the defendants under the decree in the partition suit had been deposited on 21st December, 1939, and the possession by the plaintiff of items 1 to 7 had become thereafter wrongful possession, and, so, the plaintiff must be deemed to have become dispossessed of those items on 21st December, 1939, and, as the suit was brought only on 21st April, 1946, that is, more than six years from that date, it was barred by limitation. He relied on the ruling in *Kamalanand Singh* v. *Jarao Kumari*[1]. In that view, he did not give any findings on issues 6 and 7 and dismissed the suit with the costs of the defendants. The plaintiff has preferred this appeal.

The learned Counsel for the plaintiff-appellant urged that the finding of the lower Court on issue 5 was erroneous, and that limitation would run only from the date of actual physical dispossession, that is, when the physical enjoyment of the lands by the plaintiff was disturbed, and not from the date of the defendants depositing the amount required of them and being thereby entitled to recover possession. We agree. The ruling in *Kamalanand Singh* v. *Jarao Kumari*[1], has no bearing on the facts in this case. It was not a ruling regarding limitation at all. It simply held that when a landholder had by his action made it impossible for the sub-landholder to collect the rents, he could not claim to recover those rents simply because he did not actually dispossess the under-tenure-holders physically. The general rule of law is, in our opinion, that dispossession should mean physical dispossession and not merely a right to dispossess. The right of the plaintiff to bring a suit for damages was not affected by limitation so long as he remained in possession of the items, and time began to run against him only from the date of actual dispossession even though his right to remain in possession may have been lost by a decree against him, as here. The ruling in *Avdesh Kumar* v. *Zakül Hasnain*[2], will also support this view. "Wrongful possession" is irrelevant for this purpose as it will entitle a person, if he goes on holding on to the lands for more than the prescribed period, to acquire title by prescription. That itself shows that it will not amount to "dispossession" but is clearly a species of "possession" and cannot, therefore, amount to a termination of his possession. The fact that mesne profits were directed to be paid to the defendants by the plaintiff from the date of deposit of Rs. 292-6-0 by them will make no difference and, indeed, will only show that the plaintiff was still in possession and was not dispossessed.

In this view, we set aside the dismissal of the suit by the lower Court and remand the suit to the lower Court for fresh disposal on issues 6 and 7, after allowing both sides to let in any further oral and documentary evidence they like, and to adduce all arguments they like with regard to the basis on which damages should be awarded to the plaintiff for breach of these covenants. In the circumstances, the costs in this appeal will abide and be provided for when the suit is disposed of afresh.

The Court-fee paid on the memorandum of appeal will be refunded to the plaintiff-appellant.

V.P.S. *Appeal allowed. Suit remanded.*

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1. (1912) 17 I.C. 238.
2. I.L.R. 1944 All. 612.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

Krishnamurthi Naidu .. *Appellant**

v.

Ramakrishna Naidu and others .. *Respondents.*

Compromise decree—Necessity for registration—Decree reciting that the defendant agreed to treat a will as valid and that he and his heirs would not question the will as they had no interest in the properties—Not a declaration of plaintiff's title requiring registration of the decree.

Where a compromise decree in a prior suit recited that the defendant in the present suit based on a will agreed to treat the will as valid and that he and his heirs would not question the will and that they had no interest in the properties, it cannot be said that it is a declaration of the plaintiff's title to the suit properties, requiring registration of the compromise decree. The title of the plaintiff is derived under the will and not under the compromise decree. As the compromise decree does not create or extinguish or declare any rights in the property, it does not require registration.

Bageshwari Charan Singh v. *Jagarnath Kuari*, (1931) 62 M.L.J. 296: L.R. 59 I.A. 130 : I.L.R. 11 Pat. 272 (P.C.) ; *Sakharam Krishnaji* v. *Madan Krishnaji*, (1881) I.L.R. 5 Bom. 232 and *Lahore Central Co-operative Bank, Ltd.* v. *Qadir Bakhsh* (1947) 2 M.L.J. 304 (P.C.), followed.

Appeal against the decree of the Court of the Subordinate Judge, Trichinopoly, in A. S. No. 104 of 1944, preferred against the decree of the Court of the District Munsiff, Trichinopoly, in O. S. No. 41 of 1941.

N. Rajagopala Aiyangar for Appellant.

T. V. Ramanatha Aiyar and *A. Srirangachariar* for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff is the appellant in the second appeal and his suit for recovery of possession of 1 acre 58 cents in S. No. 160/1 in the village of Melur described by boundaries in the plaint schedule was dismissed by the Courts below. Hence this appeal.

One Muthukrishna had two sons, Srinivasalu and Ramakrishna. Ramakrishna is the first defendant in the present suit. His son Pothurajalu is the second defendant. Srinivasalu had two sons Venkatakrishna and Krishnamurthi. Krishnamurthi is the present plaintiff. Venkatakrishna died in 1935. In 1917, Srinivasalu instituted a suit for partition, O. S. No. 190 of 1917, on the file of the District Munsiff's Court of Srirangam, and impleaded in that suit Muthukrishna also as a party. In that suit 2 acres 39 cents in S. No. 160/1 of which the present suit property forms a part was not included, presumably because the property was purchased by Muthukrishna in his own name. The suit was decreed. Later, Pothuraju, the present second defendant, instituted another suit for partition, O. S. No. 202 of 1929, against Muthukrishna, Ramakrishna, the present first defendant and others. That suit comprised all the properties including 2 acres 39 cents (S. No. 160/1). There was a preliminary decree for partition in that suit decreeing partition according to the shares to which each was entitled and Muthukrishna died after the preliminary decree in that partition suit. He executed a will dated 16th January, 1929, whereunder he made a bequest among others of 2 acres 39 cents in S. No. 160/1 to the present plaintiff, Krishnamurthi. After the death of Muthukrishna, the partition suit, O. S. No. 202 of 1929, was continued after impleading Lakshmi, his widow, as a party. It must be stated that the bequest in favour of the plaintiff under the will of Muthukrishna was to obtain possession of the property after the death of Lakshmi as a life interest was created in favour of Lakshmi under the said will. As Muthukrishna died after the preliminary decree and as Lakshmi was added as his legal representative and as the plaintiff had only a right to possession after the death of Lakshmi, apparently the title based on the will in respect of the 2 acres 39 cents was not and could not be put forward by the present plaintiff in that suit, O. S. No. 202 of 1929. In due course there was a final decree in that partition suit in which the properties were

* Second Appeal No. 472 of 1946. 10th January, 1949.

divided and allotted to the various sharers in accordance with the directions contained in the preliminary decree. In 1936, Ramakrishna, the present first defendant, instituted a suit, O. S. No. 17 of 1936, against the plaintiff in respect of the right to management of certain charities belonging to the family. That suit did not proceed to trial and there was a compromise decree in that suit on 21st September, 1936 (Ex. P-4). Under this compromise, Ramakrishna, the present first defendant, agreed to recognise the rights of the plaintiff, the present appellant under the will of Muthukrishna. The portion of the compromise relating to this matter is as follows :

" that the plaintiff herein (*i.e.*, Ramakrishna) has no interest, claim or right whatsoever regarding the properties belonging to the defendant under Muthukrishna Naidu's will ; that the plaintiff herein and his heirs should not question this will."

As Ramakrishna was in possession of a third share and as Pothuraju was also in possession of another third, the plaintiff instituted the present suit on the basis of the will of Muthukrishna to recover possession of the 2/3rd share in S. No. 160/1 ; the other third was in the possession of the plaintiff as per the partition decree in O. S. No. 202 of 1929.

The suit was dismissed by both the Courts on the ground that as the compromise relating to the suit property was outside the scope of the suit O. S. No. 17 of 1936 the compromise required registration ; and further that in any event the title of the plaintiff to recover the properties on the strength of the will of Muthukrishna was concluded by the decision in O. S. No. 202 of 1929. So far as the second defendant in the suit is concerned he was not a party to the compromise and the view of the Courts below that the plaintiff's claim so far as the plaintiff's claim as against him is concerned is governed by the decision in O. S. No. 202 of 1929 seems to me to be correct. It is for this reason that the learned advocate for the appellant did not press in this appeal his claim against the second defendant and I think that the position taken by the learned advocate is perfectly correct.

The claim however against the first defendant stands on a different footing. In O. S. No. 202 of 1929 the claim of the present plaintiff based on the will of Muthukrishna could not be put forward as he was not impleaded as the legal representative of Muthukrishna but his widow Lakshmi was impleaded and even if he was impleaded it was impossible for him to have raised the question of title to the property under the will as the only question in issue then was as between Ramakrishna and other members as to whether the present suit property was his self-acquired property or not. Except the decree in the suit we do not have any other record, of that suit, *i.e.*, either the pleadings or the judgment, to indicate what exactly the contentions of the parties were in that litigation. We may assume that that suit decided or at any rate proceeded on the footing that this item also was joint family property and not the self-acquired property of Muthukrishna to which he was solely entitled. That implication it is that helps the second defendant in retaining his one-third share in the present suit. It is open to Ramakrishna or other members who are in possession of this item to agree to treat the will as valid notwithstanding the implied finding, if one there was, in O. S. No. 202 of 1929 that the property was the joint family property and not the self-acquired property of Muthukrishna. This admission so far as the first defendant is concerned is contained in the compromise decree in O. S. No. 17 of 1936. It is on the basis of this admission that the present suit was instituted by the plaintiff to recover possession of the property from the first defendant. The view, therefore, of the Courts below that the implied decision in O. S. No. 202 of 1929 stands in the way of the plaintiff recovering possession of the one-third share in S. No. 160 /1 in the possession of the first defendant seems to me to be clearly wrong.

The argument that the compromise decree requires registration as it creates or in any event declares the right of the plaintiff to the suit property, in my opinion, proceeds on a misconstruction of the clause in the compromise decree. All that

the clause says is that Ramakrishna agrees to treat the will as valid; Ramakrishna definitely stated in it that he and his heirs would not question the will and that they had no interest in the properties. This is not in my opinion either a declaration of the title of the plaintiff or of his rights in the suit property; nor does this language create any title under this document to the suit properties in favour of the plaintiff. The title of the plaintiff is derived under Muthukrishna's will and not under this document. As this document therefore does not create or declare or extinguish any rights in the property it does not in my judgment require registration. As pointed out by the Judicial Committee in *Bageshwari Charan Singh* v. *Jagarnath Kuari*[1], the word "declare" really implies that the document itself creates a title; a mere recital of a fact is not a declaration within the meaning of section 17 of the Registration Act. It implies a declaration of will and not a mere statement. In the document before the Judicial Committee, the language was:

"That in view of the petition filed by Thakur Jado Charan Singh, your petitioners beg to file the original deed of gift and prays that your Honour may be pleased to sanction the same or order a fresh grant on the same terms to be executed."

That was held to be not a declaration within the meaning of section 17 requiring registration. The importance of the case before the Privy Council however is that it approves an earlier decision of West, J., in *Sakharam Krishnaji* v. *Madan Krishnaji*[2] in which the language of the document considered in that decision was similar to the language of the document in the present case. There it was stated:

". . . . we three persons and our heirs and representatives have no interest of any kind whatever. If we or they should prefer any claim then the same is to be null. This release paper we have duly passed in writing jointly and severally and in sound mind."

It was stated by West, J., with reference to this document that it did not contain a declaration and did not require registration. A passage from the judgment of West, J., was quoted by their Lordships of the Judicial Committee at page 300 and they approved the view of West, J., as to the meaning of the word "declare" in section 17 of the Registration Act. The same view was also taken in the *Lahore Central Co-operative Bank, Ltd.* v. *Qadir Bakhsh*[3]. In view of these decisions I am of opinion that the compromise decree does not require registration as it does not by itself declare or create any rights in the suit property in favour of the plaintiff.

The result is that the plaintiff is entitled to succeed in respect of the one-third share in S. No. 160/1 of the extent of 2 acres 39 cents which is in the possession of the first defendant under the partition decree in O. S. No. 202 of 1929 and which in the final allotment was described as item 5 (*c*) (2). The second appeal is allowed to this extent and the decrees of the Courts below will be modified by passing a decree in favour of the plaintiff for recovery of possession of that portion of S. No. 160/1, which was allotted to the first defendant as representing his one-third share under the partition decree in O. S. No. 202 of 1929 and was described as item No. 5 (*c*) (2) in the schedule attached to the decree. The plaintiff will be entitled also to a decree for Rs. 15 representing profits for one year from Chitrai 1939 to Chitrai 1940 (April 1939 to April 1940) and future profits will be ascertained under Order 20, rule 12 of the Code of Civil Procedure by the trial Court. The second appeal against the second defendant fails and is dismissed. The plaintiff will be entitled to recover half costs in all the Courts from the first defendant. (No leave).

V.P.S. *Appeal allowed in part.*

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1. (1931) 62 M.L.J. 296: L.R. 59 I.A. 130: I.L.R. 11 Pat. 272 (P.C.).
2. (1881) I.L.R. 5 Bom. 232.
3. (1947) 2 M.L.J. 304 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE MACK.

Payyavulu Kesanna .. *Appellant**

v.

Payyavulu Vengamma and others .. *Respondents.*

Arbitration—Statements of plaintiff and defendant taken separately—Award given on the pleadings of parties and without taking any evidence—Proceedings, if misconducted by the arbitrator.

A widow's suit against her husband's reversioners for arrears of maintenance, recovery of jewels, etc., was by consent of both parties referred to a sole arbitrator for decision. The arbitrator examined and took the statements of the plaintiff and the defendant separately in which both of them stated they were willing to abide by the decision of the arbitrator on his looking into the plaint and written statement in the suit and he gave his award without taking any evidence. On a question whether by the taking of statements of the parties separately the arbitrator misconducted the proceedings,

Held, that though an arbitrator should not hear the evidence of one party behind the back of the other, it cannot, in the circumstances, be held that by merely taking the statements of the parties separately any evidence was recorded from one party behind the other and to the latter's prejudice. The arbitrator was placed by the parties themselves in a difficult position with authorisation from them both to decide the disputes by a reference to the pleadings and the records. As there was nothing whatever to show that the arbitrator did not make his award within the narrow confines of the pleadings, it cannot be said that there was any misconduct either of the arbitrator or of the arbitration proceedings.

Appeal against the order of the District Court, Anantapur, dated 1st October, 1945, in O. P. No. 15 of 1945.

P. Chandra Reddi and *O. Chinnappa Reddi* for Appellant.

M. S. Ramachandra Rao for Respondents.

The Judgment of the Court was delivered by

Mack, J.—This is an appeal by the defendants in a suit filed by a widow Vengamma *in forma pauperis* for the recovery of maintenance, stridhanam jewels, and so on, which was referred at the request of both parties to the arbitration of one Rayala Govindappa. Vengamma who was dissatisfied with his award, filed the petition under appeal to set it aside. The learned District Judge, finding that the arbitrator was guilty of misconduct, set the award aside.

The facts are briefly these : The plaintiff, Vengamma, was the widow of the brother of the first defendant, Kesanna. Defendant 2 is his nephew, and defendant 3 is the plaintiff's step son by her late husband's second wife. Her husband died in 1927, after, according to the averments in the written statement, making a will dated 1st May, 1927, giving the plaintiff 40 acres of land, with which she was satisfied for 11 years, until she filed this suit, *in forma pauperis*, for maintenance at Rs. 100 a month, arrears of maintenance for 11 years amounting to Rs. 13,200, the recovery of stridhanam jewels or their value estimated at Rs. 4,800, Rs. 2,000 for the construction of a house, and utensils valued at Rs. 150. This is *prima facie* a very exaggerated claim without the curb of any court-fee, seeking relief of over Rs. 20,000.

Both the parties joined in a petition under section 21 of the Arbitration Act, which was in the following brief terms :

"Both the parties in this suit have agreed to appoint Rayala Govindappa as the sole arbitrator to settle the suit disputes and to abide by his decision. Therefore the plaint and written statements and record may be sent to him for his decision."

The arbitrator examined the widow, Vengamma, by herself in Amidala village, where she was residing on 6th March, 1945, and recorded from her a statement which concludes with the following request :

". . . . it is prayed that you look into my plaint and the written statements of the three defendants and give your decision according to law."

* A.A.O. No. 688 of 1945. 24th September, 1948.

A week later, on 10th March, 1945, the arbitrator examined Kesanna, the first defendant, separately, and recorded from him a statement which substantially sets out the facts alleged in his written statement and similarly ends with the following sentence :

> "as both of us stated before the Court that we will abide by your decision and as per the order of the Court, I trust that you will settle our disputes after perusing the plaint and the written statement in the suit."

The arbitrator accordingly, without taking any evidence, passed a brief award dealing with the claims made on the basis of the pleadings. His award gave Vengamma 8·1 cents of land more on the basis that she was in enjoyment of the 40 acres provided for her under her husband's will. He also awarded her a house for her residence which she may choose from among the houses belonging to the family other than the one occupied by the defendants. In addition, he gave her Rs. 1,400 towards costs to be paid by the defendants within a month and also directed the defendants to pay the entire pauper court-fee on her plaint.

The award was challenged on several grounds in Vengamma's petition. The important ground pressed before us is that the arbitrator misconducted the proceedings in examining the first defendant behind the back of the plaintiff without giving her an opportunity to challenge his statements. It is well-settled law that an arbitrator should not hear the evidence of one party behind the back of the other. It is not necessary for us to traverse the wealth of authority in support of this principle in English and Indian case-law, commencing with *Drew* v. *Drew*[1] and recognised and stressed in a number of English cases set out by Mukherjee, J., in *Ganesh Narayana Singh* v. *Malida Koer*[2], a Bench decision of the Calcutta High Court. This principle is universally accepted as based upon broad principles of justice, equity and good conscience. We concede the contention of the learned advocate for the respondent that it is settled law that an arbitrator who records evidence on behalf of either party behind the back of the other must be held to misconduct the proceedings. Our particular attention has been drawn to the decision in *W. Ramsden and Co., Ltd.* v. *Jacobs*[3]. That does not help the case for the respondents. There, in a commercial dispute, the arbitrators obtained written statements from parties, and having considered them, summoned the defendant Jacobs to attend before them. He stated his case. He was asked to retire. The arbitrators then summoned the sellers and heard their submissions in the absence of the buyer. Jacobs applied to have the award set aside on the ground that he should have been allowed to be present when Ramsden and Co. were heard and, if he had thought fit, to cross-examine their witnesses. Bray, J., condemned the procedure of the arbitrators of hearing the evidence of one party in the absence of the other as absolutely wrong. He, however, felt a difficulty as to whether Jacobs should be heard to complain, as he made no protest at the time. But in order to show judicial disapproval of the procedure that were followed, the Bench which decided that case, with some reluctance, set aside the award.

The simple point for determination in the present case, as it appears to us, is whether by interviewing the plaintiff and the defendant separately and by recording the statements he did, the sole arbitrator recorded evidence from one party behind the back of the other or even received information from one party which the other had no opportunity of meeting. The learned District Judge's reasons on the material for setting aside the award are summed up in paragraph 17 of his judgment. In connection with the present contention, he made the following observations :

> "The arbitrator does not seem to have had any personal knowledge nor is there anything to show that he consulted or adopted the opinions of other people. He seems to have been solely guided by first respondent's statement and surrendered his own judgment or consciousness."

1. (1855) 2 Macq. 511.
2. (1911) 13 C.L.J. 399.
3. (1922) 1 K.B. 640.

Another reason he gave was that the arbitrator disallowed the claim for a large sum by way of arrears of maintenance and a claim for stridhanam jewels without bestowing a single thought about it but merely acting on the word of the first respondent. These adverse findings against the arbitrator, we have no hesitation in saying, are quite unwarranted. The learned District Judge has failed to observe that both the statements he recorded from the plaintiff and the first defendant ended with a request to the arbitrator to look into the plaint and the written statement and make an award on their basis. It is true that the statement recorded by the arbitrator from the first defendant is a little longer. There is however no material fact in that statement which does not appear in the written statement except one detail on which a great deal of stress is laid by the learned advocate for Vengammal, namely, that the Government accounts would show that she was in possession of the lands bequeathed to her by her husband. Apart from this, there is not a single fact recorded by the arbitrator from the first defendant which does not find a place in his written statement.

The arbitrator presumably was agreed on by both parties as one in whom they had mutual trust and confidence. Neither the petition nor the reference to him authorised him to import his own knowledge of the affairs of this family into the award. If he had any such knowledge prior to his being appointed an arbitrator, it is quite impossible to expect him to divest his mind completely of all such knowledge of the affairs of this family in the making of the award. There is, however, nothing whatsoever to show that the arbitrator did not make his award within the narrow confines of the pleadings which both parties requested him to do. The significant fact is that neither party desired to adduce any evidence. It would undoubtedly have been better and more in accordance with recognised procedure for the arbitrator to have sent for both parties before him and recorded their statements in each other's presence. In *Ramaswami Iyer* v. *Subbier*[1], a Subordinate Judge held that arbitrators were guilty of misconduct merely because they first sent for the defendant and questioned him about the facts of the case and then sent for the plaintiff who came and represented his case. There, a week later, they examined the plaintiff. Phillips and Madhavan Nair, JJ., upheld the award, which was challenged by the plaintiff on the ground that he was examined after the defendant, because there was nothing to show that he was not told the case of the defendant which he had to meet, and therefore misconduct by the arbitrators had not been proved. The facts in that case were, as the learned Judges there observed, somewhat peculiar. No hard and fast rule can be laid down as to what precisely constitutes misconduct either of the arbitrator or of the arbitration proceedings. This must depend upon the circumstances of each case. In the present case, we have no hesitation in holding that, by merely taking down the statements he did from the parties in which they merely reiterated the request contained in their petition for arbitration that the arbitrator should give his award on the basis of the pleadings, no evidence was recorded from one party behind the other party and to the latter's prejudice.

A broad general ground on which the learned District Judge has also set the award aside is that the arbitrator has acted in a manner which is inconsistent with equity and natural justice. We are unable to agree with his observation that the arbitrator made up his mind in five minutes accepting all the first defendant's statements as true without finding out what the plaintiff's answer to these allegations were. He was also of the opinion that the arbitrator should have placed before the plaintiff her husband's will in regard to her maintenance and should have examined her about it. He also thought the award gave no reasons for the arbitrator's conclusions. We are quite unable to agree with these inferences adverse to the arbitration and the award, and are wholly unable to see in what manner the arbitrator has acted in violation of principles of equity and natural

1. A.I.R. 1926 Mad. 1158.

justice. There was the very eloquent fact that Vengamma had made no claim for maintenance for 11 years, and her then coming forward with what is *prima facie* a very exaggerated claim asking for 11 years' arrears of maintenance. The arbitrator was placed by the parties themselves in a difficult position with authorisation from them both to decide the disputes by a reference to the pleadings and the records. This is the type of case which appears to us to be covered by the dictum of the Privy Council decision in *Mohindar Singh* v. *Ramindar Singh*[1], in a case where the parties appointed a layman as an arbitrator :

> "True the decision he gave was not one that a Court could have given, nor was it one that perhaps would have been given by an arbitrator who was also a lawyer. But for better or worse they chose to submit their disputes to a relative whom they trusted and who was not a lawyer, and he has given just the sort of award that might be expected from a lay arbitrator in the circumstances."

In this case the only difference is that Rayalu Govindappa was not a relative. We observe that one of the grounds on which the award was challenged in the petition under appeal was that the arbitrator gave effect to an invalid will which could not be made by a member of a joint family. But on the pleadings, there was this averment of a maintenance provision made for Vengamma by her husband with an almost irresistible inference that she was content with that maintenance during her 11 years of inactivity after her husband's death.

We are unable to see any legal grounds on which the award of the sole arbitrator can be upset. Vengamma herself was the only witness examined on her petition, and there was only *ipse dixits* that the arbitrator, Govindappa, came to her hotel at Anantapur of his own accord before the reference and asked her to accept his arbitration, and that she was informed by her younger brother that Govindappa had practised some fraud. No attempt has been made to substantiate any allegation of any fraud by the arbitrator. He appears to us to have discharged a difficult and delicate task assigned to him to the best of his ability at the request of both parties within the narrow scope of his reference. An allegation has been made before us, any comment on which would be quite outside the scope of this appeal, that the widow has been set up by family enemies to file this suit.

In the result, the appeal is allowed with costs throughout, and the award will be made a decree of Court.

V.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

Amina *alias* Beepathumma and another .. *Appellants**

v.

B. Ahmed bin Chayabba .. *Respondent.*

Landlord and tenant—Suit based on tenancy—No denial of landlord's title—Subsequent suit on title—Maintainability.

Where in a suit based on tenancy the defendants have admitted the title of the plaintiff landlord a subsequent suit based on title is not barred. It cannot be said that by reason of the decree in the earlier suit, the plaintiff is precluded from bringing a suit for possession based on his title.

Kutti Ali v. *Chindan*, (1900) I.L.R. 23 Mad. 629, relied on.

Appeal against the decree of the Court of the Subordinate Judge, South Kanara, in A. S. No. 99 of 1945, preferred against the decree of the Court of the District Munsiff, Mangalore, in O. S. No. 153 of 1943.

T. Krishna Rao for Appellants.

K. Y. Adiga and *K. P. Adiga* for Respondent.

The Court delivered the following

JUDGMENT.—The defendants are the appellants. The suit out of which this second appeal arises was instituted for recovery of possession of the suit

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1. (1944) 2 M.L.J. 227 (P.C.)

* Second Appeal No. 625 of 1946. 18th January, 1949.

property with building standing thereon together with profits, past and future. The suit was decreed by the trial Court and was confirmed on appeal by the lower appellate Court. Hence this second appeal.

The plaintiff's predecessor-in-title let the suit property on 6th May, 1903, to one Hamed Beary, the predecessor of the defendant. The lessee died and the property came into the possession of his sister Kunhi Pathumma. The plaintiff's predecessor-in-title instituted a suit, O. S. No. 155 of 1917 against Kunhi Pathumma and another for recovery of possession on the strength of the lease in favour of Hamed Beary. That suit was dismissed on the ground that there was no apportionment of rent. After the death of Kunhi Pathumma, the defendants who are her daughters continued in possession of the property. In 1930, the plaintiff's predecessor Akbar Khan issued a notice determining the tenancy and instituted the suit O. S. No. 198 of 1930 for recovery of possession of the property. That suit was compromised and a compromise decree was passed on 25th March, 1931. Under the compromise the plaintiff Akbar Khan had to pay a sum of Rs. 175 to the defendants for improvements and he undertook to deposit the amount into Court. The defendants were permitted to continue in possession of the property till 31st December, 1931 and they agreed to surrender the property with all the buildings after the expiry of that date, failing which liberty was given to the plaintiff to deposit the amount of Rs. 175 in Court and recover possession of the property together with the buildings, and profits at the rate of Rs. 5 per mensem until delivery of possession by executing the decree itself. The parties also gave up their respective contentions in the suit. After this decree the plaintiff Akbar Khan did not pay or deposit the amount of Rs. 175 into Court and in 1935 there was a rent note, Ex. P-1, executed by the first defendant in favour of Akbar Khan. The second defendant also continued in possession of the property; but she was not a party to Ex. P-1. As the defendants did not surrender possession of the property notwithstanding the lawyer's notice dated 9th February, 1943, determining the tenancy under the rent bond, the plaintiff instituted the present suit for recovery of possession.

The defence to the suit was that the plaintiff had no subsisting title to the suit property and that the suit was barred by reason of the decree in O. S. No. 198 of 1930 and that the plaintiff's only remedy was to work out his rights by executing the decree in the suit and not to institute a separate suit. There was also an issue, relating to the rent or damages claimed by the plaintiff.

The learned District Munsiff who tried the suit overruled the contention of the defendants and decreed the suit for possession on condition of the plaintiff paying into Court Rs. 175 for the improvements. This decree was confirmed on appeal by the Subordinate Judge.

In this second appeal two questions were raised by the learned advocate for the appellant: firstly, that a second suit for possession was not maintainable and that the plaintiff's only remedy was to execute the decree in O. S. No. 198 of 1930 and as he allowed execution to become barred he was not entitled to sue for possession and secondly, that the suit was barred by limitation as the plaintiff had not possession within 12 years prior to suit.

The earlier suit, it will be seen from a perusal of the plaint which was filed and exhibited as Ex. D-1, was based on tenancy and tenancy alone. At the time of the compromise the defendants abandoned all their contentions and recognised the right of the plaintiff Akbar Khan as landlord to recover possession of the property. The landlord agreed to pay Rs. 175 for the improvements and the defendants agreed to surrender possession of the property after the 31st December, 1931. The present suit is based on title and the title was found by both the Courts in favour of the plaintiff. On the principle of the decision in *Kutti Ali* v. *Chindan*[1],

1. (1900) I.L.R. 23 Mad. 629.

I think that the second suit based on title is not barred when the defendants admitted the title of the plaintiff as landlord in the earlier suit. A suit based on tenancy is very narrow in its scope and it is unnecessary very often for the plaintiff landlord to plead his title; it is enough for him in such a suit to prove the lease and the tenancy and that it was validly terminated. If these are established, the plaintiff would be entitled to a decree for possession as the defendant in such a case would be estopped from disputing the title of the landlord at the inception of the tenancy. That is the reason why on such claims lesser court-fee is payable under section 7 (*xi*) (*cc*) of the Court-Fees Act. In such suits the question of title, it has been held, cannot be gone into. It is on this principle, it was held in *Kutti Ali* v. *Chindan*[1] that if there is no dispute about the right of the plaintiff as landlord in a suit against the tenant, a second suit based on title was not barred. The contention, therefore, that by reason of the decree in the earlier suit, the plaintiff is precluded from instituting the present suit must be overruled.

There is no substance in the contention that the plaintiff's suit is barred by limitation as admittedly the suit was filed within 12 years from the date fixed under the decree in the earlier suit, *viz.*, 31st December, 1931. The possession of the defendants under the compromise decree was permissive and was not adverse to the plaintiff. As the suit was filed within 12 years from that date the plea that the suit is barred by limitation must be rejected.

The result is that the second appeal fails and is dismissed with costs. (No leave).

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SUBBA RAO AND MR. JUSTICE PANCHAPAKESA AYYAR.

Punukollu Parandhamayya .. *Appellant**

v.

Punukollu Navarathna Sikhamani .. *Respondent.*

Hindu Law—Custom—Kamma community in Andhra desa—Custom that in case of estrangement between husband and wife, all presents made by the bride's people at the time of marriage to the bride-groom was to be returned to the bride—If opposed to public policy—Award based on such custom—If illegal within the meaning of section 30 *of the Arbitration Act.*

A custom among the Kamma families of Andhra Desa that "If estrangement results between the wife and the husband, dowry and all other kinds of gifts and presents that were made to the bride-groom by the bride's people (at the time of the marriage) have to be handed back to the bride after rendering a complete account with interest by the bride groom or his family" cannot be said to be opposed to public policy. Not only is this custom not opposed to public policy, but is really in the interests of an important section of the public. The custom is really to safeguard the interests of a woman who, for one reason or other, has to live apart from her husband.

An award based on such a custom cannot be said to be illegal within the meaning of section 30 of the Arbitration Act.

Appeal against the order of the Court of the Subordinate Judge of Masulipatam, dated 17th March, 1947, in C. M. P. No. 404 of 1947 in O. S. No. 64 of 1944.

C. V. Narasimha Rao for Appellant.

V. T. Rangaswami Aiyangar and *K. Ramaseshayya* for Respondent.

The Judgment of the Court was delivered by

Subba Rao, J.—This is an appeal against the order of the Subordinate Judge of Masulipatam, giving a decree in the terms of the award. The appellant is the husband of the respondent. They were married in the year 1930, and in 1944 disputes arose between them, and the wife was living apart from the husband from May 1944. She filed O. S. No. 64 of 1944 on the file of the Subordinate

1. (1900) I.L.R. 23 Mad. 629.

*A.A.O. No. 209 of 1947.   20th January, 1949.

Judge of Masulipatam for recovery of Rs. 30,182-15-7 and also for return of movables. The relief was based upon a claim which is stated in paragraph 10 of the plaint as follows :

> " Cash, immovable and movable properties mentioned in paragraphs 5 and 6 were intended as *stridhanam* for the benefit of the plaintiff and her children by the first defendant and were declared as presents in the name of the plaintiff even. If the first defendant's story is that any of the presents were declared in name for the first defendant at the time of the marriage, since they were intended by the givers only for the benefit of the plaintiff, the plaintiff alone has got rights in them ; it is so even according to the custom among the kammas. Apart from this, if estrangement results between the wife and husband, dowry and all other kinds of gifts and presents that were made to the bride-groom by the bride's people have to be handed back to the bride after rendering a complete account with interest by the bride-groom or his family. This has been the custom in force from a long time among the Kamma families of Andhra Desa."

Pending the suit the subject-matter of the litigation was referred to three named arbitrators who were advocates of long standing and also belonged to the Kamma community. They passed an award dated 27th January, 1947. In that award they found that the custom and usage set up in paragraph 10 of the plaint was true and valid, and that the custom was ancient and had been consistently acted upon. On that finding they directed the amounts presented by the bride's people either in the name of the plaintiff or in the name of the first defendant at the time of the marriage to be paid over to the plaintiff. Various objections were filed to the award, but the lower Court rejecting them gave a decree in the terms of the award. The first defendant has preferred the appeal against that order.

The learned advocate for the appellant contended that the award was illegal within the meaning of section 30 of the Indian Arbitration Act. His argument was that the custom found by the arbitrators was against public policy inasmuch as it would encourage a wife to get away from her husband with the hope of getting money that was presented at the time of the marriage. We do not agree with this contention. This custom must have had its origin in an attempt made by the Kamma community to stabilise the condition of a woman, who, for one reason or other, had to live apart from her husband. It was conceived in the best interests of women, a section of the public, who would otherwise be put to grave hardships and untold miseries. Not only this custom is not against public policy but is really in the interests of an important section of the public. The custom is not that an unchaste woman, who has been discarded by her husband because of her unchastity, should be given money presented at the time of the marriage. If so, there may be some force in the argument of the learned advocate for the appellant. The custom is really to safeguard the interests of a woman who, for one reason or other, has to live apart from her husband. In our view there is no illegality in the award of the arbitrators and the lower Court was right in passing a decree in terms of the award. The appeal therefore fails and is dismissed with costs.

V.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Ponna Viyyanna Sarma .. *Petitioner**

v.

Reddi Manikyam and another .. *Respondents.*

Security bond—Construction—Deposit in Court—Security bond by which property is mortgaged—Condition in bond to pay the party entitled to the amount interest till her death and to deposit amount taken, when required—Cancellation of bond and release of property from encumbrance, whether possible before the widow's death.

The amount of compensation in respect of acquisition of land belonging to the late husband of the respondent herein was deposited in Court. But as the estate in her hands was a life estate, the amount could not be given to her without sufficient safeguards. Hence the petitioner herein applied to the lower Court to give security by way of mortgage o his property and to receive the amount in Court deposit. The bond executing the mortgage contained *inter alia* the following clause : " I shall pay every year to the petitioner for her life as aforesaid the interest that accrues every year and after her life I shall deposit the said sum of

*C.R.P. No. 731 of 1947. 9th February, 1949.

rupees into Court within such time as the Court may fix". Some time later the petitioner by an interlocutory application prayed the Court that the security bond or mortgage might be cancelled and the property released from encumbrance since the money received by him from Court had been deposited by him in Court. On the question whether on a construction of the security bond the petition for cancellation of the bond and release of the property from encumbrance was premature,

Held, that the clause in the bond that the mortgagor would continue to pay interest, even if he wants to redeem the mortgage, till the widow dies, was a clog on the equity of redemption which could not be availed of to defeat the cancellation of the bond.

The right to redeem as well as the right to foreclose, or sell, should be reciprocal and co-extensive and if the mortgagee can ask for the money even during her lifetime in case of default of payment of interest by the mortgagor regularly, it stands to reason that the mortgagor should also have the privilege of redeeming the mortgage before the happening of the certain event at an uncertain time. The clause does not create an inhibition in the mortgagor from paying the mortgage money within the outer limit of the period, namely, the death of the widow.

Held further, that another way of looking at the bond would be not to construe it as a mortgage deed, but as a security bond executed in favour of the Court in which case there can be no agreement by which the mortgagor would be prevented from redeeming the mortgage in the usual course of things.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Rajahmundry dated 16th November, 1946, in I.A. No. 756 of 1946 in O.P. No. 34 of 1928.

V. Parthasarathi for Petitioner.

K. Bhimasankaram for Respondents.

The Court delivered the following

JUDGMENT:—The petitioner seeks to revise the order of the Subordinate Judge of Rajahmundry passed in I.A. No. 756 of 1946 in O.P. No. 34 of 1928 on his file.

A sum of Rs. 1739-13-3 has been deposited in Court, as compensation for acquisition of land which belonged to the husband of Reddi Manikyam, the first respondent to this petition, and which was in her possession. But since the estate held by her was only a widow's estate, the amount could not be paid over to her without the necessary safeguards. Thereupon, the petitioner, in this revision petition applied to the lower Court stating that he was willing to mortgage his property as security and receive the amount in Court deposit, for which interest at the rate of Re. 0-11-0 per cent. per month would be paid to the widow every year from the 20th March, 1930 onwards. He has been paying the amount regularly until sometime before the filing of the Interlocutory Application which has given rise to this Civil Revision Petition. By the said Interlocutory Application, the petitioner prayed that the registered security bond or mortgage may be cancelled and the property released from encumbrance since he had already deposited the amount borrowed under the security bond in Court. The learned Subordinate Judge held that the petition was premature because, in his opinion, the question of cancellation or the enforceability of the security bond does not arise except when the first respondent who is entitled to the benefit seeks to take action or until after her death. On this finding, the petition was dismissed and it is that order that is sought to be canvassed in revision.

The operative portion of the security bond which is styled a simple mortgage bond for Rs. 1739-13-3 dated 20th March, 1929 is in the following terms:—

"The petitioner herein stated that property belonging to her was acquired by the Government and the amount of compensation paid by the Government and amounting to Rs. 1739-13-3 is in deposit in Court and had asked me to effect a mortgage of my property, and to draw the money in Court and use it and to pay the interest thereon to her. I was asked to obtain the orders of the Court to that effect. I have agreed thereto and this mortgage bond is accordingly executed. For the amount of Rs. 1739-13-3 which I borrowed from you for my necessity, *i.e.*, for carrying on business I have executed this bond mortgaging the property described hereunder. I have retained the property in my possession only.

I shall be paying the interest on the aforesaid sum to the petitioner Reddi Manikyam Garu at the rate eleven annas per cent. per month every year by the 20th of March, from 1930 onwards, obtain receipts from her and shall file such receipts into Court. I shall pay every year to the peti-

tioner for her life as aforesaid, the interest that accrues every year and after her life I shall deposit the said sum of Rs, 1739-13-3 into Court within such time as the Court might fix. In case I fail to pay the petitioner every year the interest that accrues and if I do not file the receipt into Court or if after the lifetime of the petitioner I fail to pay into Court the amount due within the period fixed by Court, the said sum would be recoverable from me and from the mortgaged property as also from my other property."

The question for consideration is what is the proper interpretation of this document. The petitioner's learned counsel contends that as a mortgagor the petitioner is entitled to redeem the mortgage as the mortgage money has already become due. On the other hand the respondents' argument is that as neither of the contingencies contemplated in the mortgage deed has come into existence, the order of the lower Court is right. The agreement contained in the deed that the petitioner would pay every year to the widow for her life the interest that accrues every year and that after her life the said sum of Rs. 1739-13-3 would be deposited in Court is, it is contended, only an outer limit for the redemption of the mortgage. In case the interest is not paid regularly every year, it is open to the mortgagee to realise the amount by the sale of the mortgaged property and therefore if the mortgagee has a right to recover the money even during her lifetime, it is urged that the right to redeem cannot be postponed till her death. Mr. Parthasarathi strenuously argues that the interpretation put upon the document by the lower Court, if correct would result in this : That the mortgagor cannot pay the money till the death of the widow or till he himself commits default in the regular payment of interest and the mortgagee thereupon takes action to recover the money. Thus, he says, the clause operates as a clog on the equity of redemption. For this argument he relies upon section 60 of the Tranfer of Property Act and a decision of the Allahabad High Court in *Hira Kuar* v. *Gambhir Singh*[1]. In that case the learned Judges came to the conclusion that in a mortgage deed in which the period fixed for payment was forty years and interest was payable annually, and in case of default in the payment of interest the mortgagee was entitled to sue at once for the entire mortgage money, having regard to contract between the parties which enabled the mortgagee to sue before the expiry of the fixed period, it was only equitable that the mortgagor should be allowed to redeem before the expiry of the said period. The principles enunciated in this case are sought to be invoked in support of the contention here by applying them by means of an analogy. I do not think that a fixed period recited in the mortgage document is analogous to the terms contained in the present document. On a true construction of the document it seems to me that the mortgagor has not bound himself by agreeing not to repay the mortgage money before the expiry of a stipulated period. All that the document is meant to state is that so long as the petitioner keeps the mortgage money with him, he will pay the interest every year regularly to the widow during her lifetime and that immediately after her death he would pay the entire amount into Court. This does not preclude him from redeeming the mortgage at an earlier date.

Mr. K. Bhimasankaram for the respondent wants me to construe the document as if the mortgagor is prohibited from paying the amount before the death of the widow who was the mortgagee and he relies upon the well-known and accepted principles laid down in a number of cases that a stipulation in a mortgage deed by which a mortgagee in possession would not be redeemed for a number of years, say thirteen years (as in *Rambaram Singh* v. *Ramker Singh*[2]), fifty years (as in *Sundar Singh* v. *Hukum Singh*[3]), and even fifty eight years (as in *Ramprasad* v. *Jagrup*[4]) would not amount to clog on the equity of redemption. Other decisions of this Court have held that a long term fixed in an usufructuary mortgage by which the mortgage would not be redeemed till the expiry of the term cannot amount to a clog on the quity of redemption. A recent decision reported in *Kadir Bibi* v. *Mailappa Pillai*[5],

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1. (1921) 19 A.L.J. 460.
2. (1911) 10 I.C. 243.
3. (1914) 24 I.C. 926.
4. (1912) 10 A.L.J. 157.
5. (1946) 2 M.L.J. 82: I.L.R. 1946 Mad. 739 (F.B.)

is to the effect that if the stipulation in a mortgagee deed is for its redemption only in a particular season of the year or on a particular day in the year, the mortgagor cannot redeem on any other date during the course of the year. In my opinion, all those cases contemplated a state of things in which the mortgagee is in possession. Such clauses are intended for the benefit of persons who should not be evicted from the mortgage property in their possession before the expiry of the agreed period. The present case is different in this that here it is a simple mortgage and that the mortgagor continues to remain in possession of the hypotheca. The clause in the deed that the mortgagor would continue to pay interest even if he wants to redeem the mortgage till the widow dies, is in my opinion a clog on the equity of redemption. The date of redemption is indefinite and uncertain though, as all human beings are mortal, there is a fixity about the redemption. An agreement that a mortgagor would not redeem the mortgage until the happening at an uncertain period of a certain event is to my mind, clogging the equity of redemption. The right to redeem as well as the right to foreclose, or sell, should be reciprocal and co-extensive and if the mortgagee can ask for the money even during her lifetime in case of default of payment of interest by the mortgagor regularly, it stands to reason that the mortgagor should also have the privilege of redeeming the mortgage before the happening at an uncertain time of the certain event in this case. As I have already stated, in my opinion, the clause does not create an inhibition in the *mortgagor* from paying the mortgage money within the outer limit of period, *viz.*, the death of the widow.

Another way of looking at the question is that the document should not be strictly construed as a mortgage, because it is a security bond executed in favour of the Court and as such cannot be properly called a mortgage deed. The first respondent Reddi Manikyam is, on the face of the document, not a mortgagee. She is only a beneficiary under the document. If that is so, then there is no agreement by the mortgagor by which he is prevented from redeeming the mortgage in the usual course of things. It therefore follows that the lower Court has acted with material irregularity in the exercise of jurisdiction in dismissing the application. The order of the lower Court is set aside and the petition is remanded to the lower Court for disposal on the merits after ascertaining whether the entire mortgage amount and interest have been deposited in time. There will be no order as to costs.

K.C. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VISWANATHA SASTRI.

V. Venugopal Naidu .. *Petitioner**

v.

The Third Judge of Small Causes Court, Madras and others .. *Respondents.*

Madras Buildings (Lease and Rent Control) Act, (XV of 1946), *section* 12 (1) (a)—*Power of Government to constitute appellate authorities—Scope—Notification of 1st March,* 1948, *substituting the " Court of Small Causes " for the " Chief Judge of the Court of Small Causes "—Validity—Power of Chief Judge of the Court of Small Causes to transfer appeal to another Judge of the Court—Government of India Act* (1935), *section* 100 *and Schedule VII, List II, item* 2—*Delegation of power of legislation—Limits—Delegation of power of appointing authority involving extension of Courts' jurisdiction which can be done only by Legislature—Implied delegation of legislative power also.*

It cannot be said that the notification of 1st March, 1948, substituting the " Court of Small Causes " for the " Chief Judge of the Court of Small Causes " as the appellate authority under section 12 of the Madras Buildings (Lease and Rent Control) Act is invalid as enlarging the jurisdiction of the Court of Small Causes otherwise than by appropriate legislation or as taking away existing rights of appeal. There is no doubt an extension of the jurisdiction of the Court of Small Causes by that notification. But the Provincial Legislature is perfectly competent to make this extension of jurisdiction by virtue of the power conferred on it by section 100 of the Government of India Act read with item 2 of List II in Schedule VII to it. That this power of legislation

*C.M.P. No. 5130 of 1948. 21st January, 1949.

could be delegated by the Legislature to the executive authority, that is, the Provincial Government is also clear from the decision in *The King Emperor* v. *Benoari Lal Sarma,* (1945) 1 M.L.J. 76 : L.R. 72 I.A. 57 : 8 F.L.J. 1 (P.C.). It cannot be said that under section 12 (1) (*a*) of Madras Act XV of 1946 what was delegated was only a power of appointment but not a power of legislation. Though that provision contemplates appointment of an appellate authority, if it necessarily involves the exercise of legislative power because it may involve the extension of the jurisdiction of a Court, then impliedly the power of appointment must include such legislative power as is necessary for the purpose.

It cannot be said that all the Judges of the Court of Small Causes must hear and decide appeals under the Act. Appeals under the notification under section 12 of Madras Act XV of 1946 would also be included in the business of the Court (under section 10 of the Presidency Small Cause Courts Act) and the Chief Judge may make such arrangements as he thinks fit for the distribution of the business of the Court among the Judges thereof. Accordingly where an appeal against the order of the Rent Controller is transferred by the Chief Judge of the Court of Small Causes to the Third Judge, the Third Judge has jurisdiction to dispose of the appeal.

Quaere.—How far section 12 (4) of Madras Act XV of 1946 would affect the power of revision possessed by the High Court.

The Court of Small Causes, Madras, was constituted an appellate authority as a Court and it cannot be said that in the notification of the Government " the Court of Small Causes " meant " the three Judges of the Court of Small Causes." The right of appeal as it existed before the notification has not been taken away or interfered with by the notification in question. Only the Chief Judge of the Court of Small Causes ceased to exist as an appellate authority.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to direct the issue of a writ calling for the papers in H. R. A. No. 620 of 1948 and connected proceedings on the file of the Court of Small Causes, Madras, 3rd Judge, and the orders passed thereon dated the 16th day of August, 1948, and quash the said order dated 16th August, 1948, in H. R. A. No. 620 of 1948.

K. S. Ramamurthi for Petitioner.

The Advocate-General (*K. Rajah Aiyar*) on behalf of the Provincial Government.

S. Ramachandra Aiyar for Respondents.

The Court made the following

ORDER.—On 18th March, 1948, the Additional Rent Controller, Madras, passed an order for eviction against the first respondent in Case No. 2 of 1948, on his file in favour of respondents 5 to 10 in this application, the trustees of the Sri Kanyaka Parameswari Devasthanam Charities. There was no order of eviction as such, against the petitioner herein who was the second respondent before the Controller, but there were certain observations in the order of the Controller that he was merely a clerk under the first respondent. On 5th April, 1948, the petitioner filed an appeal, H. R. A. No. 620 of 1948, to the Chief Judge, Court of Small Causes, Madras. The appeal was transferred by the Chief Judge to the Third Judge of the Court of Small Causes. The petitioner thereupon took an objection that the third Judge had no jurisdiction to hear the appeal. This objection as to jurisdiction was heard as a preliminary point by the Third Judge who held by his order dated 16th August, 1948, that the transfer of the appeal by the Chief Judge from his file to the file of the Third Judge for disposal was within his jurisdiction and that the appeal could be heard and disposed of by the Third Judge. The petitioner seeks from this Court a *writ of certiorari* to quash this order of the Third Judge.

The transfer of the appeal by the Chief Judge to the Third Judge was made in the following circumstances : under section 12 (1) (*a*) of Madras Act (XV of 1946), the Provincial Government may, by general or special order notified in the *Fort St. George Gazette,* confer on such officers and authorities as they think fit, the powers of appellate authorities for the purposes of this Act, in such areas or in such classes of cases as may be specified in the order. Originally, in respect of the city of Madras, the Chief Judge of the Court of Small Causes was notified as the appellate authority in accordance with this provision. By a subsequent notification dated 1st March, 1948, published in the *Fort St. George Gazette,* on 23rd March, 1948, the " Court of Small Causes " was substituted for the "Chief

Judge of the Court of Small Causes," The appeal preferred by the petitioner was therefore treated as an appeal to the Court of Small Causes, and the Chief Judge made the order of transfer, presumably in exercise of his powers under section 10 of the Presidency Small Cause Courts Act.

The petitioner contended that the subsequent notification constituting the Court of Small Causes the appellate authority was illegal and *ultra vires*. The Third Judge overruled this contention on the view that what the Government meant and intended was to constitute all the three Judges as appellate authorities.

Mr. K. S. Ramamurthi learned Counsel for the petitioner raised several contentions before us. As the matter was of general importance, we also directed notice to the learned Advocate-General.

Mr. Ramamurthi's first contention was that in spite of the subsequent notification the petitioner had a right to file the appeal to the Chief Judge of the Court of Small Causes as the appellate authority. His contention was based on the rule of law enunciated in the well known case of *The Colonial Sugar Refining Company, Ltd.* v. *Irving*[1]. The following observations were relied on in particular :

> " To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal."

The decisions in *Daivanayaka Reddiar* v. *Renukambal Ammal*[2] and In re *Vasudeva Samiar*[3], were also relied on. In our opinion, the rule enunciated in all these cases has no application whatever to the present case. Here there is neither an abolition of a right of appeal altogether, nor is there a transfer to a new tribunal. Under section 12, a person aggrieved by an order passed by the Controller has got a right to prefer an appeal to the appellate authority. That right has not been taken away or in any way interfered with by the notification in question. The powers of an appellate authority can be conferred by the Provincial Government on such officers and authorities as they think fit. The Chief Judge of the Court of Small Causes was only a *persona designata* on whom the powers of an appellate authority was conferred by the earlier notification. His position is not in any way analogous to that of a Court in a hierarchy of Courts. Further, the rule in *The Colonial Sugar Refining Company, Ltd.*, v. *Irving*[1], would not apply, when the Court to which an appeal then lay is itself abolished. See In re *Vasudeva Samiar*[3] and *Canada Cement Company* v. *East Montreal* (*Town of*)[4]. On the publication of the subsequent notification, the Chief Judge of the Court of Small Causes ceased to exist as an appellate authority.

The main contention of Mr. Ramamurthi was that the subsequent notification was invalid, because it really amounted to an extension of the jurisdiction of the Court of Small Causes which could be made only by legislation and not by the Provincial Government under a power of appointment.

It may be conceded that by conferring the powers of an appellate authority under section 12 (1) (*a*) on the Court of Small Causes, there is an extension of that Court's jurisdiction. It was held in *Goonesinha* v. *Honourable O. L. de Kretsor*[5] by the Privy Council that while the ordinance constituting the Supreme Court of Ceylon did not confer upon it original jurisdiction in civil cases, the cognizance of election petitions under the Ceylon (State Council Elections) Order in Council, was a special jurisdiction conferred upon the Supreme Court by the latter Order in Council, and that this was an extension of or addition to, the ordinary jurisdiction of the Supreme Court. It is equally clear that the Provincial Legislature was perfectly competent to make this extension of jurisdiction by virtue of the power conferred on it by section 100 of the Government of India Act, read with

1. (1905) A.C. 369.
2. (1927) 53 M.L.J. 637 : I.L.R. 50 Mad. 857. (F.B.)
3. (1928) 56 M.L.J. 369 : I.L.R. 52 Mad. 361 (F.B.)
4. (1922) 1 A.C. 249.
5. (1945) 2 M.L.J. 314 : (1945) F.L.J. 96 (P.C.)

item 2 of List II in Schedule VII to it. That this power of legislation could be delegated by the Legislature to the executive authority, that is, the Provincial Government, is also clear, from the decision of the Privy Council in *The King-Emperor* v. *Benoari Lal Sarma*[1] The following observations of Viscount Simon, L.C., are very much in point :

> " There is not, of course, the slightest doubt that the Parliament of Westminster could validly enact that the choice of Courts should rest with an Executive Authority, and their Lordships are unable to discover any valid reason why the same discretion should not be conferred in India by the law-making authority, whether that authority is the Legislature or the Governor-General, as an exercise of the discretion conferred on the authority, to make laws for the peace, order and good government of India."

Mr. Ramamurthi therefore contended that under section 12 (1) (*a*) what was delegated was only a power of appointment but not a power of legislation. We do not think that there is any substance in this attempted distinction. No doubt, that provision contemplates the appointment of an appellate authority, but if it necessarily involves the exercise of legislative power, because it may involve the extension of the jurisdiction of a Court, then impliedly the power of appointment must include such legislative power as is necessary for the purpose.

It was next contended by Mr. Ramamurthi that even if the Court of Small Causes can be validly designated as the appellate authority, then all the Judges of the Court must hear and dispose of the appeal. The answer to this contention is to be found in section 10 of the Presidency Small Cause Courts Act which reads thus :

> " Subject to such rules, the Chief Judge may, from time to time, make such arrangements as he thinks fit for the distribution of the business of the Court among the various judges thereof."

After the new notification, disposal of appeals under Madras Act (XV of 1946) would also be included in the business of the Court.

An argument was sought to be raised relating to the scope of sub-section (4) of section 12 of Madras Act XV of 1946. How far this provision would affect the power of revision possessed by the High Court does not fall to be considered in this case. We do not, therefore, express any opinion on this point. But there is nothing in that provision which renders the notification in question invalid or *ultra vires*.

Mr. Ramachandra Aiyar on behalf of the contesting respondent argued that the Court of Small Causes in the later notification meant the three Judges of the Court of Small Causes. This was the view also taken by the Third Judge. This argument cannot help the respondent, because such a construction would not justify any power in the Chief Judge to transfer an appeal on his file to the file of another Judge. In our opinion, the Court of Small Causes was constituted an appellate authority as a Court. It was common ground that the word " authorities " in section 12 (1) (*a*) of the Act would cover " Courts " already in existence.

The third Judge was therefore competent to hear and dispose of the appeal. This application is therefore dismissed. We make no order as to costs.

K.S. *Application dismissed.*

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1. (1945) 1 M.L.J. 76 : 8 F.L.J. 1 : L.R. 72 I.A. 57 (P.C.)

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VISWANATHA SASTRI.

K. V. Govindan Nair and another .. *Petitioners**

v.

Appukutty .. *Respondent.*

Madras Tenants and Ryots Protection Act (*XVII of* 1946), *section* 4 (1)—Othidar *or usufructuary mortgagee who has in his turn parted with actual possession of the land to others—If "tenant" (under Malabar Tenancy Act) entitled under Madras Act (XVII of* 1946) *to have proceedings for eviction stayed—Malabar Tenancy Act (XIV of* 1930), *section* 3 (*v*) (*j*) —" *Tenant*"—*Meaning.*

An *othidar* or a usufructuary mortgagee who has in his turn parted with actual possession of the land to others would be a tenant entitled to the benefit of the provisions of Madras Act XVII of 1946.

There is no justification for holding that an " intermediary " included in the definition of a " tenant " in clause (*v*) of section 3 of the Malabar Tenancy Act must, in addition to being a person falling within the definition of an intermediary in clause (*j*), also be a person who has paid or has agreed to pay rent or other consideration for his being allowed by another to enjoy the land of the latter.

Raman Nambiar v. *Govindan Nair*, (1948) 2 M.L.J. 381, overruled.

Ranga Aiyar v. *Subbayya Gounder*, (1942) 2 M.L.J. 739 : I.L.R. 1943 Mad. 674, referred to and relied on.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Calicut, dated 14th July, 1947, and made in I. A. No. 2264 of 1947 in O.S. No. 114 of 1946.

When the matter came on for hearing in the first instance, the Order of the Court was made by

Panchapagesa Sastry.—Under rule 1 of the Appellate Side Rules, I direct that this matter be posted for hearing and determination by a Bench. It is contended that the applicant before the lower Court is a tenant under the Malabar Tenancy Act, 1929. An *othidar* is a usufructuary mortgagee and he is not a tenant but it is said he comes under the term " Intermediary " where he has demised the lands to others who hold under him. Reliance is placed upon the Bench decision in *Ranga Aiyar* v. *Subbayya Gounder*[1] but Justice Horwill has in *Raman Nambiar* v. *Govindan Nayar*[2] held otherwise. The matter is important. Hence my direction as aforesaid.

S. Venkatachala Sastri for Petitioners.

S. V. Venkatasubramaniam for Respondent.

The Bench which heard the case delivered the following

JUDGMENTS : *The Chief Justice.*—The only question in this Civil Revision Petition is whether there should be a stay of a suit pending in the Court of the Additional District Munsiff of Calicut for ejectment against the petitioners under section 4 of the Madras Tenants and Ryots Protection Act (XVII of 1946). The document under which the petitioners claimed their rights is described as an *othi* deed bearing date of the Malayalam year corresponding to 14th January, 1920. The District Munsiff held that the petitioners were not entitled to the benefit of the provisions of that section and dismissed their application for stay of the suit. When the Civil Revision Petition came on before Panchapagesa Sastry, J., he directed the petition to be posted for hearing and determination by a Bench, because of a conflict between the decision in *Ranga Aiyar* v. *Subbayya Gounder*[1] and the decision in *Raman Nambiar* v. *Govindan Nayar*[2].

Under section 4 (1) of the Madras Act XVII of 1946 a suit for the eviction of a tenant from his holding or a suit in which a claim for such an eviction is involved, whether in addition to a claim for rent or not, shall be stayed, subject to certain conditions, which are not material now. Under section 2 (*b*) of the same Act,

* C.R.P. No. 1090 of 1947. 21st January, 1949.

1. (1942) 2 M.L.J. 739 : I.L.R. 1943 Mad. 674.
2. (1948) 2 M.L.J. 381.

the expressions, "eviction," "holding," "rent" and "tenant" shall in relation to cases governed by the Malabar Tenancy Act, 1929, have the same meanings respectively as in that Act. In the Malabar Tenancy Act, a "tenant" is defined thus :

"any person who has paid or has agreed to pay rent, or other consideration, for his being allowed by another, to enjoy the land of the latter, and includes an intermediary, a kanamdar, a kuzhikanamdar and a verumpattamdar of any description."

An 'Intermediary' is defined thus in clause (*j*) of section 3 :

"Any person, who not being a jenmi, has an interest in land, and is entitled by reason of such interest, to possession thereof, but has transferred such possession to others ;"

To understand the contentions of the parties in this petition, it is necessary to refer to the main provisions of the *othi* deed : It recites that properties mentioned in the schedule which belong to the transferors in jenm are demised to the transferees on *othi* tenure on a pattom (rent) of Rs. 20 and that the transferors had received from the transferees Rs. 150 for meeting tarwad expenses. The term was fixed at 12 years, during which time the transferees were entitled to continue in possession and cultivate the land. Out of the agreed pattom of Rs. 20, Rs. 15 had to be appropriated towards interest on the *othi* amount, and the transferees were directed to pay the Government revenue of Rs. 4-12-0 and the balance of 4 annas as rent every year. It is provided that at the end of 12 years, the properties should be surrendered on repayment of the *othi* amount. The transferees were entitled to be paid the value of any improvements which they might make, according to the custom of the locality. It was contended on behalf of the respondent that the petitioners were not tenants because under this document they were not persons who had to pay, or who had agreed to pay, rent, or other consideration, for being allowed to enjoy the land, and that the deed was in essence a deed of usufructuary mortgage. The mention of a rent or pattom would not be conclusive of the matter and would not give rise to the relationship of the landlord and tenant between the parties. The case in *Venkateswara* v. *Kesava Shetti*[1] was relied upon in support of this contention. Reliance was also placed on the decision of Happell, J., in *Pottentakath Kunholan* v. *Krishnan*[2]. The learned Judge there held, on more or less similar facts, that the surplus of the usufruct paid by a usufructuary mortgagee to the mortgagor is not rent. Recently, several learned Judges have had occasion to discuss this aspect of the question and the test laid down by them to find out whether a person was or was not a tenant on the ground that he had agreed to pay rent or other consideration for his being allowed by another to enjoy the land of the latter is to consider, from a perusal of the material deed, whether its primary object is that the person put into possession should enjoy the land or whether it was primarily intended that the land should be security for the debt. Vide *Kottulungal Muhammad* v. *Akkiraman Nambudiri*[3], *Velappil Tami* v. *Pazhayakath Kinhikali Umma*[4], *Chandu* alias *Kuttiappu* v. *Puthikayil Valappil Ummatha Kutti Umma*[5] and *Karunakaran Nair* v. *Manavedan* alias *Valia Thirumalpad*[6]. It is not necessary however to decide whether the test laid down in these decisions is the correct test or to examine the provisions of the deed to decide whether the transferee is liable to pay rent under the deed in question, because in our opinion this case can be decided on another point.

There can be no doubt that the transferees in this case would be intermediators, construing the definition of "intermediary" according to the plain language of the statute. They are persons having an interest in land and are entitled by reason of such interest to possession thereof. It is common ground that they have transferred such possession to others. An intermediary is expressly included in the definition of a 'tenant' in clause (*v*) of section 3 of the Malabar Tenancy Act. But it is contended by counsel for the respondent that a mere intermediary would not be a tenant but he should also be a person who had paid, or has agreed to pay,

1. (1879) I.L.R. 2 Mad. 187.
2. (1942) 2 M.L.J. 154.
3. (1948) 2 M.L.J. 428.
4. C.R.P. No. 793 of 1947.
5. C. R. P. No. 794 of 1947.
6. C. R. P. No. 987 of 1947.

rent or other consideration for his being allowed to enjoy the land of the latter. This contention found favour with Horwill, J., in *Raman Nambiar* v. *Govindan Nayar*[1]. The learned Judges held that though a usufructuary mortgagee was certainly a person who satisfied the definition of an intermediary in section 3 (*j*) of the Act, he would not be a tenant within the meaning of section 3 (*v*) because in the latter clause, the word intermediary has to be read with the other parts of the definition and the intermediary referred to must be an intermediary who pays rent or other consideration for his being allowed by another to enjoy the land of the latter. The learned Judge made a reference to the decision of a Bench in *Ranga Aiyar* v. *Subbayya Gounder*[2]. In that decision Wadsworth and Patanjali Sastri, JJ., held that a usufructuary mortgagee who had parted with possession in favour of others would be an intermediary. The following observations of Wadsworth, J., in that decision are very apposite :

> "No doubt the definition of 'tenant' includes an intermediary but, from this fact we are not prepared to infer that an intermediary must necessarily be a person who himself pays rent. The term 'tenant' in the Malabar Tenancy Act is used in a very wide sense and it is only certain specific classes of tenants who are entitled to renewals or fixity of tenure in certain specified circumstances. Though, no doubt, in the vast majority of cases the intermediary will be a person who both receives and pays rent, we are not prepared to hold that the payment of rent is a necessary qualification for inclusion within the definition of that term."

With great respect to the learned Judge, Horwill, J., I do not find any justification for holding that an intermediary included in the definition of a tenant in clause (*v*) must, in addition to being a person falling within the definition of an intermediary in clause (*j*), also be a person who has paid or has agreed to pay rent or other consideration for his being allowed by another to enjoy the land of the latter. If a person pays or agrees to pay rent or other consideration, then such a person would be a tenant within the first part of clause (*v*), whether he is an intermediary or not. Horwill, J., observed that if all intermediaries were tenants within the meaning of section 3 (*v*), it would lead to the anomalous position that a person who was not a tenant could make himself a tenant by parting with some measure of his interest in land. On the other hand, having regard to the policy underlying the Malabar Tenancy Act, it may be that it was thought necessary to confer the rights of a tenant on an intermediary if he had transferred possession to others who were in actual cultivation of the land, so that ultimately the actual cultivator might have a secure tenure. The case dealt with by Horwill, J., in that decision, furnishes an illustration. In that case, the *othidar* had inducted other persons as his tenants. The learned Judge rules that they would not be tenants within the meaning of section 3 (*v*) of the Act and that they were liable to be evicted, because if the person from whom they held was not a tenant, the so-called sub-tenant would have no right to remain in possession. It may well be that to secure the rights of persons in actual cultivation of the land it was necessary to secure the rights of persons who were intermediaries as defined in clause (*j*). Otherwise, if they were liable to be evicted, their tenants would equally be liable to be evicted. Whatever may be the policy underlying the Act, on a reading of the plain language of clauses (*j*) and (*v*) of section 3 of the Act, I am of opinion that an *othidar* or a usufructuary mortgagee who has in his turn parted with actual possession of the land to others would be a tenant entitled to the benefit of the provisions of Madras Act XVII of 1946.

The civil revision petition is, therefore, allowed. There will be a stay of the suit.

Viswanatha Sastri, J.—I agree. There has been some diversity of opinion in this Court on the question whether an '*othidar*' is a 'tenant' within the meaning of section 3 (*v*) of Madras Act XIV of 1930 so as to entitle him to apply under Madras Act XVII of 1946 for a stay of proceedings by way of redemption. The question turns upon a construction of the particular deed on the basis of which

1. (1948) 2 M.L.J. 381. 2. (1942) 2 M.L.J. 739 : I.L.R. 1943 Mad. 674.

eviction is sought or resisted. The terms of the *othi* with which we are concerned have been set out in the judgment of my Lord. There is here an advance of money as a loan under a mortgage with possession. There is also a provision for the payment of an annual 'pattom' or rent by the *othidar* after deducting Rs. 15 for the interest due on the loan, for payment of interest on arrears of pattom and for payment of compensation "according to local usage" for improvements effected by the *othidar*. It is said for the respondent that the transaction is only a mortgage, the land being security for the loan and does not involve the creation of a tenure and that the rent payable, being a very small sum, would only form an item in the account between the mortgagor and the mortgagee. The *othidar*, being a secured creditor, must receive the debt if paid and give up the security. The petitioner contends that the "*othidar*" in the present case is a 'tenant' paying, rent within the first part of the definition in section 3 (*v*) of the Malabar Tenancy Act or at any rate an 'intermediary,' within the latter part of the definition and in either case, entitled to a stay of the proceedings for redemption which involve and would result in this eviction.

The decisions of this Court in which this question has been considered are referred to in the judgment of my Lord, which I have had the advantage of perusing. In every case the decision must depend on an ascertainment of the rights and liabilities of the parties under the document, construed if need be, in the light of surrounding circumstances. Where, as here, there is a formal document of *othi*, its substance can only be gathered from a consideration of all the terms of the document. You cannot, in the search for substance, substitute different legal rights and liabilities for those that emerge from the terms of the document construed according to ordinary legal principles. Nor can you wholly ignore the legal form or shape given by the parties themselves to the bargain between them. With the utmost respect, I cannot agree with the conclusion reached in one of the cases cited to us, that if the mortgagor is an affluent jenmi, an *othi* granted by him is only an arrangement by way of lease and should be construed to be such. The true character of the transaction and its effect upon the rights of parties would depend upon a fair interpretation of all the terms of the document in question and the nature of the dispute that has arisen between them.

Dealing with a usufructuary mortgage and a lease back of the properties to the mortgagor, the Judicial Committee observed :

> "Their Lordships agree with the High Court in thinking that the mortgage and lease were parts of one and the same transaction. But there is no inconsistency between the two instruments. Nor would there have been any inconsistency if the mortgage itself had contained a provision for granting a lease on the terms upon which the lease was actually granted." *Abdullah Khan* v. *Basharat Husain* [1]

Their Lordships held that effect must be given both to the mortgage and the lease, though they formed component parts of the same transaction and reversed the decision of the Allahabad High Court to the effect that the mortgage was usufructuary only in form and that the real object was only to secure the payment of interest out of the rents and profits. In effect the contention of the respondent is that you must ignore the stipulation for payment of pattom on the due dates, with interest on default and the stipulation for payment of compensation for improvements according to local usage and consider the creation of a security for the loan as the substance and effect of the *othi* transaction. As pointed out by the Judicial Committee, there is no inconsistency in construing different parts of the same document as giving rise to different legal rights and liabilities.

These considerations will have to be kept in view in deciding whether the payment of pattom by an *othidar* is a payment by way of rent properly so called or whether it is merely a payment of the surplus income to the mortgagor by a usufructuary mortgagee. In the present case it is not necessary to decide this

1. (1912) 25 M.L.J. 91 : L.R. 40 I.A. 31 : I.L.R. 35 All. 48 at 56 (P.C.).

question, for it is clear that, even if the *othidar* is considered to be only a usufructuary mortgagee, he would be an " intermediary," within the second part of the definition in section 3 (*v*) of Madras Act XIV of 1930, he having leased the mortgaged lands to other persons. There is no warrant in the statute for the contention that Madras Acts XIV of 1930 and XVII of 1946, were not intended for the protection of " intermediaries " but only for the benefit of the actual cultivating kanomdar, kuzhikanamdar or verumpattamdar as the case may be. A lessee or sub-lessee cannot claim higher rights than the lessor or head-lessee and Acts XIV of 1930 and XVII of 1946, while protecting the tenant in actual possession, incidentally protect the " intermediary " who let out the land. The protection given to the last derivative title enures for the intermediate title as well.

K.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VISWANATHA SASTRI.

Alluru Bapanayya .. *Appellant**

v.

Chintalapati Bangarraju .. *Respondent.*

Registration Act (XVI of 1908), *section* 77—*Suit under—Scope of the powers of Court in.*

Section 77 of the Registration Act provides a statutory right of suit of a very limited character. In such a suit the Civil Court has got to do only what the registering officer should and could have done under the powers conferred on him by the Registration Act. The Court should be guided by the same considerations which guide the Registrar in registering or refusing to register a document presented to him. In a suit under section 77 the Court is concerned with two questions : (*a*) whether the document has been executed, that is to say, whether the document bears the genuine signature of the executant or his thumb impression if he is unable to sign his name, and (*b*) whether the requirements of the law for registering documents have been complied with. If these points are decided in favour of the plaintiff, then the registration ought to be directed. The Court cannot, in such a suit, go into a defence as to whether the document was obtained by fraud or misrepresentation or even a defence that the mind of the executant did not accompany his signature.

Ramaswami Chettiar v. *Srinivasa Pillai,* (1933) 66 M.L.J. 424, referred to.

Appeal against the decree of the Court of the Subordinate Judge, Amalapuram, dated 18th March, 1946, in A. S. No. 81 of 1945, preferred against the decree of the Court of the District Munsiff, Razole, dated 29th August, 1945, in O. S. No. 34 of 1944.

V. Parthasarathi for Appellant.

S. Venugopala Rao for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal by the plaintiff against the decree of the learned Subordinate Judge of Amalapuram in A. S. No. 81 of 1945, dismissing her suit filed under section 77 of the Registration Act for directing the sale deed, Ex. P-1, dated 5th November, 1943, executed by the defendant, to be registered by the Sub-Registrar of Razole. The suit has been dismissed by the lower appellate Court on the ground :

" that the defendant did not execute the deed understanding it to be a sale deed and that his finger impression was taken by representing that he has to attest a document, *i.e.*, sale deed executed by his brother in favour of plaintiff."

The defendant, who is an illiterate person unable to sign his name, did not, in his written statement, dispute the fact that the thumb impression appearing on the two pages of the sale deed, Ex. P-1, was this thumb impression. He stated, however, that his brother obtained his thumb impression on Ex. P-1 on a fraudulent misrepresentation that his thumb mark was taken as an attestor to the sale deed executed by the brother and not as a vendor under Ex. P-1. The contention of Mr. V. Parthasarathi, the learned advocate for the appellant in this second appeal,

* Second Appeal No. 1925 of 1946. 26th January, 1949.

is that the lower appellate Court has erred in dismissing the suit on a mistaken view of the powers of a Court trying a suit under section 77 of the Registration Act. I am of opinion that this contention is sound and must prevail. In a suit under section 77 of the Registration Act, the Civil Court has got to do only what the registering officer should and could have done under the powers conferred on him by the Registration Act. The Court should be guided by the same considerations which guide the Registrar in registering or refusing to register a document presented to him. Under section 35 of the Registration Act, a Registrar is bound to register a document if the ostensible executant admits his signature to the document. This is the admission of execution referred to in section 35 of the Registration Act. If a person admitting his signature or thumb impression proves that he signed it under a misapprehension believing it to be a different kind of document from what it was or that he was induced to sign the document as a result of a deception practised upon him and that he was therefore unaware of the real nature of the document, it is a ground for setting aside the document or having it adjudged void and inoperative in an ordinary suit in a Civil Court. But neither the Registrar nor the Court in a suit under section 77 of the Registration Act has jurisdiction to enter into these questions. In a suit under section 77, the Court is concerned with two questions : (*a*) whether the document has been executed, that is to say, whether the document bears the genuine signature of the executant or his thumb impression if he is unable to sign his name ; and (*b*) whether the requirements of the law for registering documents have been complied with. If these points are decided in favour of the plaintiff, then registration ought to be directed. The Court cannot, in such a suit, go into such defence as whether the document was obtained by fraud or misrepresentation or even a defence that the mind of the executant did not accompany his signature (vide *Ramaswami Chettiar* v. *Srinivasa Pillai*[1]). Section 77 provides a statutory right of a suit of a very limited scope. A great deal of evidence recorded and relied upon by the Courts below is beside the point in a suit of this sort. In this view, I hold that the lower appellate Court, on its own findings of fact, should have directed the registration of the document. I therefore set aside the decrees of the Courts below and pass a decree in favour of the plaintiff with costs throughout.

Having regard to the fact that the document, Ex. P-1, has to be presented for registration within 30 days of the decree of this Court, I direct that the document Ex. P-1 be returned to the appellant-plaintiff within a week from the date of this judgment.

V.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO AND MR. JUSTICE PANCHAPAKESA AYYAR.

Turlapaty Rajeswara Rao and another .. *Appellants**

v.

Kamarajugadda Rangamma and others .. *Respondents.*

Hindu Law—Will—Construction—Provision that "my wife alone shall be kartha *(owner) without having powers of gift, exchange and sale. After her lifetime, my nephews shall enjoy the property"—Provision for payment of two-thirds of income to nephews in case of disputes between wife and nephews—Nature of interests conferred on wife and the nephews.*

A will provided *inter alia* " in respect of all the remaining moveable and immoveable properties belonging to me and in respect of the liabilities and assets, my wife alone shall be the *kartha* (owner) without having powers of gift, exchange and sale. After her lifetime, my nephews, (*X* and *Y*) shall become the *karthas* of the said moveable and immoveable property and of the liabilities and assets and they have been empowered to enjoy my property with such rights and interest as I have been enjoying, *i.e.*, with powers of disposition thereto by way of gift, sale, etc., and from son to grandsn and so on in succession."

" Should any misunderstandings arise between my wife and my nephews my wife alone shall retain the said property in her possession during her lifetime, without having the powers of gift,

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1. (1933) 66 M.L.J. 424.

* Appeal No. 582 of 1945. 8th February, 1949.

exchange and sale, shall collect the income realised therefrom and shall give two shares to the nephews and enjoy one share for herself. After her lifetime, the entire moveable and immoveable property shall pass to my nephews."

By an earlier clause some lands were given absolutely to the wife. On a construction of the will

Held: The wife got a life estate in the properties and the nephews got a vested interest in the same though their right to possession was postponed till after her death.

Case-law reviewed.

The fundamental rule of construction of a will is that the intention of the testator should be gathered from a reading of the will as a whole.

Appeal against the decree of the Court of the Subordinate Judge of Vijayavada, in O. S. No. 48 of 1944.

A. Krishnaswami Aiyar and *N. Rajagopala Aiyangar* for Appellants.

P. Somasundaram, K. Kameswara Rao, V. Srinivasamurthi and *C. V. Narasimha Rao* for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal against the decree and judgment of the Subordinate Judge of Bezwada dismissing the suit O. S. No. 48 of 1944, filed by the appellants for a declaration of title and for possession of the suit properties. The relationship of the parties can be seen from the following pedigree :

Basavayya
- Sangayya
  - China Veerabadra Rao
    - Rajeswara Rao (1st Plaintiff)
    - Somasundara Rao (2nd Plaintiff)
- Rajalingam
  - Pedda Veerabadra Rao (Testator) D. 1918=Syamalamba D. 17—1—1944
  - Rangamma
    - Basaveswara Rao D. 1919=Rangamma (1st Defendant)
    - Mrutyunjaya (D. 1927-28) =Lakshminarasamma (2nd Defendant)
      - Ranganayakamma (3rd Defendant)

Pedda Veerabadra Rao died on 9th March, 1918. Before his death, on 5th December, 1917, he executed a will, Ex. P-1, disposing of his properties in the manner mentioned in the document. After his death Syamalamba was in possession and enjoyment of the plaint schedule properties till her death on 17th January, 1944. Basaveswara and Mrutyunjaya who were the sister's sons of the testator and in whose favour certain bequests were made, predeceased the widow Syamalamba. The plaintiffs, who are the testator's paternal uncle's grandsons, filed the suit for recovery of the plaint schedule properties claiming to be the next reversioners to the estate of Veerabadra Rao. First defendant is the wife of Basaveswara, one of the nephews of the testator. Second defendant is the widow of Mrutyunjaya, another nephew of the testator. Third defendant is the daughter of the second defendant. The other defendants are alienees. Defendants 1 to 3 contested the suit on the ground that under the will of Veerabadra Rao, Basaveswara and Mrutyunjaya got a vested right in the suit properties and though they predeceased the widow, they are entitled to the suit properties as heirs of the testator's nephews. The learned Subordinate Judge accepted the case of the defendants and dismissed the suit. The plaintiffs have preferred the above appeal against the judgment and decree of the Subordinate Judge.

The only question that arises in this appeal is therefore one of the construction of the will. If, under the will, Basaveswara and Mrutyunjaya got a vested interest, the suit would be liable to be dismissed. If, on the other hand, what

Basaveswara and Mrutyunjaya got under the will was only a contingent interest in the suit properties, as they predeceased the widow, the plaintiffs would be entitled to succeed. As the decision in the appeal turns upon the construction of the will, it is as well that we extract the relevant portions of the will. The testator after giving the reasons for his executing the will, and also after dedicating certain properties to the temple, proceeded to dispose of his other properties in the following manner :

" 5. The jewels which my wife Thurlapati Syamalamba has been wearing and six acres of land out of the land which fell to my share in Mounje Adivavulapati Vasathi agraharam shall permanently pass to my wife with powers of disposition thereto by way of gift, exchange and sale.

6. Excluding the property which has been set apart to be conveyed to the aforesaid Sri Swamivaru and to my wife, in respect of all the remaining moveable and immoveable properties belonging to me and in respect of the liabilities and assets, my wife alone shall be the *kartha* (owner) without having powers of gift, exchange and sale. After her lifetime, my nephews, namely, Kamarajugadda Basaveswara Sarma and Mrutyunjaya Sarma shall become the *karthas* of the said moveable and immoveable property and of the liabilities and assets and they have been hereby empowered to enjoy my property with such rights and interest as I have been enjoying, *i.e.*, with powers of disposition thereto by way of gift, sale, etc., and from son to grandson and so on in succession.

7. Should any misunderstandings arise between my wife and my nephews, my wife alone shall retain the said property in her possession during her lifetime, without having the powers of gift, exchange and sale, shall collect the income realised therefrom and shall give two shares to the nephews and enjoy one share for herself. After her lifetime, the entire moveable and immoveable property shall pass to my nephews.

8. After my lifetime, my wife, and after the lifetime of my wife, my nephews and their sons, grandsons and so on in succession shall be the dharmakarthas of Sri Raja Rajeswara Swami Varu and these individuals alone shall give the income realised therein for the *nitya neivedya dheeparathanas* and to the *archakas*.

9. My nephews shall perform my obsequies and the obsequies of my wife. As they are my father's daughter's sons and my sister's sons, I have no other persons in the world than these to whom I can show affection. I have, therefore, wholeheartedly executed this will in my own hand and without going against my conscience, providing that the moveable and immoveable properties belonging to me should, as mentioned above, pass to my sister's sons."

Before we consider the various clauses of the will, it will be convenient at this stage to state the legal principles governing the construction of wills. The fundamental rule of construction is that the intention of the testator should be gathered from a reading of the will as a whole. Decided cases lay down various rules which afford valuable guides to find out the intention of the testator.

(1) In *Duffield* v. *Duffield*[1], an important rule is stated which has been followed and adopted in later decisions. The following passage may usefully be cited :

" It has long been established rule . . . . in construing devises, that all estates are to be holden to be vested, except estates in the devise of which a condition precedent to the vesting is so clearly expressed that the Courts cannot treat them as vested without deciding in direct opposition to the terms of the will. If there be the least doubt, advantage is to be taken of the circumstances occasioning that doubt ; and what seems to make a condition is holden to have only the effect of postponing the right of possession."

(2) Another rule of law is stated by Pandrang Row, J., in *Viswanadham* v. *Anjaneyalu*[2]. The learned Judge says :

" The general rule of law is very clear, namely, that the mere fact that the possession of the estate bequeathed is to be given at a future time is not by itself a reason for coming to the conclusion that the estate was not to be vested at the time of the testator's death."

(3) " An estate or interest is vested, as distinguished from contingent, either when enjoyment of it is presently conferred or when its enjoyment is postponed the time of enjoyment will certainly come to pass ; in other words, an estate or interest is vested when there is an immediate right of present enjoyment or a present right of future enjoyment. An estate of interest is contingent if the right of enjoyment is made to depend upon some event or condition which may or may not happen or be performed, or if in the case of a gift to take effect in future, it cannot be ascertained in the meantime whether there will be anyone

1. (1829) 4 E.R. 1334 at page 1358. 2. A.I.R. 1935 Mad. 865.

to take the gift; in other words, an estate or interest is contingent when the right of enjoyment is to accrue, on an event which is dubious or uncertain. And as regards certainty, the law does not regard as uncertain the event of a person attaining a given age or of the death of somebody beyond which his enjoyment is postponed, because if he lives long enough, the event is sure to happen "—*Sashi Kantha* v. *Promode Chandra*[1].

(4) The presence of a gift over, which is not a mere gift by way of defeasance, is generally held to be an indication that the prior gift was only a limited interest—*Pavani Subbamma* v. *Anumala Rama Naidu*[2].

(5) It is possible to create a woman's estate by a will or by a grant. There is conflict of decisions on the question whether it is open to a stranger to create what would strictly be a Hindu widow's estate in a property by a gift or devises—*Maharaja of Kolhapur* v. *Sundaram Aiyar*[3]. The question whether a vested remainder can subsist side by side with a limited interest analogous to a Hindu woman's estate is also not free from doubt—*Pavani Subbamma* v. *Anumala Rama Naidu*[2] and *Ratna Chetti* v. *Narayanasmami Chettiar*[4].

Having regard to the aforesaid principles, we shall now proceed to consider the relevant provisions of the will to ascertain the intention of the testator. Reading the will as a whole, we have no hesitation in holding that under the will the testator intended to confer a vested interest on his nephews. The testator had no children and he was very much attached to his nephews. By previous clauses he had dedicated some property to the temple and also conferred an absolute interest on his wife on some other properties. He intended that his wife and nephews should get on amicably during her lifetime and thereafter the entire properties should go to the nephews absolutely. He was also anxious that they should perform the obsequies of himself and his wife. To effectuate this intention, he gave a life estate to his wife in the suit properties and stated that after her death, the properties should go to his nephews. He also made a provision that, in case there were disputes during the lifetime of the widow, she should make over two-thirds of the income to the nephews. These objects could not be carried out if she was given an absolute right or even a widow's interest in the properties and therefore he did not give her any right of alienation.

Mr. Rajagopala Aiyangar, the learned counsel for the appellants, raised two points before us. The first is that under the will, the testator conferred a woman's estate on his wife and therefore the will could only confer a contingent interest on his nephews. He relied upon the word "kartha" and the words "*asthikinni dhanarunamulakunnu*" which according to him, point to only one conclusion that the testator intended only a woman's estate to be conferred on his widow. In our view, the use of the words "*asthikinni dhanarunamulakunnu*" is only a compendious mode of describing the entire properties of the testator. We cannot also say that the use of the word "*kartha*" in the context of this will can only mean an absolute estate or a woman's estate. Having regard to the other clauses of the will, and the context in which it was used, it only meant to describe a life estate. The words prohibiting alienation which really qualify the word "*kartha*" bring out the intention of the testator that his widow should take a life estate without any powers of alienation. The 7th clause of the will also lends support to the aforesaid construction. It was intended to provide for contingency, namely, disputes between the widow and his nephews in which case, his wife should be in possession of the properties during the lifetime but should pay 2/3rds of the income to his nephews. It is impossible to hold that this clause confers a widow's estate on the wife. If so it would lead to anomalous results if the 6th clause is construed to confer a widow's estate and the 7th a life estate. If so construed, the result would be that she could alienate away the property for necessity if there were

1. (1931) I.L.R. 59 Cal. 859 at 878 : A.I.R. 1932 Cal. 600 at 609.
2. (1937) 1 M.L.J. 268.
3. (1924) I.L.R. 48 Mad. 1 at 116 and 119
4. (1914) 26 M.L.J. 616.

no quarrels, but she would have no power to alienate the properties if there were quarrels *inter se*. The construction suggested by the learned counsel would also throw the nephews on the mercy of the widow which was never the intention of the testator, and, if accepted, would be in conflict with the paramount intention of the testator to benefit his nephews ultimately. We therefore hold that under the will, the testator did not confer a woman's estate on his wife. In this view, it is not necessary to consider the other question whether a vested interest can subsist side by side with a woman's estate.

The learned counsel for the appellants next argued that, even so, the interest that the nephews got under the will was only a contingent interest, contingent on their surviving the widow. Emphasis was laid on three words, "after the testator's wife," "*kartha*" and "authorised." The argument was that the nephews, the *karthas*, were authorised to enjoy the property only after her death. The learned counsel also relied upon the fact that the testator directed his nephews to perform the funeral ceremonies of his wife which also, according to him, indicated that the testator expected the nephews to survive the widow. The argument advanced is rather attractive, but we are unable to accept the same having regard to the terms of the entire will and the principles extracted above. The learned counsel relied upon the decision in *Peria Nayaki Ammal* v. *Rathnavelu Mudaliar*[1]. Ramesam, J., in that case relied upon the words "after these" as indicating that the testator intended a contingent interest, not a vested interest. The document in that case is not similar in terms and, in our view, that decision cannot afford any help in deciding the present case. If the user of the word "after" is conclusive, of the intention of the testator, the decision of Pandrang Row, J., in *Viswanadhan* v. *Anjaneyulu*[2] that of Madhavan Nair, J., in *Narayana Aiyar* v. *Subbaraya Aiyar*[3] and Horwill, J., in *Subramania Chettiar* v. *Lakshmanan Chettiar*[4] must all be wrong, as in all those cases, the subsequent interest was preceded by the word "after". In our view, the adverb "after" and similar words do not impose any condition, but merely express the time when the interest shall take effect in possession. Again, clause 7 which comes into play on the happening of a contingency, namely, difference between the widow on the one side and the nephews on the other, clearly indicates that the intention of the testator was only to give a vested interest to his nephews. We cannot construe clause 6 in a different manner. We therefore hold that under the will, the wife got a life estate in the suit properties and the nephews got a vested interest in the same, though their right to possession was postponed till after her death. If so construed, the plaintiffs' suit was liable to be dismissed and rightly dismissed by the lower Court.

The appeal fails and is dismissed with costs of the contesting respondents. Vakil's fee one set.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

Thayyal and another .. *Petitioners**

v.

Baggyathammal and another .. *Respondents.*

Civil Procedure Code (V of 1908), Order 13, rule 1 and Civil Rules of Practice (Madras), rule 62—Refusa to excuse delay in filing some of the documents and excusing delay as to documents regarding which there was n opposition by the other party—Arbitrary exercise of discretion—Revision.

Where an application is made to excuse delay in filing a number of documents, the Judge canno arbitrarily condone the delay as to documents for which there was no opposition and refuse to excuse the delay as to the other documents where there is no ground for any real discrimination between the items admitted and the items excluded. In such a case it cannot be said that the discri-

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1. (1924) 47 M.L.J. 310.
2. A.I.R. 1935 Mad. 865.
3. A.I.R. 1929 Mad 32.
4. (1940) 1 M.L.J. 817.

* C.R.P. No. 1751 of 1948. 18th February, 1949.

mination was made in the exercise of judicial discretion and is liable to be interfered with in revision, though ordinarily, an order refusing to condone the delay in filing a document is not one which is interfered with in revision.

It is usual to apply rule 62 of the Civil Rules of Practice (Madras) with reasonable laxity and give parties time to get certified copies of official documents in view of the possibility of delay.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Court, West Tanjore at Tanjore, dated 2nd December, 1948, in S. A. No. 333 of 1948 in O. S. No. 6 of 1948.

K. V. Ramachandra Aiyar for Petitioners.

R. Rajagopala Aiyangar for Respondents.

The Court delivered the following

JUDGMENT.—The petitioners are defendants 1 and 2 in O. S. No. 6 of 1948 on the file of the District Court, West Tanjore. They seek to revise the order of the District Judge on an application they filed to excuse delay in filing 19 documents. The learned District Judge excused the delay in the case of 11 documents as regards which there was no opposition from the plaintiff; but he declined to excuse the delay in the case of 8 documents, namely, Nos. 12 to 19 on the list. His order is a very brief one and reads as follows :

"The counter-petitioner does not oppose so far as items 1 to 11 are concerned. I have heard the pleader for the petitioner. I do not consider that the petitioners have made out sufficient grounds for the admission of documents at such a late stage. I admit items 1 to 11 and dismiss the petition for the rest."

The relevant facts are these : Issues were framed on 15th September, 1948, and time was given for the filing of documents till 18th October, 1948. This was done under rule 62 of the Civil Rules of Practice read with Order 13, rule 1 which ordinarily requires the parties to produce all their documentary evidence at the first hearing of the suit. Time was extended till 2nd November, 1948. The present application was filed on 29th November, 1948, 27 days after the expiry of the time fixed. Ordinarily, an order refusing to condone the delay in filing a document is not one which is interfered with in revision.

Mr. Ramachandra Aiyar for the petitioners contends however that the lower Court has adopted an arbitrary selection made by the first respondent as regards what documents should be admitted and what documents should be excluded. He suggests that documents which militate against the plaintiff's case are being objected to and that there is no real differentiation in legal principle which is apparent from the list of documents filed. Mr. Rajagopala Aiyangar for the respondent urges that there was no opposition only to public documents into which category most of the items 1 to 11 fall. I have perused the list of documents and there are certainly some documents amongst those admitted which do not fall into this category. Amongst the documents excluded are also some certified copies. One general reason was given in the affidavit in support of the application to the effect that some of these documents were found in a search of old papers and also time was taken to obtain certified copies. I am quite unable to see any ground for any discrimination between the items admitted and the items excluded. The learned District Judge should not have merely condoned the delay as regards the documents to which there was no opposition, but should have given his attention, before excluding the other documents altogether, to their real nature. It is difficult to hold in the circumstances that the differentiation was made in the exercise of judicial discretion, the order exposing itself to the criticism of a rather arbitrary selection made by the respondent and adopted by the learned District Judge. It may be that one or more of the documents excluded may be found to be very material to the petitioner's case.

In *Gopika Raman Roy* v. *Atal Singh*[1], their Lordships of the Privy Council considered the rule of exclusion of documentary evidence under Order 13 (1)

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1. (1929) 56 M.L.J. 562 : L.R. 56 I.A. 119 : I.L.R. 56 Cal. 1003 (P.C.).

of the Civil Procedure Code observing that it only comes into operation when the documents on which the parties rely should have been, but were not produced at the first hearing. In the present case the affidavit gives reasons why the documents could not have been produced at the first hearing. Their Lordships also made the following observation :

"Further as has been held in India, even where the rules of exclusion apply and the documents cannot be filed without the leave of the Court, that leave should not ordinarily be refused where the documents are official records of undoubted authenticity which may assist the Court to decide rightly the issues before it."

In the matter of certified copies of official documents it is usual to apply rule 62 with reasonable laxity and give parties time to get these copies in view of the possibility of delay. In this case the delay has not been very serious, only 27 days. I do not think it is necessary to remand the application to the lower Court for a considered order as regards the grounds of its differentiation between documents 1 to 11 and documents 12 to 19. I direct that the delay in filing all these documents be condoned. All the documents may be admitted in evidence subject to proof and relevancy.

The revision petition is allowed with costs.

K.S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Koyithodi Amikutty Umma .. *Appellant**

v.

Viruthiyam Parambath Ramochen Nedungadi and another .. *Respondents.*

Civil Procedure Code (V of 1908), section 39 (1)—Person entitled to restitution under a decree because of the variation of the decree owing to its being scaled down under Madras Act IV of 1938—Right to have the decree transferred to another Court for execution.

A defendant entitled to recover costs from the plaintiff in a suit which is dismissed will be a "decree-holder" and can get the decree transferred to another Court to recover his costs. So too, a person entitled to restitution (under a decree) by a variation of the decree owing to the scaling down under the Madras Agriculturists' Relief Act, can get it transferred to another Court for execution as there is an order for restitution capable of being executed.

Appeal against the order of the Court of the Subordinate Judge, South Malabar, at Calicut, dated 25th February, 1946, in A.S. No. 32 of 1946, preferred against the order of the Court of the District Munsiff, Calicut, dated 28th December, 1944 in E.P. No. 1968 of 1944 (in O.S. No. 256 of 1937, District Munsiff Court, Parappanangudi).

B. Pocker and *P. A. Quadir Meeran* for Appellant.

K. Kuttikrishna Menon (Government Pleader) and *V. Balakrishna Eradi* for Respondents.

The Court delivered the following

JUDGMENT.—There are two points for determination in this second appeal. The first is whether the lower appellate Court was right in holding that the petitioner, conceding that he is entitled to restitution of any amount owing to the alleged variation of the decree in O.S. No. 256 of 1937 could get the decree transferred from the Parappanangudi District Munsiff Court, which passed the decree, to the District Munsiff's Court, Calicut, for getting such restitution. The second is whether in fact, the decree in O.S. No. 256 of 1937 against the appellant was varied, and he was entitled to restitution of the original decree amount which he had deposited. The first is a question of law, and the other is a mixed question of law and fact.

By consent of both sides the question of law has been argued here. I am unable to agree with the finding of the lower appellate Court that a person entitled to

* A. A. A. O. No. 32 of 1947. 19th February, 1949.

restitution, by virtue of a variation in the decree amount, due to scaling down under the Madras Agriculturists' Relief Act, will not be entitled to get the decree transferred to another Court for execution under section 39 of the Civil Procedure Code. The law has always proceeded on the footing that any person entitled to recover any amount under a decree will be in the position of a decree-holder to that extent. "Decree-holder" has been defined in section 2 (3) of the Civil Procedure Code

"as any person in whose favour a decree has been passed or an order capable of execution has been made."

So, in my opinion, a defendant entitled to recover costs from the plaintiff in a suit which is dismissed will be a "decree-holder" and can get the decree transferred to another Court to recover his costs. So too, a person entitled to restitution (under a decree) by a variation of the decree owing to the scaling down under the Madras Agriculturists' Relief Act, as there is an order for restitution capable of being executed. Section 39 (1), Civil Procedure Code, will, in my opinion, therefore, enable such a person also to get a transfer of the decree to another Court for executing it and getting restitution. Mr. Kuttikrishna Menon, the learned counsel for the respondents, was unable to convince me that in such a case a person entitled to restitution cannot get the decree transferred to another Court. I have not also been referred by him to any ruling which prohibits such a transfer, and, as stated before, unless such a transfer of the decree is allowed, many persons granted rights to recover amounts under decrees can never recover them. Public policy also, is, therefore, in consonance with the above view.

Regarding the second point, the parties are not agreed. Mr. Kutikrishna Menon, for the respondents, says that there was in fact no variation of the decree in O.S. No. 256 of 1937 passed against the appellant, whereas the learned counsel for the appellant urged that there was a variation of a fundamental nature, namely, the holding by the District Munsiff, Parappanangudi, on a remand by the District Court, Calicut, that nothing was due under the decree owing to the operation of the Madras Agriculturists' Relief Act. Of course, the learned Government Pleader urged that, as the decree itself was passed after the passing of the Madras Agriculturists' Relief Act, there could not have been any scaling down, under that Act, of the amount under such a decree. But, as urged by the learned counsel for the appellant, if the District Munsiff, Parappanangudi, on remand by the District Court of South Malabar, varied the decree, and held that nothing was due under it, by applying the provisions of the Madras Agriculturists' Relief Act, and that decree became *final*, however erroneous in its origin, by not being appealed against, there will be a claim for restitution. I find the following remarks in the judgment of the District Munsiff, Calicut.

"The appellate Court held that the mortgage debt was one which could be scaled down under the provisions of the Act and remanded the petition for ascertaining the amount due for scaling down. Subsequently, the District Munsiff's Court, Parappanangudi, has held that the entire debt has been discharged by payment of more than twice the principal amount including the payment of the arrears of rent due under the decree in question."

These remarks show that the question of restitution has to be enquired into.

I, therefore, set aside the order of the lower appellate Court and remand the appeal to the lower appellate Court for fresh disposal after finding out whether the appellant is entitled to any restitution on the facts. In the circumstances, the costs in this second appeal will abide and be provided for by the lower appellate Court when disposing of the appeal afresh.

K.S. *Order set aside and appeal remanded.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL, MR. JUSTICE GOVINDA MENON AND MR. JUSTICE BALAKRISHNA AYYAR.

S. P. Thiruvengadasami Naidu .. *Petitioner**

v.

Municipal Health Officer, Karaikudi .. *Respondent.*

Madras District Municipalities Act (V of 1920), *section* 249—*Prosecution for running an oil mill after licence to do so had been refused—Court if can go into legality or otherwise of the refusal of licence.*

In a case where a person is prosecuted for carrying on an industry or trade for which a licence to do so has been refused, it is open to the Court to find out whether the order of the Statutory Body was made without jurisdiction; whether on the face of it the order is illegal or whether it is unreasonable, revolting or repugnant to conscience. But where the order is in the legitimate exercise of jurisdiction vested in the Statutory Body and passed *bona fide* after considering the evidence before it, even if the order is wrong on the merits, the Court cannot hold that it is wrong. It is not the function of the Court to substitute its judgment as an appellate authority for that of the Statutory Body. In cases where the party pleads that no licence is necessary, it is one of jurisdiction. But where the plea is that even though a licence is necessary it has been refused on the merits, the plea cannot be considered as one involving jurisdiction at all.

(Case-law discussed.)

The action of a Municipality in refusing the licence to run an oil mill on the ground that the premises are situated in a residential area cannot be said to be without jurisdiction. Further, where the party aggrieved has not availed himself of the remedy of filing a suit for injunction or resorting to one of the prerogative *writs* allowed by the law, it is not open to him to contend, when he is prosecuted for running an oil mill after a licence to run it has been refused, that the licence should have been given to him and that the order of the executive authority is wrong on the merits.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Additional District Magistrate of Devakottah, dated 3rd May, 1947, in C. A. No. 16 of 1947, preferred against the judgment of the Court of the Second Class Bench of Magistrates, Karaikudi, dated 3rd February, 1947, in S. T. Case No. 562 of 1946.

When the case came on for hearing in the first instance, the Court (*Govinda Menon, J.*) made the following

ORDER OF REFERENCE (25th March, 1948).—The questions raised in this case are of sufficient importance to be considered by a Bench and an authoritative pronouncement given thereon. The trend of the recent decisions, as seen from Criminal Appeal No. 415 of 1946 and *Commissioner, Dindigal Municipality* v. *Rajamani Iyer*[1] is to the effect that a Criminal Court cannot go into the question as to whether a licence was refused for improper reasons, whereas a long catena of cases, beginning with *Queen-Empress* v. *Veerammal*[2], followed in *Chairman, Municipal Council, Chidambaram* v. *Thirunarayana Iyengar*[3], strike a different note. On one side we have the decisions reported in *Chairman, Municipal Council, Chidambaram* v. *Thirunarayana Iyengar*[3], *Sesha Prabhu*, In re[4], *Ayyar and Co.* v. *Srinivasalu*[5] and other decisions holding that the Courts can go into the question of propriety, and on the other, the recent decision abovenamed, as well as the observations of Oldfield, J., in *Taluk Board, Bandar* v. *Zamindar of Chellapalli*[6], following Farwell, L.J. I therefore refer this case for decision by a Bench. The papers will be placed before my Lord the Chief Justice for orders.

When the matter came up for hearing before a Bench, the Court (*Govindarajachari and Govinda Menon, JJ.*), made the following Order of Reference to a Full Bench.

The Order of the Court was made by

Govindarajachari, J. (14th April, 1948).—In the order of reference to a Division Bench made by one of us have been quoted several of the decisions bearing on the question which arises in this case.

* Crl.R.C. No. 811 of 1947.
* (Crl.R.P. No. 704 of 1947).

24th February, 1949.

1. (1941) M.W.N. 1073.
2. (1892) I.L.R. 16 Mad. 230.
3. (1927) 55 M.L.J. 566 : I.L.R. 51 Mad. 876.
4. (1921) 42 M.L.J. 149.
5. (1941) 2 M.L.J. 145 : I.L.R. (1942) Mad. 73.
6. (1920) 40 M.L.J. 91 : I.L.R. 44 Mad. 156.

namely, whether a Criminal Court cannot go into the legality of an order refusing a licence under the Madras District Municipalities Act. Besides these decisions, there is the decision of a Full Bench in *Muthu Balu Chettiar* v. *The Chairman, Madura Municipality*[1], in which it has been stated that it is not within the province of a Criminal Court to determine whether the rules framed under the Madras District Municipalities Act had been validly framed. The exact effect of that decision may have to be considered though we are told that it has not been referred to, or, if referred to, not followed, in later decisions.

As the matter is of great importance and may frequently arise for decision, we consider that it is desirable that this case should be posted before a Full Bench of three, if not of five, Judges in accord ance with the directions of my Lord the Chief Justice.

K. Viraswami for Petitioner.

K. M. Murugappa Chettiar for Respondent.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the Crown.

The Judgment of the Full Bench was delivered by

Govinda Menon, J.—This case came to be heard before this Full Bench on a reference made by one of us (Govinda Menon, J.) and Govindarajachari, J., as the matter is of great importance and the authorities on the point are conflicting.

The facts are simple and do not admit of any doubt. The petitioner was prosecuted before the Court of the Second Class Bench of Magistrates, Karaikudi, for an offence under section 249 read with section 313 of the District Municipalities Act, in that he, on 14th August, 1946, was running a rotary oil engine without a licence from the Karaikudi Municipality and despite the refusal by the said Municipality to issue a licence for the year 1946-47. A particular area within the confines of the Karaikudi Municipality had been declared a "residential area" under section 89 (1) of the Madras Public Health Act and the same was published in the Ramnad District Gazette, on 24th March, 1943. The result of such a notification is that in that particular area the running of an oil engine even though it was existing before was prohibited unless a licence for that purpose was given by the Municipality. Under section 92 of the Madras Public Health Act (III of 1939) the consequences of such a notification under section 89 are: (1) that the construction or establishment of any new factory, workshop or workplace, or the carrying on of any new offensive trade in the areas specified in the notification shall be absolutely prohibited; and (2) that in the case of any factory, workshop or workplace in existence at the time when the notification came into force or of any offensive trade in existence at such a time, the restrictions, limitations and conditions, if any, specified in the notification, shall be observed in the areas so notified. The oil engine in question was in existence in this area long before it was notified as a residential area and therefore it is that sub-clause (*b*) of section 92 is attracted. On 25th February, 1946, the petitioner applied to the Municipality for the issue of a licence for running the oil engine during the year 1946-47 and on 8th March, 1946, orders were passed refusing the licence for the year aforesaid and the said order was served on the petitioner on 9th March, 1946, *vide* Ex. A-2. The grounds for the refusal of the licence are:

1. The premises were untidy and there were jut holes and broken floorin g;
2. Beds and tins were stored in the premises; and
3. The premises were situated in the residential area.

The petitioner again applied for modification of the order and for renewing the licence for running oil mills by machinery of 25 H.-P. oil engine. This again was refused by order dated 22nd March, 1946, by which the Municipal Health Officer stated that with reference to the petitioner's application for licence and the office order served on him on 9th March, 1946, the licence was refused for running four oil mills by machinery of 25 H.-P. oil engine. Even though the permission to run the oil engine was refused, the petitioner continued to run it with the result

1. (1927) 53 M.L.J. 633: I.L.R. 51 Mad. 122 (F.B.).

that the prosecution was launched under the sections mentioned above. The petitioner's defence in the Court of First Instance was that the order refusing the licence was wrong and since he had applied under section 321 (11) of the District Municipalities Act which provides that if a Municipal Council accepted the pre-payment of the fee for a licence along with an application and the refusal to issue the licence was not communicated to the applicant within 30 days after the receipt by the authority of the application, then the application shall be deemed to have been allowed for the year mentioned in the application and subject to the law, rules, by-laws, etc. The petitioner contended that the refusal of the licence was wrong and the Municipal authorities should have granted the permission and therefore since no valid refusal was communicated to him within 30 days after the receipt of the application by the authority, he was entitled to run the oil engine. The trial Court held that the petitioner had not proved by oral or documentary evidence that he took out a licence and since he ran the oil engine after the licence to run it had been refused he was guilty of the offence and a fine of Rs. 20 or in default simple imprisonment for two days was imposed on him. On appeal, even though the Additional District Magistrate of Devakottai referred to a decision of Devadoss, J., in *Chairman, Municipal Council, Chidambaram* v. *Thirunarayana Iyengar*[1], he was of the view that the executive authority had power to refuse to renew the licence and that as all the reasons for refusal to renew the licence were not known and since it was legal and within the powers of the authority to refuse the renewal, he confirmed the conviction and sentence.

The petitioner's contention both before the Division Bench and before us is the same, *viz.*, that the Criminal Court before it imposes a punishment for an offence like the one in question, should go into the merits of the reasons for the refusal and find out whether on the facts and circumstances, the Municipal Council was justified in refusing the licence. In other words, the petitioner's contention is that the Criminal Court has power to find out whether the Municipal authority acted rightly or wrongly in refusing the licence, thereby constituting the Criminal Court as a sort of appellate authority in finding out the correctness of the order before the accused person could be found guilty. The learned Public Prosecutor on the other hand contends that it is not open to the Criminal Court to re-open the whole matter in order to ascertain whether the refusal of the licence was justified on the material facts before the Municipal authority. This question as well as allied and similar subjects had been considered in this Court on many previous occasions and on account of the difference of view among the various Division Benches and single Judges of this Court, the matter has now to be considered in detail.

As a prelude to the consideration of the case-law on this topic, it is advisable to notice the various provisions of the Madras District Municipalities Act (V of 1920) and the Madras Public Health Act (III of 1939) which have a bearing on the subject at hand. Chapter XII of Act V of 1920 is headed " Licence and Fees " and section 249 is the initial section under a sub-heading " Industries and Factories." This section lays down that a Municipal Council may publish a notification in the district Gazette . . . . . that no place within municipal limits . . . . . shall be used for any one or more of the purposes specified in Schedule V without the licence of the executive authority and except in accordance with the conditions specified therein. Schedule V mentions the purposes for which the premises may not be used without a licence under section 249 ; and purpose (g) refers to " making soap, dyeing, *boiling or pressing* oil, burning bricks, tiles, pottery, or lime." Section 249, sub-section (3) states that the executive authority may by an order and under such restrictions and regulations as he thinks fit, grant or refuse to grant such licence. Sub-section (4) mentions the duration of the licence and sub-section (5) states that an application for renewal of such licence shall be made not less than thirty days before the end of every year. I have already referred to sub-section (11) of section 321 to the effect that if within 30 days of the acceptance

1. (1927) 55 M.L.J. 566 : I.L.R 51 Mad. 876.

of the licence fee the municipal authority does not refuse the licence, the applicant shall proceed as if the licence had been granted. Section 321 (4) lays down that every order of a municipal authority refusing a licence or permission shall be in writing and shall state the grounds on which it proceeds. The order of the executive authority is not final, because section 320 provides an appeal to the Municipal Council from any order of the executive authority granting or refusing to grant a licence or permission. The executive authority is defined in section 3 (8-C) as the Commissioner of the Municipality, or if there is no Commissioner in charge, the Chairman. Reading this along with section 16 of the Madras Public Health Act it is seen that the Health Officer of a local authority shall perform such of the functions, and discharge such of the duties, of its executive authority in regard to public health matters under any of the provisions applicable to such local authority contained in the District Municipalities Act, subject to such appeal and control as the Government may, by general or special order, determine. Therefore the Municipal Health Officer in this case is the proper executive authority under the District Municipalities Act to grant or refuse to grant the licence. Another provision of the District Municipalities Act to which reference has to be made is section 313 (1) (*a*) which is to the effect that whoever contravenes any provision of any of the sections or rules specified in the first column of Schedule VII . . . . . . shall on conviction be punished . . . . . . Schedule VII provides that in contravening section 249 (1) of the Act by using a place for any of the purposes specified in schedule V without a licence or contrary to a licence (boiling or pressing oil), the offender shall be punished with a fine of Rs. 100.

It is common ground that on the refusal of the executive authority, which in this case was the Municipal Helath Officer, to renew the licence, no appeal was preferred by the applicant (petitioner) to the Municipal Council as provided for in section 322 of the Act. What the petitioner did was to ignore the refusal of the licence on the ground that the action of the Health Officer was wrong and unjustified and to continue to run the oil engine as if no refusal of licence ever took place. What is now contended by his learned counsel is that the order of the Municipal Health Officer dated 8th February, 1946, refusing to renew the licence was an arbitrary exercise of power not referable to a proper appreciation of the facts and circumstances existing on the occasion and therefore it can be ignored. According to Mr. Veeraswami, the learned counsel for the petitioner, the executive authority was influenced by extraneous and irrelevant considerations and his refusal to renew the licence is a wrong exercise of the powers and as such amounted to the authority not functioning at all. He states that the authority being a public body ought to exercise the discretion in a judicial manner weighing the pros and cons properly and to come to a correct conclusion on the facts. If no such thing was done, then the order if the executive authority need not be taken note of and can be considered as *non est.* He further contends that on the authority of the decision in *A. E. Smith,* In re[1] it is not obligatory upon the petitioner to exhaust his remedy by means of an appeal before transgressing the order which according to him is wrong or illegal.

We have therefore to consider the limits of the power which a Criminal Court possesses when it is approached by a local body for punishing a person for acting in violation of a certain permission or licence either granted or refused by it. Before we discuss the conflicting decisions of this Court on the point, it is necessary to state briefly as we understood it the rules of practice and procedure a public or a quasi public body ought to conform to before refusing a licence or permission which it has power to grant or refuse. Though in India we have no bodies like the Licensing Justices as are existing in England, the functions of such bodies are similar to the functions of either the local, or municipal, or other statutory bodies created by legislative Acts in England. In *Sharp* v. *Wakefield*[2], Lord Halsbury, L.C., lays

1. (1923) 45 M.L.J. 731.
2. (1891) A.C. 173.

down the rules and canons to be observed by Licensing Justices in the following terms :

"An extensive power is confided to the justices in their capacity as justices to be exercised judicially ; and 'discretion' means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion.........It is to be, not arbitarary, vague, and fanciful, but legal and regular, and it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself........"

In the circumstances of that case the House of Lords held that the Licensing Justices were justified in exercising the discretion in refusing the renewal of the licence. The distinction between the Licencing Justices and Magistrates in England and the municipal or local bodies here is this : From the decision of the Licensing Justices, an application to quash the order lay to the Queen's Bench Division whose decision was subject to an appeal to the Court of Appeal and therefrom to the House of Lords. Therefore it is plain that in England the Licensing Justices figure as judicial functionaries and not as they do in this country ; and when their actions can be traced to judicial authority, an appellate court has necessarily to find out whether judicial actions were done according to law. Even so we are of opinion that even local, municipal, or other statutory bodies entrusted in India with the duty of granting or refusing licences or permits ought to function as Lord Halsbury, L.C., says, not arbitrarily, vaguely, or fancifully, but in a legal and regular manner. Whether they have functioned like that can be ascertained by the appellate authority, which in this case is the Municipal Council, and the decision of the Council on such appeal according to section 322 (2) of the District Municipalities Act shall be final. It is the function of the Municipal Council to correct, modify, or set aside, the order of its executive officer by using its appellate power just as the Licensing Magistrates or Justices in England can be corrected by the Divisional Court of the King's Bench and the Court of Appeal therefrom. The decision in *Sharp* v. *Wakefield*[1] referred to above on which the learned counsel for the petitioner placed reliance is a useful and helpul guide only where the appellate authority from the executive authority of the Municipality is approached to exercise its appellate powers. When a Criminal Court has to find out whether any person has contravened any provisions of the section or the rules specified in schedule V of the District Municipalities Act, it cannot scrutinise the order of the executive authority of the Municipality as if it is sitting as a Court of appeal over the Municipality.

We have now to notice the conflicting decisions of this Court. The trend of modern authority is to the effect that it is not competent for a Criminal Court, when a person is prosecuted for running a factory or doing an act, without a licence for which a licence is necessary, to find out whether the refusal of the licence was justified on the facts. In *Commissioner, Dindigul Municipality* v. *V. Rajamani Iyer*[2], Lakshmana Rao, J., was of opinion that when the executive authority of a Municipality declined to renew licence, it was not open to the Criminal Court to acquit the accused on the ground that the order of refusal is not valid. In that case the trial Court acquitted the accused of an offence under sections 249 and 313 of the Madras District Municipalities Act for running a coffee hotel and preparing and selling sweetmeats in unlicensed premises when his application for renewal had already been rejected. The reason given by the trial Court was that the executive authority had not applied his mind to the application for renewal and had not inspected the premises as he was bound to do to satisfy himself that they were really dirty so as to warrant the refusal to renew the licence. Therefore the refusal to renew was treated as invalid and the Court was justified in going into the validity or otherwise of the order. Lakshmana Rao, J., disagreed with the reasons given by the trial Court holding that it was not competent for a criminal Court under the circumstances to go into the question regarding the correctness or otherwise of the reasons for refusing to renew the licence. In *The Public Prosecutor* v. *Abdul*

1. (1891) A.C. 173. 2. (1941) M.W.N. 1073.

Hamid Rowther[1] our learned brother Yahya Ali, J., took the same view though he did not refer to the judgment of Lakshmana Rao, J. Relevant portions of Yahya Ali, J.,'s judgment are as follows :—

"The fact that the licence was refused and the mill was run after the expiry of the period of licence is not disputed. The Sub-Magistrate, however, took it upon himself to canvass the reasons which actuated the President of the Panchayat Board to refuse the licence. Clearly he was not entitled to do that. There are appellate authorities constituted under the statute itself, who are empowered to deal with that aspect of the matter."

On this reasoning, the order of acquittal was set aside. To practically the same effect is an earlier decision in *Krishnaswami. In re*[2]. In that case, Krishnan, J., was of the view that where an accused was convicted for having contravened section 166 (1) of the Local Boards Act, by having plied his motor car without a licence, after he had applied for the licence but the same was refused to him, and the order of refusal had also been communicated and it was contended that the President was actuated by personal malice and ill-feeling and hence the case should be treated as one under section 212 (11) of the Act in which no order had been passed, that the conviction was right even if the President was so actuated by any personal feelings and that the accused could only be entitled to claim damages on establishing that fact. A Criminal Court cannot treat the refusal of a licence as one under section 212 (11) of the Local Boards Act (equivalent to section 321 (11) of the District Municipalities Act) to the effect that the licence should be deemed to have been granted. In doing so, the learned Judge observed thus :

"We are not concerned at present with the question whether that order was properly passed or not. We have only to see if the provisions of law have been complied with. It is true clause 4 of section 212 requires the grounds to be stated, on which the order of the President is passed ; but the grounds have been stated by the President in his order. As held by the Bombay High Court, in a similar case, arising under the City of Bombay Municipal Act, the fact that the person authorised to grant or refuse the licence did not exercise his discretion reasonably in refusing to grant the licence is not one that could afford an answer to a charge that the accused had done something for which a licence was necessary and for which he had no licence. No authority has been brought to my notice to the contrary. I am therefore prepared to follow the view taken by the Bombay High Court ; and I hold that the conviction is correct."

None of the three cases above referred to makes mention of a large body of case law which have preceded them to the effect that it is open to a Criminal Court under certain circumstances to enquire into and find out the correctness or legality of the order of the executive authority of the local body refusing to grant a licence. On a reference to the decision in *Commissioner, Dindigul Municipality* v. *Rajamani Iyer*[3], it is seen that the trial Court in that case had referred to the decision of Devadoss, J., in *Chairman, Municipal Council, Chidambaram* v. *Thirunarayana Iyengar*[4] of which notice had already been taken of. But Lakshmana Rao, J., in his judgment does not even notice it. As early as 1892, a similar question arose before Muttusami Aiyar and Best, JJ., in *Queen Empress* v. *Veerammal*[5]. The facts of that case were as follows :—

A landowner in a Municipality, subject to the District Municipalities Act then in force, which did not differ in salient aspects regarding the question of licence from the present Act, applied for a building licence under section 180 of the Act then in force. The Municipality had resolved that a portion of the land was required for widening a public lane, and therefore ordered the applicant not to build upon that portion but to abstain from doing so and granted a licence for the building to be erected on the remaining portion. The landowner however erected a building even upon the interdicted portion of the land whereupon the Municipality, having received a refusal from the landowner to demolish the structure built upon the portion for which no licence was given, prosecuted the

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1. Crl. App. No. 415 of 1946.
2. (1924) 48 M.L.J. 132.
3. (1941) M.W.N. 1073.
4. (1927) 55 M.L.J. 566 : I.L.R. 51 Mad. 876.
5. (1892) I.L.R. 16 Mad. 230.

landowner under the relevant sections of the Act for building upon a piece of land without obtaining the licence. Muttusami Ayyar and Best, JJ., came to the conclusion that the prosecution was unjustified because the order of the Municipal Council was illegal and consequently no offence had been committed by the landowner. In the course of the judgment, Best, J., observed that the Municipal Council had no power conferred upon it of depriving an owner of the legitimate use of the land. Section 180 of the Act was intended only to ensure the safety and sanitation of the buildings to be newly erected and what the Council had to consider was the plan of the proposed building and the grounds on which the same can be disapproved. The learned Judge further observed that against the order of the Municipal Council there was no appeal allowed by the law. The Civil Courts were empowered only to award damages and cannot cancel the licence. In observing thus, the learned Judge was of opinion that the trial Court should have considered the legality of the order of the Municipal Council and declined to convict on his finding it to be illegal. Since the prosecution was not based on a legal order, the conviction was held unsustainable. This case does not go to the extent of holding that a Criminal Court can canvass the correctness of an order of the executive authority of the Municipal Council refusing to grant a licence where a licence had been applied for. On the very face of it, a Municipality cannot refuse a licence to build on a particular plot of land on the ground that that piece of land is required for a certain object without previously taking the necessary steps for acquiring the land for that purpose or otherwise. Therefore so far as this decision goes, the order which, the Municipality complained, was transgressed by the landowner was not only illegal but *ultra vires* the powers of the Municipality and without jurisdiction. The reason for coming to the conclusion that the refusal of the licence was illegal is stated to be that under section 180 of the Act the Municipal Council was not empowered to deprive the owners of the legitimate use of the land, because the section only meant to confer powers to ensure the safety and sanitation of buildings. The next case to which our attention was drawn is the judgment of O'Farrel and Michell, in *Subrahmanya Aiyar* v. *Asirvadam Pillai*[1]. In that case an application was made to the Municipal Council for a licence to erect a building with a thatched roof and the same was returned under a misapprehension that the land on which it was proposed to build was public road. Without heeding to this refusal the applicant erected a building on the land with a tiled roof. When he was prosecuted for failure to take out a licence before constructing the building, the answer was that the sanction had illegally been refused and that a roof having been mentioned in the application, the mere change in the material of the roof did not make the building substantially different from that applied for so as to constitute an offence under section 180 of the Act. The principle on which this decision was based turns out to be that the prohibition by the Municipal Council from having the building erected was due to the erroneous belief that the land sought to be built upon was public land. Therefore here also, the refusal was not on the merits of the facts contained in the application but on a thoroughly extraneous matter which had no bearing on the subject before he Council. The refusal to grant the licence was due to a mistake which went to the root of the matter and therefore the refusal was an act without jurisdiction and was void. The next case on which reliance was placed by the petitioner's counsel is reported in *V. Sesha Prabhu*, In re[2] and deals with section 249 of the present Act. There the accused was convicted and sentenced for the offence of storing and selling grain within the Cannanore Municipal limits without the licence of the Chairman under sections 249 and 338 (*b*) of Madras Act V of 1920 (the Act now under consideration), contrary to a notification issued in July, 1920, by the Municipal Council constituted under the repealed Act of 1884 purporting to act under section 249 of the new District Municipalities Act V of 1920, some $2\frac{1}{2}$ months before the new Act was put in force. The learned Judges held that the whole procedure was void *ab initio* and that no conviction can be sustained,

1. (1899) 9 M.L.J. 337. 2. (1921) 42 M.L.J. 149.

because of the notification issued by a council constituted under an Act which did not authorise it before the new Act which created the offence came into force. Both the learned Judges were of opinion that the action of the council in notifying some $2\frac{1}{2}$ months before the new Act was brought into force was devoid of any jurisdiction and was therefore utterly void. Such a notification is, in our opinion, nothing but a waste paper because the body that issued it was not empowered to do so under the law. It was also held that the circumstance that the accused was in no way prejudiced was immaterial when the question arises in connection with the application of a penal provision, as a strict construction of the law is required in such a case.

The next relevant case on this part of the contention is the one reported in *Ellammal*, In re[1]. S. 171 (3) of the Local Boards Act (XIV of 1920), provided that a panchayat shall, as regards private markets already lawfully established, grant the licence applied for subject to such regulations as to supervision, inspection and such conditions as to sanitation, drainage, water supply, etc. In accordance with this provision of law, the owner of a private market which was existing before the commencement of the Local Boards Act (XIV of 1920), applied for a licence to continue the same and licence was refused by the Panchayat Board on the ground that it considered it undesirable that the market should be kept open there. The Petitioner, in spite of this refusal, carried on the private market which was unlicensed, and sold fish in the market. He was convicted by the trial Court for running a private market without a licence. In revision Jackson and Thiruvenkatachariar, JJ., set aside the conviction holding that the order of the Board refusing the licence was not a legal order passed in exercise of their powers under the Act. Jackson, J., went further and laid down that refusal to function under the Act is not passing an order under the Act. The order, in order to be effective, must be *intra vires*, and an order *ultra vires*, is no order at all. When the statute makes it obligatory upon the panchayat to grant the licence applied for, subject only to the conditions prescribed thereunder, the action of the panchayat Board in totally refusing the licence cannot be said to be in exercise of the powers under the Act. Such being the case, the order refusing sanction should be deemed to have no existence whatever ; and on this ground it was held that the action of the Panchayat Board, if upheld, would amount to confiscating private rights without compensation, which intention cannot be attributed to the Legislature. Though the Panchayat Board might impose conditions in the interest of public health in granting the licence, it has no power to refuse the licence totally and therefore the refusal of the licence cannot be held to be invalid exercise of the powers conferred under the Act. It is clear that the learned Judges set aside the conviction mainly on the ground that the order refusing the licence was one not passed in exercise of the powers conferred under the Act. It is difficult to see how the facts of this case can be made to fit in with the facts of the case before us.

We have next to consider a few cases on which the petitioner's counsel has placed great reliance and which, on a casual or cursory examination, seem to support his contention. In *Chairman, Municipal Council, Chidambaram*, v. *Thirunarayana Aiyangar*[2], Devadoss, J., had to consider an allied topic. The circumstances which led up to the consideration of the question by Devadoss, J., can be shortly stated in the following words : A coffee hotel keeper had a licence for carrying on the business for the year 1926-27. As he had incurred the displeasure of the Chairman for some reasons, notice was issued cancelling the licence. Without caring for such cancellation, he carried on the business and was prosecuted for keeping a coffee hotel without a licence as required by section 249 and Schedule V of the District Municipalities Act. The Court of First instance acquitted the person complained against, *i.e.*, the hotel keeper, on the ground that the prosecution had failed to justify the order cancelling the licence with the result that the Municipal Council came up in revision to this Court to set aside the order of acquittal. After discussing the merits of the case, the learned Judge came to the

1. (1927) 53 M.L.J. 810.
2. (1927) 55 M.L.J. 566: I.L.R. 51 Mad. 876.

conclusion that however reprehensible the conduct of the coffee hotel keeper may be in not paying the water tax due to the Municipality, that would not be a ground for cancelling his licence to carry on the business of a coffee hotel keeper; and that therefore the cancellation of the licence was *ultra vires* the powers of the Chairman of the Municipal Council. Then the learned Judge proceeded to discuss the question as to whether it was permissible for a Criminal Court, which has seisin of a prosecution like the one in question, to go into the merits of the cancellation. The argument advanced before him by the counsel for the Municipality was that it was not open to the Court to go into the validity or otherwise of the cancellation because it is outside the province of the Court trying an accused person for an offence under the Municipal Act to go into the question whether the order made by the Chairman is proper or improper. In the discussion of this question, a distinction was drawn between the case of a refusal of a licence asked for the doing of a thing and the cancellation of a licence which a person had properly obtained. At page 880 the learned Judge observed that in the case of a refusal of a licence it may be that the Municipal Chairman has some reason for refusing it and it would not be open to the Court to consider whether the reasons were good or bad, for no reasonable man who is acting as Chairman would refuse to grant a licence unless he has some reason for refusal. He further observed as follows:

"But if it is patent to the Court that there could have been no reasons, the Court could come to the conclusion that the refusal amounted to not doing what is required by the Act but something which is outside the Act and such refusal might be considered to be *ultra vires* the Chairman. In the case of a licence which has been granted and which is good for a period it would be *ultra vires* the Chairman of the Council to cancel it or suspend it for not something which the licensee did in the contravention of the terms of the licence but for something which was unconnected with the licence. In such cases the Court is not prevented, by anything contained in the District Municipalities Act, from holding that such an act was not within the ambit or within the scope of the powers vested in the Chairman of the Council by the Act and therefore the reason for doing such an act would not arise for consideration."

The learned Judge also refers in addition, to the case in *Queen Empress* v. *Veerammal*[1], *Municipal Council, Chicacole* v. *Seetharamayya Naidu*[2], and to the decision of Krishnan, J., in *Krishnaswami* v. *Emperor*[3]. In upholding the conviction in the last-mentioned case, for driving a car without a licence, Krishnan, J., observed as follows:

"I do not think that his order can be regarded as an absolute nullity as is argued and the case considered as one in which no order has been passed. It may be that the accused can claim damages against the President if he is able to establish that the President exercised his powers under section 212 not *bona fide* but with malice on account of personal ill-feeling against him. That question will have to be considered when a proper case is brought; but in this prosecution, the accused, in order to escape punishment, must show that he had a licence given by the President of the District Board or he comes under clause (11) of section 212."

In another place Devadoss, J., after quoting the above observes that it may be that the refusal to grant a licence may be for proper and valid reasons and the Court cannot go into the validity of the reasons or the expediency of the occasion which necessitated the refusal of the licence and a Court is bound to assume that the Chairman has acted properly; but that where he is bound to do a certain thing and he does not do it or, where he is not permitted to do a thing and he does it, it cannot be said that the Court could not go into the question of the validity of the omission or act especially when a prosecution is launched against a person for violating the illegal or *ultra vires* order of omission or the act of the Chairman. Again he reiterates at page 885 that where the order is within the powers of the Chairman of the Council or sanctioned by the rules framed under the Act, *it is not open to the Magistrate or the Court to go into the necessity, expediency or the reasonableness of the order.* The learned Judge concluded by holding that in the case before him the order of the Chairman was *ultra vires* and therefore it was open to the Court to go behind it. We are far from convinced that the facts of that case have any similarity to the present case. Devadoss, J., was definitely of opinion that in cases where the order was *ultra vires* it was open to the Magistrate to go into its validity. But

1. (1892) I.L.R. 16 Mad. 230.
2. (1924) 21 L.W. 280.
3. (1924) 48 M.L.J. 132.

where it is sanctioned by the rules framed under the Act, the Magistrate cannot go into the necessity, expediency or the reasonableness of the order. During the course of arguments in that case reference was made to the observations of the Full Bench in *Muthu Balu Chettiar* v. *Chairman, Madura Municipality*[1]. The Full Bench had to consider the necessity of taking out a fresh annual licence under section 249 of the Act when permission to construct or establish a factory or instal in any premises a machinery had been obtained under section 250 of the Act. Agreeing with the view taken in *Muthu Balu Chetti*, In re[2] by Odgers and Madhavan Nair, JJ., and dissenting from the view of Devadoss and Waller, JJ., in *Madura Municipality* v. *Muthu Balu Chetti*[3], the learned Judges of the Full Bench held that an annual licence under section 249 of the Act was necessary. Incidentally it was observed that a Magistrate cannot take cognizance of a plea questioning the validity of the order disobeyed by the accused. The offence charged there was under section 338 of the Act and consisted in using a rice mill without the licence prescribed by the rule, bye-law or regulation made under the Act. As the necessary rules had been framed in that case, it was held by the Full Bench that it was not within the province of the Criminal Court to determine whether such rules have been validly framed—a matter which should be left for determination in a Civil Court. As observed by Devadoss, J., the observations of the Full Bench come to this effect, *viz.*, it is not open to a Criminal Court to probe into the terms or details of a licence or the validity of its terms and this is all that is meant by the observations of the Full Bench. In short, the decision of Devadoss, J., distinguishing the observations of the Full Bench, lays down that where the act of the stautory body, whether it be the Chairman or a whole Council, is *ultra vires* and a Court is asked to convict a person for violation of such an order, the Court is not prevented from considering its legality. But where it is within the powers of the statutory body or sanctioned by the rules framed under the Act, it is not open to the Magistrate or the Court to go into the necessity, expediency, or the reasonableness of the order.

Practically to the same effect is a more recent ruling where Mockett, J., in *Ayyar and Co.* v. *Srinivasalu*[4], was of the view that when there is no provision in the District Municipalities Act either directly or by implication to enable the Municipality to levy a licence fee for advertisements, the Council, which has power to make bye-laws for prohibition and regulation of advertisements in public streets and parks, cannot levy a licence fee in respect of such advertisements. Basing its authority on clause 28 of section 306, the Coimbatore Municipal Council levied a licence fee on the petitioner for advertising on his bullock cart and by means of a Board hung over its roof. For not taking out a licence before the said advertisements were put up the Municipal Council prosecuted him and the petitioner before the High Court was convicted by the trial Court. In revision Mockett, J., held that the action of the Municipal Council in enacting the bye-law was *ultra vires* because prohibiting and regulating advertisements in public streets and parks did not imply the power to levy a licence fee. Here also the decision depended upon the *ultra vires* nature of the order or bye-law which was not obeyed or adhered to by the party. One of us (Horwill, J.) considered a similar question in the case reported in the *Public Prosecutor* v. *Ponnusami Mudaliar*[5], where it was contended for the prosecution in an appeal against the acquittal that the trying Magistrate had no power to find out whether the order of the Local Board which was contravened by the accused therein was correct or not. The question depended upon the ownership of the land over which the front portion of a verandah extended and the trial Court held that though the evidence was weak the matter was of a Civil nature and acquitted the accused on that ground. In appeal under section 417, Criminal Procedure Code, this Court held that the Magistrate cannot avoid his responsibility to go into the question of the ownership of the land and decide the dispute as to the best of his ability. It was further held therein that any case launched under

1. (1927) 53 M.L.J. 633 : I.L.R. 51 Mad. 122 (F.B.).
2. (1926) 51 M.L.J. 490.
3. (1926) 50 M.L.J. 384.
4. (1941) 2 M.L.J. 145: I.L.R. 1942 Mad. 73.
5. (1943) 1 M.L.J. 492.

the encroachment provisions of the Local Boards Act is necessarily of a civil nature and the Court has to decide whether the land said to be encroached upon belonged to the Local Board or to the private party. This case is similar in some respects to the earlier one reported in *Subramania Iyer* v. *Asirvadam Pillai*[1], where the question of the ownership of the land had to be decided. If the land belonged to the statutory body or to the Crown, then the action of the accused was wrong and he was liable to be punished. If, on the other hand, the land belonged to the party himself, the action of the local body was thoroughly without jurisdiction and *ultra vires*. On account of the particular nature of the dispute, it is incumbent upon the Court to find out whether the action was within the powers of the statutory body or not.

We have so far discussed cases where prosecutions were launched for non-compliance with certain directions or orders of the statutory body or refusing to take out a licence and matters of such nature. Another line of cases to which our attention was invited relate to civil actions questioning the validity or otherwise of the orders or bye-laws promulgated or passed by the statutory body and where the citizen did not conform to such orders. Subramania Ayyar and Davis, JJ., in *Somu Pillai* v. *The Municipal Council, Mayavaram*[2], were of the view that the power conferred by the provisions of the District Municipalities Act on the Chairman of a Municipality to license places for selling meat etc., only empowered him to consider the propriety of granting or withholding the licence in each case and not to enter into agreements which would preclude him from considering any such application except from a particular person or persons. It was further held that the power to interfere with the ordinary rights of citizens will not be inferred in the absence of an express grant unless it be necessarily implied as incidental to the other powers expressly granted or is indispensable to repress the mischief contemplated and advance the remedy given. When the Municipal Council entered into a contract with the plaintiff to grant and secure to him the exclusive right of selling fish within the municipal limits of Mayavaram for a period of one year in consideration of the payment of a certain sum of money and a suit for damages was brought on the footing of such a contract, it was held by this Court that such an undertaking by the Municipality was illegal and void and the question must therefore be gone into in a civil suit. A really instructive case is the one reported in *Taluk Board, Bandar* v. *Zamindar of Chellapalli*[3], in which the facts were the following : On a report from the District Medical and Sanitary Officer of Krishna that three tanks belonging to the Zamindar of Chellapalli were injurious to the health of the villagers, the President of the Taluk Board acting under section 100 of Madras Act V of 1884 by notice required the owner of the tank to clean, fence, and fill up the tanks, because on inspection it appeared to him to be dangerous to the health of the people in the neighbourhood. On failure to comply with the notice, the Board threatened to fill up the tank and collect the charges from the Zamindar. On this notice, a suit was brought for an injunction against the Board restraining it from filling up the tanks as the Zamindar did not act according to the notice issued. The question for consideration was whether the President of the Taluk Board had authority to act as he did under section 100 of the Act. It was held that the power conferred under section 100 of the Local Boards Act, though a very wide power, must not be exercised for ulterior purposes, or in a capricious, wanton and arbitrary manner, and if so used, can be controlled by the Civil Courts and as the order in question passed by the Board was one such, it should be set aside by the Civil Court. In this case the finding was that the tanks became insanitary on account of the action of the Taluk Board itself in allowing drainage water to escape into the tanks. Abdur Rahim, J., at page 158, observes as follows :

"The rulings to which we have been referred show that if there were materials before a local authority to come to such a conclusion it is not for the Civil Courts to enquire into the sufficiency or otherwise of those materials. It is for the Board to decide upon the evidence whether a certain tank is dangerous or injurious to the health of the neighbourhood, and when such decision is arrived at it is not for the Court to interfere with it on the ground that the Court would have come to a different conclusion."

1. (1899) 9 M.L.J. 337.
2. (1905) I.L.R. 28 Mad. 520.
3. (1920) 40 M.L.J. 91 : I.L.R. 44 Mad. 156.

But as stated above, the learned Judge held that if the decision was arrived at in a capricious, wanton, arbitrary or unreasonable manner, the Court can interfere. Oldfield, J., agreed with the same view and followed a dictum of Farwell, L.J., in *Rex* v. *Board of Education*[1], which is in the following terms :—

"If the tribunal (public body) has exercised the discretion entrusted to it *bona fide*, not influenced by extraneous or irrelevant considerations, and not arbitrarily or illegally, the courts cannot interfere ; they are not a Court of appeal from the tribunal (public body), but they have power to prevent . . . . the refusal of its true jurisdiction by the adoption of extraneous considerations in arriving at their conclusion or deciding a point other than that brought before them, in which cases the Courts have regarded them as declining jurisdiction."

In *Rex* v. *Board of Education*[1], Cozens-Hardy, M.R. observed at page 174 that if the decision of the statutory body is based on a wrong interpretation of the statute, it is not absolute in the sense that no Court can interfere with, or review it. In all matters of fact not involving a wrong construction of a statute, the decision of the Board of Education which was the statutory body in that case was final. But where the decision was so perverse as really to amount to a non-exercise of jurisdiction entrusted to the Board, the Court can interfere by issuing a *writ of certiorari*. There are other passages also than the one already quoted by Oldfield, J., in the judgment of Farwell, L.J., where observations of a similar nature can be found. It seems to us that the English Courts have considered that their power to interfere in proceedings brought to set aside orders of statutory bodies by the exercise of prerogative *writs* has been interpreted as more in the nature of a revisional exercise in questions of jurisdiction than as an appellate authority reviewing evidence.

The decision of Stone, J., in *Venkatachallam* v. *The Commissioner, Corporation of Madras*[2], was based on a motion for the issue of a *writ of cortiorari* to the Commissioner of the Corporation of Madras, for the quashing of an order in the matter of issuing a licence for a condiment factory. The learned Judge held that the order of the Commissioner refusing to issue the licence for the carrying on of the factory and directing the party to close the business was one made without any statutory or proper authority and should be quashed. After discussing the various provisions of the City Municipal Act and the powers and rights of the Corporation as well as its Standing Committee, the learned Judge came to the conclusion, on an application for a *writ of certiorari*, that the action of the Commissioner was *ultra vires* and without jurisdiction. Similar observations regarding the powers of a Civil Court to set aside orders passed by statutory bodies are found in *Corporation of Madras* v. *Madras Electric Tramways Ltd.*[3]. It is therefore clear that the actions of a statutory Body can be questioned in a Civil Court and to some extent the wrong interpretation put upon laws and regultions by the Statutory Body can be corrected in proper civil proceedings taken by parties to rectify the mistakes committed by the Statutory Body.

It is necessary to refer to two more decisions which, though they do not relate to prosecutions for carrying on business without taking proper licences, were concerned with the validity or otherwise of bye-laws and how far a Criminal Court can consider such matters. The decision in *Satyanarayana* v. *Yorke*[4], is a case of that kind. Bardswell, J., after a review and discussion of the relevant case-law on the subject was of opinion that a bye-law or any rule or order of the kind, as to the taking out of a licence, is not bad merely because the licence fee is excessive. The question of the legality of ordering that a licence should be taken out and that of the reasonableness or unreasonableness of the fees charged for such a licence, are separate and independent questions, the legality of the order not being dependent on the fees being reasonable. The reasonable and equitable nature of a bye-law framed by the local body is a matter open to the Criminal Courts to consider when offenders against the bye-laws are put up for prosecution before them. The learned Judge further held that where the licence fee levied is excessive and cannot be justified, the Court will refuse its summary recovery under the provisions of the

1. (1910) 2 K.B. 165 (179).
2. (1933) 65 M.L.J. 860.
3. (1930) 60 M.L.J. 551 : I.L.R. 54 Mad. 364.
4. A.I.R. 1933 Mad. 148.

Local Boards Act. This was a case where the prosecution was launched for failure to take out a licence for manufacturing certain arrack with machinery, etc., and the learned Judge considered the question of the reasonableness or otherwise of the bye-law passed. The learned Judge referred to the judgment of Wallace, J., in *Kunhambu* v. *Local Fund Overseer, Chirakkal*[1], in a case referred to him on a difference of opinion between Waller and Krishnan Pandalai, JJ. The principle underlying this decision is that when a Criminal Court is approached by a statutory body for the realisation of a licence fee by proceedings of a summary nature, it is open to the Court to find out whether the licence fee levied is so unreasonable that its summary recovery should not be ordered. A distinction has to be drawn regarding the powers of a Criminal Court when its machinery is sought by the statutory body for recovering a licence fee, a tax or tithe and cases where a citizen is prosecuted for carrying on a business or industry without a licence where the statutory body, rightly or wrongly, but *bona fide*, refused the licence. In the former case it is open to the Court to weigh the evidence and find out whether the statutory body was justified in levying an unreasonable fee. But in the latter case where the Statutory body acted *bona fide* and honestly considering the materials before it, even if on the same materials the Court would have come to a different conclusion, it is not open to the Court to sit in judgment over the deliberations of the statutory body as if there was an appeal to it. But, as we have already shown by the cases discussed *supra*, where the matter is one of jurisdiction or *ultra vires* nature of the proceedings, it is open to the Court to go into the validity of the proceedings.

The only other case which has some relevancy to the question under consideration is a Full Bench decision reported in *Ramaswami* v. *President, Taluk Board, Tadepalligudem*[2], where Curgenven, J., delivering the opinion of the Full Bench observed that when a Local Board moves a magistrate to recover a penalty for an alleged encroachment on land belonging to the Board, the defaulting party can plead that there was no encroachment at all and the magistrate can go into the question whether the alleged encroachment was true or not and whether the imposition of the penalty was justified or otherwise. Here also the question is one of jurisdiction because if there was no encroachment at all, the action of the Board in levying a penalty is, on the face of it, void. The conflicting views which were prevalent before that, as manifest in the reported cases, *viz.*, *Ramachandra Servai* v. *President Union Board, Karaikudi*[3], *Rangesa Rao* v. *Swaminatha Iyer*[4] and *Local Fund Overseer, Devakotta* v. *Subramania Chetti*[5], on the one hand to the effect that the Court cannot in such matters go into the merits of the case and those exemplified by *Union Board of Paramakudi* v. *Chellasami Tevar*[6], and *Sayid Mustapha Saheb* v. *Union Board, Kaveripatnam*[7] on the other that under such circumstances it was open to the accused person to raise the question whether the encroachment was true or not, were discussed before the Full Bench and it was held that the correct view was that laid down by Phillips and Madhavan Nair, JJ. in In re, *Gopayya*[8], wherein they dissented from the opinion of Wallace and Devadoss, JJ., in *Ramachandra Servai* v. *President, Union Board, Karaikudi*[3]. During the course of the judgment, the Full Bench observed that it was not disputed before them that where a prosecution has been instituted for failure to comply with the terms of a notice, it is competent to the Court, in disposing of the case, to undertake an enquiry whether the notice was validly issued. We are not satisfied that the statement of the law so broadly stated can be accepted. To the extent to which the Full Bench was engaged in considering the question referred to it, we find no difficulty in accepting their view, because as stated already when the local body wants to recover a sum of money, which sum was contingent upon the satisfaction of con-

1. 1932 M.W.N. 873.
2. (1930) 59 M.L.J. 346 : I.L.R. 53 Mad. 873 (F.B.).
3. (1925) 49 M.L.J. 356 : I.L.R. 49 Mad. 888.
4. (1927) 27 L.W. 329.
5. (1927) 39 M.L.T. 205.
6. 1926 M.W.N. 676.
7. 1926 M.W.N. 678.
8. (1927) 55 M.L.J. 27 : I.L.R. 51 Mad. 866.

ditions laid down by the provisions of the Statute, then it would be legal to levy the amount if such conditions are satisfied ; as in that case the question of encroachment. In view of the pronouncement of the Full Bench above referred to, it is unnecessary to consider in detail the cases discussed in that judgment for we do not think it necessary to dilate more upon this topic.

Two recent decisions of single Judges of this Court relating to prosecutions for offences under section 15 (*b*) of the Madras General Sales Tax Act wherein the question of burden of proof on the prosecution to establish affirmatively that the accused was liable to pay the tax was considered and decided in favour of the accused, were quoted before us, the earlier of them by Kuppuswami Ayyar, J., in *Public Prosecutor* v. *Khader Khan*[1], and the later by Yahya Ali, J., in *Public Prosecutor* v. *Chakka Kondappa*[2]. We do not think that these cases are very helpful in the consideration of the present question. All that was decided in those cases was that just like any other criminal case, the prosecution should prove affirmatively that the tax is due. The learned advocate for the petitioner referred to section 5 (2) of the Criminal Procedure Code laying down that all offences under any law other than the Indian Penal Code shall be investigated, enquired into, tried and otherwise dealt with according to the same provisions but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. Reference was also made to sections 29 and 261 (*b*) of the Code. From these he argued that the Code does not place any restriction upon the powers of the Court in the matter of an enquiry or trial regarding an offence committed against laws other than the Penal Code. No doubt it is open to the Court to find out whether the ingredients of the offence defined in the Indian Penal Code have been satisfactorily established in the trial of an offence under the Indian Penal Code. We feel no difficulty in holding that the Court has the power to find out whether the offence was committed or not and that is all that is laid down by the provisions of the Criminal Procedure Code referred to above. But it is a different thing to say that even though *prima facie* an offence is committed by contravening the provisions of a special law, still it should be deemed that there would not have been such a contravention if there had been no occasion for such contravention. The law of procedure is not different in the trial of cases under the Indian Penal Code and those under other statutes according to section 5 of the Criminal Procedure Code except that in the case of offences under other laws the procedure laid down by the Criminal Procedure Code is subject to any enactment for the time for regulating the manner or place of investigation, enquiry or trial. When section 322 (2) of the District Municipalities Act says that the decisions of the Council on appeals against the order of the executive authority granting or refusing to grant a licence or permission shall be final, it should be deemed that a Criminal Court trying an offence for contravening certain provisions of the District Municipalities Act can only be subject to the finality as contemplated in section 322 (2). Mr. Veeraswami relied on the observations of Krishnan J., in *Smith, In re,* where the learned Judege held that in a prosecution for the offence of non-payment of the licence fee payable for erecting a machinery under section 288 of the City Municipal Act, the fact that the accused did not appeal to the Standing Committee against the imposition of the fee does not preclude him from raising the plea that the machinery was not one in respect of which a licence was required, and that he was therefore not bound to pay the same. Here again the question is one of jurisdiction. Where the order of the executive authority was *ultra vires* and without jurisdiction, it is as if no such order is in force. Such being the case, it is not necessary to appeal against an order which is without jurisdiction. It can be taken as if it never existed. But in the present case, the order of the executive authority refusing to grant the licence for running the oil mill on the ground that it is situated in a residential area cannot be said to be an

1. (1946) 2 M.L.J. 461.
2. (1947) 1 M.L.J. 317.
3. (1923) 45 M.L.J. 731.

order without jurisdiction for it is not pretended that the oil mill is one for the running of which a licence is not necessary at all. The petitioner himself applied for the licence and he has never pleaded that the provisions of the District Municipalities Act relating to licences are not applicable to his oil mill at all. All that he contends is that in view of the fact that the oil mill was in existence prior to the differentiation of areas into industrial and residential areas, he was entitled as a matter of right to be granted a licence. To a state of circumstances like this the passage in Maxwell on Interpretation of Statutes, 9th edition, at page 129, to the effect that in a statute which lays down that where something is left to be done according to the discretion of the authority on whom the power of doing it is conferred, the discretion must be exercised honestly and in the spirit of the statute, otherwise the act done would not fall within the statute, cannot be said to have any direct application.

The learned Public Prosecutor contended that there exists a distinction where a party contravenes any of the provisions of the sections of the District Municipalities Act or rules specified in schedule V and the recovery of fines as contemplated in section 344 of the same statute. In the former he contended that the Court investigating the offence has no power to go into the merits of the order contravened ; whereas in the latter, where a sum of money is sought to be recovered, the question whether the amount is really due or not is one which a Court has to go into. He invited the attention of the Court to the cases of profession tax contemplated by rule 29 of Schedule IV. We have already discussed the difference between the two categories of cases when dealing with *Satyanarayana* v. *Yorke*[1], and *Kunhambu* v. *Local Fund Overseer, Chirakkal*[2].

To sum up the result of the above discussion of the case-law, we think that in a case where a person is prosecuted for carrying on an industry or trade for which a licence to do so has been refused, it is open to the Court to find out whether the order of the statutory body was made without jurisdiction ; whether on the face of it the order is illegal or whether it is unreasonable, revolting or repugnant to conscience. But where the order is in the legitimate exercise of jurisdiction vested in the statutory body and passed *bona fide* after considering the evidence before it, even if the order is wrong on the merits, the Court cannot hold that it is wrong. It is not the function of the Court to substitute its judgment as an appellate authority for that of the Statutory Body. In cases where the party pleads that no licence is necessary it is one of jurisdiction. But where the plea is that even though a licence is necessary it has been refused on the merits, the plea cannot be considered as one involving jurisdiction at all.

We have been taken through the orders of the lower Courts as well as the exhibits filed in the case. We do not think that the action of the Municipality in refusing the licence on the ground that the premises are situated in a residential area is without jurisdiction. The petitioner has not appealed to the Council against this order. As has been laid down in a number of cases, it is open to the aggrieved party to have his remedy in a Civil Court by instituting a suit for an injunction or resorting to one of the prerogative *writs* allowed by the law if such a remedy is available to the party. Without resorting to these remedies, it is not open to the petitioner to contend when he is prosecuted for running an oil mill after the licence to run it has been refused, that the licence should have been given to him and that the order of the executive authority is wrong on the merits. We are therefore of opinion that the decision of the lower Court is right. This revision petition is dismissed.

K.S. *Petition dismissed.*

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1. A.I.R. 1933 Mad. 148.
2. 1932 M.W.N. 873.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAGESA SASTRI.

Mohammed Yusuf Bannay Sahib, and others .. *Plaintiffs**

v.

Khadir Badsha Sahib and another .. *Defendants.*

Madras City Civil Court Act (VII of 1892), *section* 16 (2) *and G. O. No. Mis.* 4175 *(Home), dated* 11*th November,* 1948—*Suits in which the value of the subject-matter is between Rs.* 5,000 *and Rs.* 10,000 *pending in the High Court on the date of the G.O. increasing the pecuniary limits of the jurisdiction of the City Civil Court—If can be transferred to the City Civil Court under section* 16 (2).

On the question whether consequent on the increase in the pecuniary limits of the jurisdiction of the City Civil Court by the G.O. No. Mis. 4175 (Home), dated 11th November, 1948, suits wherein the value of the subject-matter is between Rs. 5,000 and Rs. 10,000 and pending in the High Court on the date of the said notification could be validly transferred to the City Civil Court.

Held :—A transfer could not be made under section 16 (2) of the Madras City Civil Court Act unless the suit to be transferred is within the jurisdiction of the City Civil Court. At the time the pending suits were instituted in the High Court, the City Civil Court had no jurisdiction to receive, try and dispose of them. That Court was given the jurisdiction to try such suits only on and from 1st day of December, 1948. This indicates that suits and proceedings, which had already been instituted prior to 1st December, 1948, and which had arisen already, could not be tried by the City Civil Court. It is therefore not possible to hold that these pending suits are within the jurisdiction of the City Civil Court within the meaning of section 16 (2) of the Act and hence they cannot be transferred for trial to the City Civil Court.

C.S. No. 119 of 1948.

C. Srinivasachari for Plaintiff.

H. Neelakantan of Messrs. Short Bewes and Co. for Defendants.

C.S. No. 123 of 1948.

T. V. Subramanya Iyer for Plaintiff.

M. Ranganatha Sastri and *S. Ramanathan* for Defendants.

C.S. No. 239 of 1948.

K. S. Ramamurthi and *P. K. Narayanaswami* for Plaintiff.

K. K. Sridharan and *K. Umamaheswaram* for Defendants.

C.S. No. 244 of 1948.

M. S. Venkatarama Aiyar and *S. Viswanathan* for Plaintiff.

V. V. Srinivasa Ayyangar and *S. Ramanujachari* for Defendants.

C.S. No. 286 of 1948.

V. Radhakrishnayya and *E. R. Krishnan* for Plaintiff.

A. Seshachari and *A. Srinivasan* for Defendants.

C.S. No. 302 of 1948.

C. Narasimhachari, M. E. Rajagopalachari and *G. Thiruvenkatachari* for Plaintiff.

L. V. Krishnaswami Aiyar and *R. Narasimhachariar* for Defendants.

C.S. No. 329 of 1948.

V. Rajagopala Mudaliar for Plaintiff.

V. C. Gopalaratnam, M. V. Ganapathi and *P.C. Parthasarathi* for Defendants.

C.S. No. 351 of 1948

P.B. Ananthachari for Plaintiff.

K. Narasimha Iyer and *T.V. Subramania Iyer* for Defendants.

C.S. No. 427 of 1948.

V. S. Rangachari for Plaintiff.

N. K. Mohanarangan Pillai, M. V. Gopalaratnam, N.K. Pattabiraman and *R. Krishnaswami* for Defendants.

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*C.S. Nos. 119, 123, 239, 244, 286, 302, 329, 351, 427, and 618 of 1948. 15th February, 1949

C.S. No. 618 of 1948.

V. T. Rangaswami Aiyangar and *R. Rangachari* for plaintiff.

N. K. Mohanarangan Pillai, M. V. Gopalaratnam and *N. K. Pattabhiraman* for Defendants.

The Court made the following

ORDER.—These suits are posted before me for orders as to whether they can be transferred to the City Civil Court, Madras, under section 16 (2) of the Madras City Civil Court Act VII of 1892.

In G.O. No. Ms. 4175 (Home) dated 11th November, 1948, the Government of Madras made the following notification :—

"In exercise of the powers conferred by section 3-A of the Madras City Civil Courts Act, 1892 (Central Act VII of 1892) and in supersession of Law (General) Department Notification No. 216, dated the 22nd March, 1935, published at page 488 of Part I of the *Fort St. George Gazette*, dated the 26th March, 1935, His Excellency the Governor of Madras hereby invests with effect on and from 1st day of December, 1948, the Madras City Civil Court subject to the exceptions specified in section 3 of the said Act, with jurisdiction to receive, try and dispose of all suits and other proceedings of a civil nature arising within the City of Madras and of value not exceeding ten thousand rupees."

Consequent on this notification and the increase in the pecuniary limits of the jurisdiction of the City Court, the question has arisen whether the suits wherein the value of the subject-matter is between Rs. 5,000 and Rs. 10,000 and now pending in the High Court could be validly transferred to the City Court. Section 16 (2) of Act VII of 1892 provides that,

"in any suit or other proceeding pending at any time in the High Court, any Judge of such Court may at any stage thereof make an order transferring the same to the City Court if in his opinion such suit or proceeding is within the jurisdiction of that Court and should be tried therein."

The transfer cannot be made unless the suit to be transferred is within the jurisdiction of the City Court. That jurisdiction is provided for in sections 3 and 3 (*a*) of the Act. The City Court has jurisdiction to *receive, try and dispose of* all suits and other proceedings of a civil nature (subject to certain exceptions,) *arising* within the City of Madras and of value not exceeding Rs. 10,000. At the time when these suits were instituted in this Court, the City Court had no jurisdiction to receive, try and dispose of them, as the pecuniary limits of that Court were then limited to Rs. 5,000. Section 16 (2) is intended to provide for transfer of suits from the High Court to the City Court, because notwithstanding the creation of the Madras City Civil Court, the jurisdiction of the High Court was not ousted in such suits and this High Court continued to have concurrent jurisdiction. The City Court would have jurisdiction to receive, try and dispose of such suits where the value of the subject-matter is between Rs. 5,000 and Rs. 10,000 only on and from 1st day of December, 1948. The jurisdiction is confined to suits and proceedings *arising* within the City of Madras and of value not exceeding Rs. 10,000. This would indicate that suits and proceedings, which had already been instituted prior to 1st December, 1948 and which had arisen already, could not be tried by the City Court. It is therefore not possible to hold that these suits are within the jurisdiction of the City Court within the meaning of section 16 (2) of the Act. In my opinion, therefore, these suits cannot be transferred for trial to the City Civil Court.

Even if there is such a power, the question would still remain whether it is desirable to make an order of transfer. The members of the Bar who argued the question before me in these suits, as well as others interested in similar suits likely to be transferred, were all unanimous in objecting to such transfer. Several points of view were submitted urging the undesirability of such transfers. I must admit there was considerable force in the same and, if this Court has power, those considerations will have to be borne in mind in ordering transfers in individual cases on the merits thereof. In view, however, of my decision on the main question, it is unnecessary to refer to this aspect of the matter at greater length.

If it is intended that relief should be given to this Court by empowering it to transfer such suits as above to the City Court, suitable legislation may have to be enacted somewhat on the lines of section 18 of the Bombay City Civil Courts Act XL of 1948. So also if concurrent jurisdiction of this Court is to be taken away, legislation is necessary. It is ordered accordingly that these suits should be posted in the usual course for trial and disposal by this Court.

V.S. *Ordered accordingly.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Madras).

PRESENT :—LORD PORTER, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

N. S. Venkatagiri Ayyangar and another .. *Appellants**

v.

The Hindu Religious Endowments Board, Madras .. *Respondent.*

Civil Procedure Code (V of 1908), section 115—Scope and applicability.

Section 115, Civil Procedure Code applies only to cases in which no appeal lies, and, where the Legislature has provided no right of appeal, the manifest intention is that the order of the trial Court, right or wrong, shall be final. The section empowers the High Court to satisfy itself upon three matters : (*a*) That the order of the Subordinate Court is within its jurisdiction, (*b*) That the case is one in which the Court ought to exercise jurisdiction, and (*c*) That in exercising jurisdiction, the Court has not acted illegally, that is, in breach of some provision of law, or with material irregularity, that is, by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision. If the High Court is satisfied upon those three matters, it has no power to interfere because it differs, however profoundly, from the conclusions of the Subordinate Court upon questions of fact or law.

Amir Hasan Khan v. *Sheo Baksh Singh*, (1884) L.R. 11 I.A. 237 : I.L.R. 11 Cal. 6 (P.C.) and *Balakrishna Udayar* v. *Vasudeva Aiyar*, (1917) 33 M.L.J. 69 : L.R. 44 I.A. 261 : I.L.R. 40 Mad. 793 (P.C.) referred to.

There is no justification for the view that sub-section (*c*) of section 115 is intended to authorise the High Courts to interfere and correct gross and palpable errors of subordinate Courts so as to prevent gross injustice in non-appealable cases ; it would indeed be difficult to formulate any standard by which the degree of error of subordinate Courts could be measured.

Mohunt v. *Khetter Moni Dassi*, (1896) 1 C.W.N. 617, disapproved.

Their Lordships judgment was delivered by

SIR JOHN BEAUMONT.—This is an appeal by special leave from a judgment and order of the High Court of Judicature at Madras dated the 6th November, 1944, which revised a judgment and decree of the Court of the District Judge of Ramnad at Madura dated the 7th August, 1943.

The only matter which arises for determination in this appeal, and upon which special leave to appeal was granted, is, whether the learned Judges of the High Court had any power to interfere in revision with the said order of the District Judge.

On the 1st July, 1907, one Narayana, the grandfather of the appellants, made a will by which he founded a temple and directed his male heirs to act as trustees of the temple. Narayana died in 1910, and in 1915 the family became divided. Thereafter each branch of the family managed the temple for one year in rotation.

In 1927, the Madras Hindu Religious Endowments Act, 1926 (Act II of 1927) (hereinafter with its amendments referred to as the "Act") was passed. The Act authorised the creation of a Hindu Religious Endowments Board and empowered it to take over control of temples dedicated to the use of the public. Section 63 of the Act empowered the Board to settle a scheme of administration for the endowments connected with a math or temple. Section 84 of the Act was in the following terms :

"(1) If any dispute raises as to whether an institution is a math or temple as defined in this Act or whether a temple is an excepted temple, such dispute shall be decided by the Board.

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* P. C. Appeal No. 94 of 1947. 24th January, 1949.

(2) Any person affected by a decision under sub-section (1) may, within one year, apply to the Court to modify or set aside such decision; but, subject to the result of such application, the order of the Board shall be final."

The respondent Board was duly constituted under the Act, and, in or about the year 1930, demanded a contribution under the Act for the upkeep of the said temple constituted by the will of Narayana, from N.S. Narayana, another grandson of the testator, though representing a different branch from the appellants. The said N.S. Narayana objected to pay on the ground that the temple was a private one.

On the 15th January, 1931 the respondent, having decided to hold an inquiry under section 84 of the Act, served on N.S. Narayana informing him that his contention that the temple was a private one, would be heard by the Board on the 26th February, 1931, and that he should appear either in person or by counsel.

On the 4th August, 1931, the respondent having held an inquiry at which N.S. Narayana had been represented, declared the temple to be a public one which was to be classed as an excepted one under the Act. The contention of the appellants is that the said N.S. Narayana was not at the date of these proceedings a trustee of the temple, that the order was never served upon the trustees, and that the appellants are not bound thereby.

In 1933 the respondent asked Sadagopa, another grandson of the testator, to make a contribution out of the temple funds. The said Sadagopa objected to the levy on the ground that it was illegal. On the 8th September, 1933, the respondent ordered the cancellation of the contribution demanded from the temple funds.

From 1933 to 1937 the respondent does not appear to have made any further demand for contribution; but in 1938 the respondent asked for a contribution from the appellants, who refused to pay on the ground that the temple was a private one. In answer to such refusal the respondent, on the 19th January, 1938, wrote a letter to the appellants in the following terms:—

"Sir,

Reference—Your letter dated 3rd January, 1938, regarding recovery of contribution, I have to state that your contention that the temple is 'Private' is untenable as the temple was already declared by the Board in its Order No. 820, dated 4th August, 1931, to be an 'Excepted Temple' as defined in the Madras Hindu Religious Endowments Act, 1926, and as that Order has not been set aside by the Court."

On the 15th April 1939, it appears that the respondent made an order under section 63 of the Act that a scheme relating to the endowments of the said temple should be framed, and this was subsequently done.

On the 19th January, 1939, the appellants filed a petition O.P. No. 15 of 1939 purporting to be under section 84 (2) of the Act, asking for a declaration that the order of the respondent dated 19th January, 1938, was without jurisdiction and void, to have that order set aside, and for a declaration that the said temple was a private temple.

On the 16th October, 1939, the appellants appear to have filed a suit against the respondent and three others asking to have the said scheme set aside.

The learned District Judge tried the petition and suit together and gave judgment on the 7th August, 1943, in both matters. He held that the temple was a private one and that the appellants were not bound by the order of the respondent made on the 4th August, 1931. On the petition he passed an order setting aside the alleged order of the respondent dated 19th January, 1938, and declared the said temple to be a private one. The learned Judge was clearly in error in purporting to set aside the so-called order of the 19th January, 1938, because no such order existed. In the letter of that date the respondent merely informed the appellants that they were bound by the order of 4th August, 1931. The effective part of the order of the learned District Judge was his declaration that the temple was a private one. In the suit the learned Judge passed a decree that the said scheme be set aside.

From the order passed by the learned District Judge on the said petition an application for revision was presented to the High Court at Madras under section 115 of the Code of Civil Procedure, and there was also an appeal to the said Court from the decree passed in the suit.

On the 6th November, 1944, the learned Judges delivered one judgment in both matters. In the suit they allowed the appeal setting aside the order of the lower Court so far as it held the said temple to be a private one and remanded the suit to the lower Court for a decision on certain issues raised in the suit. No appeal has been presented to His Majesty in Council from this order made in the suit, and such order is unaffected by this judgment. On the revision application Mr. Justice Mockett expressed the view that the decision of the case depended entirely on the construction of the will of Narayana. He considered that the conclusion of the learned Judge upon the construction of the will was so entirely out of accord with the meaning of the document that it required interference by the High Court and that the wrong construction put upon the will by the learned District Judge involved such material misuse of jurisdiction as to involve interference by the High Court. Mr. Justice Kuppuswami Ayyar in a concurring judgment expressed the view that the High Court was justified in interfering in revision under sub-section (*c*) of section 115 of the Code of Civil Procedure.

Section 115 of the Code of Civil Procedure is in the following terms :—

"The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears :

(*a*) to have exercised a jurisdiction not vested in it by law, or

(*b*) to have failed to exercise a jurisdiction so vested, or

(*c*) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit."

As long ago as 1884 in the case of *Amir Hassan Khan* v. *Sheo Baksh Singh*[1], the Privy Council made the following observation upon section 622 of the former Code of Civil Procedure which was replaced by section 115 of the Code of 1908.

"The question then is, did the Judges of the lower Courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity. It appears that they had perfect jurisdiction to decide the question which was before them and they did decide it. Whether they decided rightly or wrongly, they had jurisdiction to decide the case, and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity."

In the case of *Balakrishna Udayar* v. *Vasudeva Ayyar*[2], the Board observed :—

"It will be observed that the section applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusion of law or fact in which the question of jurisdiction is not involved."

In the present case the learned Judges of the High Court did not act upon this principle. They set aside the judgment of the District Judge because they considered that he had made a serious mistake in the construction which he had placed upon the will of the testator and they seem to have thought that a 'serious' error of law could be corrected in revision. There have been, no doubt, decisions in some High Courts in India which lend support to the view upon which the Judges acted. The cases are collected in the 4th Edition of Chitaley and Rao, the Code of Civil Procedure, Vol. I, p. 1105. In *Mohunt* v. *Khetter Moni Dassi*[3] the High Court of Calcutta expressed the opinion that sub-section (*c*) of section 115 of the Code of Civil Procedure was,

"intended to authorise the High Courts to interfere and correct gross and palpable errors of subordinate Courts so as to prevent gross injustice in non-appealable cases."

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1. (1884) L.R. 11 I.A. 237 : I.L.R. 11 Cal. 6. I.L.R. 40 Mad. 793 (P.C.)
2. (1917) 33 M.L.J. 69 : L.R. 44 I.A. 261 : 3. (1896) 1 C.W.N. 617.

This passage was dissented from by the Calcutta High Court in *Enat Mondul* v. *Baloram Dey*[1], but was cited with approval by Lort-Williams, J., in *Gulabchand* v. *Kabiruddin*[2]. Their Lordships can see no justification for any such view; it would indeed be difficult to formulate any standard by which the degree of error of subordinate Courts could be measured. Section 115 applies only to cases in which no appeal lies, and, where the Legislature has provided no right of appeal, the manifest intention is that the order of the trial Court, right or wrong, shall be final. The section empowers the High Court to satisfy itself upon three matters: (*a*) That the order of the Subordinate Court is within its jurisdiction; (*b*) that the case is one in which the Court ought to exercise jurisdiction and (*c*) that in exercising jurisdiction the Court has not acted illegally, that is, in breach of some provision of law, or with material irregularity, that is, by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision. If the High Court is satisfied upon those three matters, it has no power to interfere because it differs, however profoundly, from the conclusions of the Subordinate Court upon questions of fact or law. No such matters arose in this case, and the order of the High Court upon the petition was without jurisdiction.

For these reasons their Lordships will humbly advise His Majesty that this appeal be allowed, that the order made by the High Court at Madras on the 6th November, 1944, upon the origial petition No. 15 of 1939 be set aside and that the order on such petition made by the learned District Judge of Ramnad, dated 7th August, 1943, so far as it declared the said temple to be a private one, be restored. Their Lordships, however, must not be understood as expressing any opinion upon the question whether the said temple is a private one or a public one, which question is not before them. The respondent must pay the costs of the revision application to the High Court made in O.P. No. 15 of 1939 and of this appeal.

V.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAJAGOPALAN.

K.G. Ramaswami Ayyar and others ... *Appellants**

v.

The Srirangam Municipal Council, by its Commissioner .. *Respondents.*

Madras District Municipalities Act (V of 1920), section 81 (4)—Lands within municipal limits used exclusively for purposes of agriculture—Levy of tax under section 81 (2)—If prevented by section 81 (4).

There is nothing in section 81 (4) of the District Municipalities Act to prevent a Municipality from levying taxes on agricultural land under section 81 (2), though the Municipality could very well have levied that tax on the annual value calculated on the basis of section 81 (4). It is for the assessing authority, to decide, not for the assessee to tell the assessing authority, which of the two modes of assessment permitted by the statute, the assessing authority should elect.

Section 81 (4) provides merely an alternative method of levy.

Decision of Byers, J., in *Municipal Council, Chicacole* v. *Rajah of Vizianagaram*, S. A. No. 1025 of 1943 and *Municipal Gouncil, Chicacole* v. *Sri Vyricherla Chandramani Pattamahadevi*, 1026 of 1943 and *obiter* in *M. S. M. Railway Co., Ltd.* v. *Bezwada Municipality*, (1944) 2 M.L.J. 25 : L.R. 71 I.A. 113 (P.C.). relied on.

Appeal against the decree of the Court of the District Judge of Trichinopoly in A.S. No. 40 of 1944 preferred against the decree of the Court of the District Munsiff of Trichinopoly in O.S. No. 111 of 1941.

K. G. Srinivasa Aiyar for Appellants.

K. R. Krishnaswami Aiyar and *S. P. Subramaniam* for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff owned lands within the limits of Srirangam Municipality, which lands, it is now common ground, were lands exclusively used for purposes of agriculture and which lands were liable to pay the property tax

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1. (1899) 3 C.W.N. 581.
2. (1930) I.L.R. 58 Cal. 111.

* S. A. No. 978 of 1946. 24th January, 1949.

levied by the Municipality. The levy of such a tax is regulated by section 81 of the District Municipalities Act, 1920. Section 81 (2) provides :

"Save as otherwise provided in this Act, these taxes shall be levied at such percentages of the annual value of lands or buildings or both as may be fixed by the municipal Council, subject to the provisions of section 78."

Section 81 (3) runs :

"The Municipal Council may, in the case of lands which are not used for agricultural purposes . . . . . levy these taxes at such per centages of the capital value of such lands . . . . . ."

Section 81 (4) (*a*) runs :

"The Municipal Council may, in the case of lands used exclusively for agricultural purposes levy these taxes at such proportions as it may fix of the annual value of such lands as calculated in accordance with the provisions of section 79 of the Madras Local Boards Act, 1920."

Of the four items of lands involved in these proceedings three were held on ryotwari tenure and one on inam tenure. Section 79 of the Local Boards Act provides that in the case of ryotwari tenures the annual value shall be taken as the annual assessment payable on those lands. In the case of inam lands the annual value is to be taken as the notional annual assessment that could have been levied in those inam lands.

Section 82 runs :

"(1) Every building shall be assessed together with its site and other adjacent premises occupied as an appurtenance thereto . . . .

(2) The annual value of lands and buildings shall be deemed to be the gross annual rent at which they may reasonably be expected to let from month to month or from year to year less a deduction . . . .

Provided that (*a*) in the case of :

(i) any Government or railway building ; or

(ii) any building of a class not ordinarily let the gross annual rent of which cannot, in the opinion of the executive authority, be estimated the annual value of the premises shall be deemed to be six per cent. of the total of the estimated value of the land . . . ."

That the properties involved in this appeal do not fall within the scope of section 82 (2) should be clear. Section 82 (2) provides for assessment on the basis of an annual value of the lands and buildings, *i.e.*, lands appurtenant to buildings and not lands independent of buildings, *e.g.*, agricultural lands.

The plaintiff's case was that he should have been assessed under section 81 (4) of the Act, *i.e.*, that he should have been called upon to pay only a proportion of the annual value of the lands, *i.e.*, a proportion of the annual assessment payable on the lands. The learned Munsiff accepted that contention and decreed the plaintiff's claim. On appeal, however, the learned District Judge dismissed the plaintiff's suit. The plaintiff comes up in second appeal.

Though the three sub-issues framed under issue 1 by the learned Munsiff would imply that the real question the Court was called upon to consider was whether section 82 (2) offered an alternative to section 81 (4) as the basis on which the tax should be assessed, the real question now is whether the levy made by the Municipality should come within the scope of section 81 (4) only or whether it could be upheld as valid if it could be brought within the scope of section 81 (2) of the Act quite independent of the question whether the property could also be assessed under section 81 (4).

No doubt the annual value in the present case was calculated on principles analogous to those embodied in section 82 (2). That such a calculation of the annual value with reference to properties other than those specifically covered by section 81 (2) is not illegal is the scope of the decision of the Privy Council in *M.S.M. Railway Co., Ltd.* v. *Bezwada Municipality*[1].

The real question for determination in this second appeal is the same as was formulated by Byers, J., in *The Municipal Council, Chicacole* v. *Rajah of Vizia-*

1. (1944) 2 M.L.J. 25 : L.R. 71 I.A. 113 (P.C.).

nagaram[1], and the *Municipal Council, Chicacole* v. *Sri Vyricherla Chandramani Pattamahadevi*[2], whether the assessment of property tzx on the plaintiff's agricultural lands by the Municipal Council under section 81 (4) of the District Municipalities Act was *ultra vires.*

Section 81 (2), it will be remembered, applies where there is no other specific provision in the Act. That should be the scope of the expression " Save as otherwise provided in this Act." Section 81 (4) (*a*) is certainly a provision otherwise than in conformity with the principles embodied in section 81 (2) of the Act. But again the question arises whether the Municipality has a right to avail itself of the provision of section 81 (2) despite the provisions of section 81 (4) or whether the right of the Municipality is limited to section 81 (4) (*a*) alone in assessing agricultural lands within the Municipality to property tax.

The learned District Judge followed the principles laid down by Byers, J., in *Municipal Council, Chicacole* v. *Rajah of Vizianagaram*[1] and *in Municipal Council Chicacole* v. *Sri Vyricherla Chandramani Pattamahadevi*[2]; and Byers, J., himself based his decision on *M.S.M. Railway* v. *Bezwada Municipality*[3]. In the Bezwada case by which name I shall refer to the case decided in *M.S.M. Railway Co. Ltd.* v. *Bezwada Municipality*[3], lands which belonged to the railway company were assessed by the Municipality on an annual value calculated on lines analogus to those made applicable by section 82 (2) of the Act to a different kind of property, *i.e.*, lands appurtenant to a building. As I have already pointed out, their Lordships of the Privy Council held that merely because there was a provision in section 82 (2) for calculation of annual value on a particular basis with reference to a given type of land, adoption of that basis was not ruled out with reference to other properties also, *i.e.*, those liable to assessment under section 81 (2) of the Act, again on the annual value. Their Lordships pointed out that sub-section 3 of section 81 could have been availed of. But it was common ground that the levy in that case by the Bezwada Municipality was not under section 81 (3). In dealing however with the scope of sub-section 3 of section 81 their Lordships observed :

" Sub-section (3) otherwise provides inasmuch as it permits, but does not enjoin, the levying of the tax ' in the case of lands which are not used exclusively for agricultural purposes and are not occupied by or adjacent or appurtenant to building ' either at a percentage of the capital value of such lands or at such rates with reference to the extent of such lands as the Municipal Council may fix, subject to compliance with the proviso to the sub-section. If either of the alternative methods permitted by sub-section (3) is adopted, the assessment is not on annual value. Appropriate as this sub-section was to the case of the appellants' lands, the respondents did not in fact avail themselves of it in making the assessment complained of. In particular they did not levy the tax at the per centage of the capital value of the appellants' lands ; they levied it at a percentage on their annual value."

Both in sub-section 3 and sub-section 4 (*a*) of section 81 of the Act the word is " may." No doubt, the learned Munsiff construed the word in sub-section (4) as " shall." That point was not specifically decided by the learned District Judge. The learned advocate for the appellant contended that the observations of their Lordships of the Privy Council in the Bezwada case with reference to the scope of sub-section 3 of section 81 must be viewed as *obiter dictum*, because their Lordships specifically refrained from deciding the question, whether the levy could have been justified under section 81 (3), and whether that sub-section alone should have been invoked. Treating it even as *obiter dictum*, those observations on the scope of the expression " may " in section 81 (3) are entitled to considerable weight. There seems to be no real basis for differentiating the expression " may " in section 81 (4) from that used in section 81 (3). Their Lordships pointed out that sub-section (3) did not otherwise provide within the meaning of section 81 (2). Their Lordships also pointed out that with reference to the properties assessed by the Bezwada Municipality, sub-section (3) of section 81 would have been the more appropriate section. All the same, their Lordships made it clear that sub-section (3), though it was a specific provision otherwise, was merely permissive and was not mandatory. In the words of their Lordships, " It permitted, but did not enjoin." If that is the scope of sub-section (3) of section 81, I am unable to see any basis for holding

1. S. A. No. 1025 of 1943 (unreported).
2. S. A. No. 1026 of 1943 (unreported).
3. (1944) 2 M.L.J. 25 : L.R. 71 I.A. 113 (P.C.).

that the scope of section 81 (4) (a) is different. Section 81 (2) the main provision for taxation makes it clear that the basis of levy shall be the annual value. Section 81 (3) provides for a different basis, the capital value. Section 81 (4) again refers to the annual value, but specifically provides with reference to the agricutural lands the basis for fixing the annual value, *i.e.*, the annual assessment payable to the Government. Except this there is no real difference between the scope of section 81 (3) and the scope of section 81 (4) (a) as detracting from or limiting the powers of a Municipality conferred upon it by section 81 (2). If, despite sub-section (3) of section 81 the Municipality could still levy the tax under sub-section (2) of section 81, I see nothing in section 81 (4) to prevent the Municipality from levying taxes on agricutural lands under section 81 (2), though the Municipality could very well have levied that tax on the annual value calculated on the basis of section 81 (4). It was for the assessing authority to decide, not for the assessee to tell the assessing authority, which of the two modes of assessment permitted by the statute the assessing authority should elect.

To sum up, the question is whether section 81 (4) provides merely an alternative method of levy. That question is answered in the affirmative. There is authority, the decision of Byers, J, for it. Besides, the observations of their Lordship in the Bezwada case leave room for no other construction.

The second appeal fails and is dismissed with costs. Leave to appeal is refused.

NOTE.—The clauses of section 81 have been referred to in this judgment as they stood during the period of assessment in question and before the amending Act of 1946.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BELL.

D. Jayalakshmi *alias* D. Jayam .. *Petitioner**

v.

R. Soundararajan .. *Respondent.*

Special Marriage Act (III of 1872), sections 2, 4, 10 and 17—Hindu minor girl going through form of marriage under the Act—Consent of girl's parent or relatives not obtained—Proper form not complied with—Validity of marriage.

Where a Hindu minor girl goes through the form of marriage with a man of twenty one under the Special Marriage Act, but the consent of the living parent of the minor girl has not been given and the form or what might be called the ritual prescribed for the marriage by the Special Marriage Act has not been carried out and there is no declaration as required by the Act, and even the certificate is improper, there is no marriage in accordance with the Special Marriage Act and the so-called marriage has to be pronounced to be invalid.

Ganeshprasad v. *Damayanti*, I.L.R. 1946 Nag. 1, dissented from.

Basana Sen v. *Aghore Nath Sen*, (1928) I.L.R. 56 Cal. 628, (F.B.), followed.

C. R. Patabhiraman and *R. Ramasubba Iyer* for the Petitioner.

J. Vedamanickam for *J. Nargunam* for Respondent.

The Court delivered the following

JUDGMENT.—This suit is one for nullity under the Special Marriage Act III of 1872 as amended. The petitioner was born on the 28th of January 1929, and is therefore today under 20 years of age. Her father died in 1938 and since then she has lived with her mother and latterly with her mother in her maternal uncle's house. In 1947-48 she was attending school in Coimbatore and through one of her school mates met the respondent, a young man now aged about 22. On the 24th of March, 1948, the parties appeared before the Registrar and went through a

* O.M.S. No. 11 of 1948. 5th January, 1949.

form of marriage purporting to be in accordance with this Act. At that time the petitioner was just over 19 years of age and the respondent about 21.

The question is whether the form of marriage was correct under the provisions of the Act. It is necessary to refer to one or two sections. The first is section 2 which lays down the conditions upon which marriages under the Act may be celebrated. The parties are Hindus and at the time of the marriage, the petitioner being under the age of 21, it was necessary that the consent of her father or guardian should have been obtained. Section 2, sub-section (3). It is presumed that due notice was given to the Registrar under section 4. Section 10 provides as follows:

"Before the marriage is solemnized, the parties and three witnesses shall, in the presence of the Registrar, sign a declaration in the form contained in the second schedule to this Act. If either party has not completed the age of 21 years, the declaration shall also be signed by his or her father or guardian, except in the case of a widow, and, in any case, it shall be counter-signed by the Registrar."

Pausing here it may be observed that the requirements of this section were admittedly not fulfilled. There was no declaration made as required in the form in the second schedule. Despite the statement of the Registrar in the so-called certificate that the declarations required by the Act had been made, they had not been made, and I consider it a grave dereliction of duty on the part of the Registrar that the requirements of section 10 were not complied with.

Section 17 provides that the Indian Divorce Act shall apply to marriages solemnized under the Special Marriage Act and that any marriage contracted under this Act may be declared null in the manner provided by the Indian Divorce Act.

It is admitted that the form prescribed by the Special Marriage Act has not been followed, and the question is whether the marriage is therefore valid or not. Mr. J. Vedamanickam who appears for the respondent has contended strongly and, if I may say so, very ably that the mere absence of the required declaration or even the lack of consent of the father or guardian does not make a marriage between minors invalid and that so to hold would affect the sanctity of the sacrament of marriage. He has cited *Ganeshprasad* v. *Damayanti*[1], where a Bench of three Judges held that the minority of one or other of the parties to a marriage under Special Marriage Act does not in itself invalidate the marriage, and that section 2 of the Special Marriage Act does not lay down the conditions of validity but merely prescribes the forms which must be filled in to enable the Registrar to marry the parties. That was a case in which a young man became involved with a woman of bad character but himself was not free from blame and on the special facts of that case they refused to intervene although no consent of the guardian had been obtained. With the greatest respect I am unable to follow or agree with the reasoning of the long judgments which appear in the case and which are mainly devoted to an analysis of English cases which in their turn, in the main, relate to cases where minors have appeared before a Registrar and have made false declarations about their age, a case which not infrequently happens. The English Courts have always held that where a false declaration is made the parties are not entitled to go behind it afterwards when they have begun to repent at leisure of their marriage in haste.

In this case, however, a different situation arises. The form or what might be called the ritual prescribed for the marriage has not been carried out. Even the certificate appears to be improper and there is clearly no declaration as is required. In *Basana Sen* v. *Aghore Nath Sen*[2], a Full Bench held that in a case where a girl did not have the consent of her father and therefore the express terms of section 17 of the Special Marriage Act had not been carried out it was proper to pronounce that the marriage was null and void. With respect I prefer to follow that case rather than the Nagpur case. It seems to me that to hold otherwise would completely destroy the purpose of section 2 and section 17. If they are to be disregarded then no female minor would be free from danger and the same

1. I.L.R. (1946) Nag. 1. 2. (1928) I.L.R. 56 Cal. 628.

observation no doubt would apply in some cases to a male minor, but at any rate, the rights of the parents or guardians would be completely destroyed. The law is intended in my view to provide that the rights of parents and guardians should be maintained. They are in charge of their children and no one else must be allowed to interfere unless the legal requirements which aim at the protection of society are fulfilled.

I have decided this case on the law as applied, in my opinion, to the admitted facts and I have suggested to counsel who appears for the respondent that it was unnecessary for him in the circumstances to cross-examine the petitioner as he desired to do no doubt as to her willingness to enter into this form of marriage and also no doubt as to the relationship between the parties before and at the time of the marriage. I have no doubt that she went quite willingly to the Registrar's Office and quite willingly signed the form which was put before her. I know nothing about the background of the case but since it is admitted that the proper form was not used and that the consent of the girl's mother or relations was not obtained, in my opinion, there was no marriage in accordance with the Special Marriage Act, and I must therefore pronounce that the so-called marriage is invalid. There will be a decree *nisi* in the first instance declaring the marriage null and void. With regard to the question of costs, with some hesitation, I order that the respondent shall pay the petitioner's costs. After all he must have given the notice required under section 4 and it was his duty as the prospective bridegroom to see that the proper form was carried out. To that extent therefore he is responsible for the present position.

V.S. *Suit decreed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

Pydah Suryanarayanamurthy .. *Petitioner**

v.

Pydah Ramakrishnayya and others .. *Respondents.*

Court-Fees Act (VII of 1870), sections 11 and 12 (1)—Suit for dissolution of partnership and accounts—Decree—Appeal by defendant on basis of the tentative valuation in plaint—Appeal directed to be numbered—Subsequent order for payment of deficient court-fee on the basis of decree amount—Jurisdiction of court to pass.

In a suit for dissolution of partnership and accounts, a decree was passed against the defendant (petitioner here). In the appeal against the decree, the defendant paid court-fee adopting the tentative valuation in the plaint. The Distirct Judge accepted the valuation and directed the appeal to be numbered. But subsequently on the objection of the Court-fee Examiner, the District Judge upholding his view point directed the deficit court-fee to be paid. In revision against the order,

Held, that the original order of the District Judge, directing the appeal to be numbered cannot be deemed to be a considered order ; otherwise the Court-fee Examiner's work would be pointless. Moreover it is open for the question of Court-fee to be raised at any time during suit or appeal and it has to be determined in a considered order after hearing the parties. This is the kind of decision contemplated by section 12 (1) of the Court-Fees Act.

Dhanukoti, In re (1938) 1 M.L.J. 628 : I.L.R. 1938 Mad. 598, (F.B.) referred to.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the District Court, East Godavari, at Rajahmundry dated 8th November, 1946, in Court-Fee Examiner's Check slip in A.S. No. 183 of 1945.

P. Somasundaram and *D. Narasaraju* for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) for the Respondent.

The Court delivered the following

JUDGMENT.—The petitioner was the first defendant in a suit for dissolution of partnership and accounts. A decree was passed against him to pay Rs. 52,958-15-4. In an appeal against this decree he tried to get away with court-fee on the appeal memorandum valued at Rs. 3,100 adopting the tentative valuation in the plaint.

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* C. R. P. No. 1316 of 1946. 23rd February, 1949.

The appeal memorandum was objected to by the District Court office and ultimately the District Judge directed the appeal to be numbered. The Court-fee Examiner subsequently took objection to the valuation and the District Judge upholding his objection directed the appellant to pay a deficit court-fee of Rs. 1,522-7-0, *ad valorem* court-fee, on the decree he sought to avoid.

Mr. Somasundaram concedes that the court-fee on the appeal memorandum is correct and in accordance with the Full Bench decision in *Dhanukoti*, In re[1]. The only point he takes is that under section 12 (1) of the Court-Fees Act the District Judge had given a decision as regards the correct court-fee which is final between the parties when after the objections by the office were replied to by the advocate filing the appeal he directed it to be numbered. This order however is clearly not a considered order which is final and binding between the parties to the suit. If this view is accepted the Court-fee Examiner would be doing perfectly pointless work in the District. It is quite open for the question of court-fee to be raised at any time during a suit or an appeal and to be determined in a considered order after hearing the parties. It is only this kind of decision which is contemplated by section 12 (1) of the Court-Fees Act. The order of the District Judge is quite correct. There is no substance in this petition.

3. I should like however to observe here that the plaintiff and the defendants in a suit for dissolution of partnership and for accounts who ultimately obtain a decree cannot make it operative unless they pay suitable *ad valorem* court-fee on the amounts decreed to them. It is usual for a defendant appealing to seek to value his appeal memorandum in exactly the same way as the plaintiff valued his suit and the fact that the first defendant has sought in an appeal to get away with the same court-fee as in the plaint suggests that the deficit court-fee in accordance with section 11 may not have been collected from the plaintiff. If that has not been done, steps should be taken immediately to collect the deficit court-fee under section 11 of the Court-Fees Act.

The petition is dismissed with costs of the Government Pleader. Time for payment of court-fee two weeks from the date of the receipt of the records in the lower Court.

K.C. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

Sekuru Murahari Rao .. *Petitioner**

v.

Kandula Bapayya .. *Respondent.*

Civil Procedure Code (V of 1908), *Order* 37, *rules* 1, 2 *and* 4—*Suit on Promissory note under the summary provisions of Order* 37—*Ten days' time allowed for leave to defend as per form* 4 *in Appendix B, Civil Procedure Code—Application for leave to defend made beyond the time given—Condonation of delay—Jurisdiction of Court.*

It is not necessary that every procedural order of a Court should be supported by a specific statutory provision, and when there is neither provision nor prohibition it has to be guided by ordinary principles of common sense, justice, equity and good conscience.

Where a suit was filed under Order 37, rule 1, Civil Procedure Code, on a promissory note and the summons served on the defendant was in form No. 4 in Appendix B, Civil Procedure Code, allowing ten days to the defendant within which he should apply for leave to defend, but the defendant applied for leave to defend, a day after the expiry of the time allowed, on the question whether the Court had jurisdiction to condone the delay and give leave to defend,

Held, as no decree had been passed when the leave to defend was asked, the Court had ample discretion to give the defendant such leave as he wanted, notwithstanding the fact he had not appeared within ten days of the service of summons.

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1. (1938) 1 M.L.J. 628 : I.L.R. 1938 Mad. 598 (F.B.).

* C. R. P. No. 5 of 1948. 1st March, 1949.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsiff, Tenali, dated 10th November, 1947, in I.A. No. 893 of 1947 in O.S. No. 194 of 1947.

V. Suryanarayana for Petitioner.

N.V.B. Sankara Rao for Respondent.

The Court delivered the following

JUDGMENT.—The petitioner is a plaintiff who filed a suit on a promissory note under the summary provisions of Order 37, rule 2 of the Civil Procedure Code. A summons was issued requiring the appearance of the defendant within ten days o service. On the 11th day after service the defendant appeared and moved the Court under Order 37, rule 3, for leave to defend on the ground that the promissory note sued on was a forgery. The learned District Munsiff gave him leave to appear and defend the suit unconditionally overruling a technical contention that there was no provision under the Limitation Act to condone any delay in the ten days given in the summons No. 4 in App. B prescribed under Order 37, rule 2.

The learned District Munsiff found some difficulty in meeting a technical argument that the Limitation Act made no specific provision for condoning such a delay. His reasoning to get over the technical argument advanced before him is open to a little criticism. It is true that there is no specific provision in Order 37, rule 2 or in the Limitation Act empowering a Court to condone a delay in appearance beyond the ten days prescribed by the summons in Form No. 4. Technicality can be met with technicality, because the default recited in this summons for non-appearance within ten days is that the plaintiff will be entitled after the expiration of this period to obtain a decree with costs. It is common ground that no decree was passed by the Court when the defendant filed his application for leave to defend on the 11th day. Furthermore under Order 37, rule 4, even after decree the Court may, under special circumstances, set aside and give leave to the defendant to defend the suit on terms it thinks fit. *A fortiori* if the Court has passed no decree, it clearly has ample discretion to give the defendant such leave, notwithstanding the fact that he has not appeared within ten days of the service of the summons on him in Form No. 4, App. B.

There is no substance at all in this petition, the District Munsiff having ample discretion and power to pass the order he did. It is not necessary that every procedural order of the Court should be supported by a specific statutory provision, and when there is neither provision nor prohibition it has to be guided by ordinary principles of common sense, justice, equity and good conscience. The petition is dismissed with costs.

K.C. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VISWANATHA SASTRI.

Hasan Badsha, minor by his father and next friend, K. Mohamed Ghouse Sahib .. *Petitioner**

v.

Sultan Raziah Begum, minor by her father and guardian-ad-litem, Fathauddin Saheb .. *Respondent.*

Civil Procedure Code (V of 1908), Order 23, rule 1—Withdrawal of suit—Limits to the right of a plaintiff—Suit for partition—Plaintiff praying for sale of suit property under the Partition Act—Defendant applying for its purchase—Plaintiff, if can be allowed to withdraw his suit at that stage.

A plaintiff in a suit can withdraw his suit of his own accord without the permission of the Court. The only penalty attached to a withdrawal of the suit is that he is precluded from bringing a fresh suit on the same cause of action unless he obtains the leave of the Court for instituting a fresh suit

*C.R.P. Nos. 650 and 651 of 1948. 2nd February, 1949.

under the provisions of Order 23, rule 1, Civil Procedure Code. It is therefore, normally speaking, the right of the plaintiff to withdraw his suit without reference to the convenience of the defendant and without obtaining beforehand the permission of the Court. But there is a limit to the exercise of this right of withdrawal. Where the litigation has reached a stage at which the rights of parties have become fixed, for example, by the passing of a preliminary decree, or adjustment by a compromise, it is not open to the plaintiff to withdraw his suit thereafter and thereby seek to wipe off the effect of the adjudication rendered by the Court creating rights in the parties. But where, however, the rights of the parties have not assumed any definite shape either under a decree of Court or under a compromise entered into between them with reference to the subject-matter of the suit, it is competent to the plaintiff to withdraw his suit and he cannot be forced to remain on the record at the instance of the defendant to prosecute the suit.

Where in a suit for partition and possession of a half share in a house the plaint averred that the house was incapable of being divided by metes and bounds and prayed that it might be sold under the Partition Act and the defendant applied under section 3 of the Act for its purchase and had asked for the appointment of a Commissioner for determining the valuation, on a question whether at that stage the plaintiff could be allowed to withdraw his suit,

Held, that the stage reached in the litigation was not such as to deprive the plaintiff of his right to withdraw his suit. Though an advantage had accrued to the defendant by reason of the admission made in the plaint and in the course of the proceedings, that, however, did not clothe the defendant, with any enforceable right and did not prevent the plaintiff from exercising the right of a suitor to withdraw his suit.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the orders of the Court of the City Civil Judge, Madras, dated 23rd February, 1948 and 24th March, 1948 respectively in I.A. No. 1209 of 1947 in O.S. No. 706 of 1946 and I.A. No. 421 (521 of 1948 as noticed in the certified copy) of 1948 in O.S. No. 76 of 1948 respectively on his file.

M. S. Venkatarama Sastri for Petitioner.

Basheer Ahmed Sayeed for Respondent.

The Court delivered the following

JUDGMENT.—(C.R.P. No. 650 of 1948.)—This revision petition is preferred against an order of the learned Judge of the City Civil Court, Madras, in I.A. No. 1209 of 1947 in O.S. No. 706 of 1946, declining to allow the plaintiff to amend his plaint by withdrawing certain allegations made in paragraph 5. The suit laid by plaintiff, a minor, acting through a next friend, for partition and possession of a half share in a certain house property, the defendant being entitled to the other half share. In paragraphs 5 and 6 of the plaint, it is distinctly averred that as a division by metes and bounds was not possible, the property might be directed to be sold under the Partition Act and the proceeds divided. In paragraph 9 of the plaint, the plaintiff prayed for a sale of the house under the Partition Act between the parties. It is recorded by the lower Court that when the suit was taken up for trial on 26th September, 1947, both parties conceded that the property was incapable of being divided by metes and bounds and that it should be sold under the provisions of the Partition Act. On the same day, the defendant who wanted to purchase the property under section 3 of the Partition Act was given time for filing an application for that purpose, which was later on filed on 11th October, 1947. On 14th October, 1947, the next friend of the minor plaintiff filed the application, out of which this civil revision petition has arisen, alleging that the property was capable of a convenient division by metes and bounds, that the statements to the contrary made in paragraphs 5 and 6 of the plaint and before the Court on 26th September, 1947, were all due to a mistake and that the proceeding should be amended by his being allowed to withdraw those statements. The plaintiff also prayed incidentally for the appointment of a Commissioner to inspect the property and report as regards the divisibility of the property by metes and bounds into two shares without affecting the value of the other share. A Commissioner was accordingly appointed by the lower Court and his report is to the effect that the property as it is could not be conveniently divided but that if the dilapidated portion is demolished and dismantled it might be capable of a convenient division. The learned City Civil Judge has, after due consideration of the report, declined to allow the plaintiff to amend his plaint or withdraw the admission made before the Court by the next friend on 26th September, 1947. The applica-

tion, I.A. No. 1209 of 1947 was made after the defendant had applied for a sale under the Partition Act on 11th October, 1947 and I am unable to say therefore that the Court below erred in declining to allow the plaintiff to give up the whole basis of his plaint and to go behind the admissions made before the Court and recorded by it. I therefore dismiss the civil revision petition with costs.

(C.R.P. No. 651 of 1948.)—This civil revision petition is preferred against an order of the learned Judge of the City Civil Court, Madras, in I.A. No. 421 of 1948 in O.S. No. 706 of 1946. In my judgment in C.R.P. No. 650 of 1948 I have briefly indicated the facts which have given rise to this litigation. The suit was, as already stated, one for partition, by a Mohamedan minor, of a certain house property, the defendant also being a minor entitled to a half share. The plaintiff prayed for a sale of the property and division of the proceeds inasmuch as the property was not capable of a convenient division by metes and bounds. On 11th October, 1947, the defendant in the suit filed an application under section 3 of the Partition Act for leave to buy the plaintiff's half share at a valuation to be fixed by the Court. Thereafter, the plaintiff applied for leave to withdraw the suit unconditionally, but the Court below has declined to allow the withdrawal. A plaintiff in a suit can withdraw his suit of his own accord without the permission of the Court. The only penalty attached to a withdrawal of the suit is that he is precluded from bringing a fresh suit on the same cause of action unless he obtains the leave of the Court for instituting a fresh suit under the provisions of Order XXIII, rule 1, Civil Procedure Code. Normally speaking, therefore, it is the right of a plaintiff to withdraw his suit without reference to the convenience of the defendant and without obtaining beforehand the permission of the Court. But there is a limit to the exercise of this right of withdrawal. If, for instance, in a suit for partition or in a suit for the taking of the accounts of a dissolved partnership, there has been a preliminary decree by which the rights of the parties have been fixed, then it is not open to the plaintiff to withdraw the suit thereafter and thereby seek to to wipe off the effect of the adjudication rendered by the Court creating rights in the parties. Similarly, where in the course of a suit there has been a compromise arrived at between the parties with reference to the subject-matter of the litigation, it creates mutual rights and obligations between them and it is not open to the plaintiff, after such a compromise has been arrived at with reference to the subject-matter of the suit to withdraw the suit and thereby seek to nullify the compromise. Where, however, the rights of the parties had not assumed any definite shape either under a decree of Court or under a compromise entered into between them with reference to the subject-matter of the suit it seems to me that it is competent to the plaintiff to withdraw the suit and he cannot be forced to remain in the record at the instance of the defendant and prosecute the suit. In this case, the contention of Mr. Basheer Ahmed Sayeed, the learned advocate for the respondent, is that by reason of the concession made by the plaintiff both in the plaint and in the statement before the Court on 26th September, 1947, his client, the defendant, had acquired an indefeasible right to purchase the share of the plaintiff at a valuation to be fixed by the Court and therefore the plaintiff cannot by withdrawing the suit deprive him of the right which has accrued to him under the provisions of the Partition Act. I would be inclined to agree with the contention if the Court had made a valuation and made an order that the half share of the plaintiff should be conveyed to the defendant on the valuation determined by the Court. The stage now reached in this litigation is that the defendant has applied under section 3 (1) of the Partition Act for the appointment of a Commissioner for determining the valuation. The Commissioner has not yet determined the value. It may be that when the Commissioner determines the value, the defendant may find the valuation so high that he cannot purchase the share of the plaintiff. It may also be that having regard to the fact that the defendant is a minor, the Court may not under section 5 of the Partition Act sanction the purchase. It is no doubt true that an advantage has accrued to the defendant by reason of the admissions made in the plaint and by reason of the admission made before the Court as regards the impracticability of dividing the property. That, however, does not clothe the defen-

dant with any enforceable right and does not prevent the plaintiff from exercising his right of a suitor to withdraw his suit. In these circumstances, I consider that the order of the lower Court is without jurisdiction and should be set aside; and I hold that it is open to the plaintiff at this stage to withdraw his suit. Having regard to the peculiar circumstances of the case, I make no order as to the costs of this civil revision petition.

V.S. *C.R.P. No.* 650 *dismissed.*

C.R.P. No. 651 *allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.:—MR. P. V. RAJAMANNAR, *Chief Justice,* AND MR. JUSTICE BALAKRISHNA AYYAR.

Balasubramania and Company .. *Petitioner**

v.

Penukonda Radhakrishnamurthy and others .. *Respondents.*

Civil Procedure Code (V of 1908), *sections* 110 *and* 109 (c)—*Valuation—Court of first instance—Meaning—Arbitrators, if can be described as such—Claim before arbitrators exceeding Rs.* 10,000—*Award for a lesser sum—Amount due with interest as per award less than Rs.* 10,000 *on the date of filing in the High Court of the petition to pass a decree in terms of the award—Decision of the High Court on the petition on the Original Side reversed on appeal—Leave to appeal to the Federal Court against the decision on appeal—If can be granted—Section* 109 (c)—*Substantial question of law—If sufficient for granting of leave.*

Arbitrators cannot be described as the "Court of first instance" within the meaning of section 110, Civil Procedure Code. The word "Court" in that section must be understood with reference to the scheme of the Code in general and refers to one of the Courts in the hierarchy of Civil Courts in the country as envisaged by the Code.

A claim before the arbitrators was above Rs. 10,000. But the award was for a lesser amount. An application was made to the OriginalSide of the High Court to pass a decree in terms of the award. Even on that date the amount awarded together with interest as provided in the award was less than Rs. 10,000. The petition was dismissed but upon appeal this decision was reversed. On an application for leave to appeal to the Federal Court, it was contended that for purposes of section 110 in regard to valuation "the Court of first instance" must be deemed to be the arbitrators.

Held: As the word "Court" in section 110 refers to Courts as contemplated by the Civil Procedure Code, in this case "the Court of first instance" must be held to be the High Court on the Original Side and as the value of the subject-matter in that Court was less than Rs. 10,000 leave to appeal could not be granted.

Though a case may involve a substantial question of law, it would not be a ground entitling a party to obtain leave to appeal because it is not every substantial question of law that can be treated as a question of public importance to justify the grant of a certificate under section 109 (*c*), Civil Procedure Code.

Petition under Order 45, Civil Procedure Code, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to grant leave to appeal to the Federal Court against the decree and judgment of the High Court dated 13th August, 1948, in O.S.A. No. 49 of 1947[1] preferred against the order of the Hon'ble Mr. Justice Kunhi Raman dated 18th March, 1947, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in O.P. Nos. 153 and 197 of 1946.

V. Radhakrishnayya and *B. Venkataramiah* for Petitioners.

P. Somasundaram and *A. K. Muthuswami Iyer* for the first Respondent.

The Order of the Court was pronounced by

The Chief Justice.—The decision of this Court in O.S.A. No. 49 of 1947[1] no doubt reversed the decision of the learned Judge on the Original Side and therefore our decree is not an affirming decree. It is also clear that the appeal does involve a substantial question of law. But the objection raised to the grant of leave to appeal to the Federal Court is that the condition in section 110, first paragraph, *viz.*, that the amount or value of the subject-matter of the suit in the Court of first instance must be Rs. 10,000 or upwards is not satisfied. Under the award the sum payable was Rs. 9,682-8-0 with interest thereon at six per cent per annum

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* C.M.P. No. 7393 of 1948. 2nd March, 1949.

1. (1948) 2 M.L.J. 601.

from the date of the award. Calculating interest till 17th July, 1946, the date of the filing of the Original Petition No. 153 of 1946 to pass a decree in terms of the award, the amount comes only to Rs. 9,896-3-0, which is less than the required amount. To get over this difficulty Mr. Radhakrishnayya, the learned counsel for the petitioner, contended that in this case the Court of first instance must be deemed to be the Arbitrator before whom the claim exceeded Rs. 10,000. In support of his contention he relied upon the ruling of the Judicial Committee in *Ramdutt Ramkissendass* v. *E. D. Sassoon and Co.*[1], in which their Lordships held that in applying to an arbitration Article 115 of the First Schedule of the Indian Limitation Act, effect should be given by analogy to section 14 of the Act so as to exclude the time occupied by the plaintiff acting *bona fide* and with diligence in obtaining a previous award on the same cause of action. Their Lordships held that,

> " Civil proceedings in a Court must be held to cover Civil proceedings before arbitrators whom the parties have substituted for the Courts of law to be the judges of the dispute between them."

The Nagpur High Court following this decision has held in *Fatechand* v. *Wasudeo*[2], that arbitrators to whom parties refer their dispute are a " Court " and the proceedings before them are civil proceedings before a Court within the meaning of section 14 of the Indian Limitation Act. But we are of the opinion that these decisions do not help the petitioner. It may be that for the purpose of the Limitation Act proceedings before a Court may include proceedings before arbitrators. The question before us is whether arbitrators can be described as the Court of first instance within the meaning of section 110 of the Code of Civil Procedure. We think they cannot be. The word ' Court ' in section 110 of the Code must be understood with reference to the scheme of the Code in general. Under section 3 there is a hierarchy of Civil Courts recognised and the subordination of Courts is also defined therein. Section 9 of the Code enacts that the Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. The reference here is obviously to Civil Courts. Section 15 provides that every suit shall be instituted in the Court of the lowest grade competent to try it. This again shows that the reference is to a Court which is included in the gradation of the Civil Courts in the land. Having regard to these and several other provisions in the Code, it appears to us to be clear that the Court of first instance mentioned in section 110 is one of the Courts in the hierarchy of Civil Courts in the country. The fact that an arbitrator can be deemed to be a Court for the purpose of a particular Act cannot necessarily lead to the result that the should be deemed to be a Court for the purpose of all enactments. For instance by virtue of the definition in the Evidence Act, an arbitrator would not be a Court. We therefore hold that in this case the Court of first instance must be held to be this Court on the Original Side and admittedly the amount or value of the subject-matter in that Court was less than Rs. 10,000.

It was also urged before us that in any event the petitioner will be entitled to a certificate under clause (*c*) of section 109 of the Code that this is a fit case for appeal to the Federal Court because it involves a point of general importance, public as well as private. It is true, as already mentioned, there is a substantial question of law. But it is not every substantial question of law that can be treated as a question of public importance to justify the grant of a certificate under section 109 (*c*). On an analysis of the judgment of this Court in appeal, it is clear that the decision ultimately depended upon the peculiar facts of this case and not on any general legal considerations. We therefore do not think that this is a case which can be certified to be a fit case for appeal under section 109 (*c*) of the Code.

The application is therefore dismissed.

V.S. ——— *Application dismissed.*

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1. (1928) 56 M.L.J. 614 : L.R. 56 I.A. 128 : I.L.R. 56 Cal. 1048 (P.C.).
2. I.L.R. 1947 Nag. 477.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAGESA SASTRI.

Mantharavadi Suryanarayana and others .. *Appellants**

v.

Merugu Venkatadu and others .. *Respondents.*

Madras Estates Land Act (*I of* 1908), *section* 3 (2) (d), *Explanation I* " *other tenure* "—*Personal inams*—*If comes under*—*Exclusion of porombokes in a grant* —*Explanation I of section* 3 (2) (d) *if can be applied.*

There is no reason why personal inams like *Bhatta Vrithi* inams and *Dharmadayam* inams to a temple could not be held to come under the expression " other tenure " in Explanation (1) to section 3 (2) (*d*) of the Madras Estates Land Act.

The exclusion of prombokes in an inam grant cannot stand in the way of applying the Explanation (1) to section 3 (2) (*d*) to that grant.

Appeals respectively against the orders of the Court of the Subordinate Judge, Masulipatam, dated 30th April, 1945, in O.S. No. 46 of 1944 (O.S. No. 6 of 1944, District Munsiff Court, Gudivada) and O.S. No. 53 of 1943 respectively.

K. Ramamurthi and *K. Kotayya* for Appellants.

P. Satyanarayana Raju for Respondents.

The Court delivered the following

JUDGMENT.—C.M.A. No. 648 of 1946 is a transferred appeal from the Court of the District Judge of Kistna. It was C.M.A. No. 66 of 1945 there. It was an appeal preferred by the plaintiffs in O.S. No. 46 of 1944 on the file of the Sub-Court, Masulipatam, against an order returning the plaint for presentation to the proper Court on the ground that the Sub-Court had no jurisdiction to try the suit. The suit was to recover a sum of Rs. 1,502-9-0 claimed as damages for use and occupation of the suit property belonging to the plaintiffs in the village of Cherichintala, Kistna district, by the defendants for faslis 1350-52. C.M.A. No. 649 of 1946 is also a transferred appeal; which was C.M.A. No. 67 of 1947 in the District Court, Kistna. That also was an appeal filed by the plaintiffs, in O.S. No. 53 of 1943, Sub-Court, Masulipatam, against an order returning the plaint for presentation to the proper Court. The suit was to recover a sum of Rs. 3,355-14-0 claimed as damages for use and occupation of plaint land in the same village for faslis 1350-1352. C.R.P. No. 66 of 1946 is a revision petition against an order of the Subordinate Judge, Masulipatam, in S. C. S. No. 62 of 1943 directing the return of the plaint for presentation to the proper Court. The suit was by the plaintiffs to recover Rs. 696-10-0 from the defendants as damages for use and occupation of the plaint land for faslis 1350-1352. The plaintiffs were the same in all the cases, though the defendants and the lands involved are different. All the lands are the same Cherichintala village aforesaid. The main defence was that Cherichintala was an " estate " under the Estates Land Act and the defendants had occupancy rights and that the Civil Courts had no jurisdiction. All the suits were tried together and the learned Subordinate Judge held that the village in question was an " estate " under section 3 (2) (*d*) of the Estates Land Act. He directed the return of the plaints for presentation to the proper Court. The three cases aforesaid have now come before me for disposal.

The question to be decided is whether the decision of the Subordinate Judge holding that Cherichintala village is an estate governed by the Act is correct. Ex. P-1 is an extract from the Fair Inam Register of the said village. Column 2 describes the inam as a personal one. In column 3 the total ayacut is given as 620 acres 86 cents of which poromboke of 44 acres 96 cents and inams of 43 acres 15 cents totalling 88 acres 11 cents together were deducted and the remainder 532 acres 75 cents is shown as dry. Column 11 shows that the grant was in A.D. 1764. The inam was confirmed and a title deed was issued. Exs. P-3, P-4 and P-5 are also certified extracts from the Register of Inams and they show that they were

*A.A.O. Nos. 648 and 649 of 1946. 8th February, 1949.

certain minor inams which were also confirmed at the same time in favour of the holders. Ex. P-3 relates to 8 acres 48 cents of Bhatta Virthi inam, which appears to have been originally granted in fasli 1149. Exs. P-4 and P-5 are inams in favour of the Devasthanam of Sri Venugopalaswami and the Devasthanam of Sri Someswaraswami in the same village, of 16 acres 97 cents each, which are mentioned therein as inams granted prior to Permanent Settlement. They were also confirmed in favour of the Devasthanams. In addition to these extracts we have also Ex. P-2, an extract from the Oaks Register for fasli 1173 wherein in column 2 the inam is described as an agraharam. The original grant is not now available and is not produced. Ex. D-2 is described as a Purvana and bears date 10th May, 1792. It is stated therein by the Collector that Mantharavadi Gangadhara Sastrulu had an agraharam called Cherichintala village and that he had grains gifts paper granted by Papayya and Surayya in 1173 fasli for the shrotriem of 25 pagodas per annum and that he was enjoying it, but after his death the same is being enjoyed by his son Lakshminarasimha Sastrulu and this Purvana was granted to him for the year fasli 1201. Ex. D-1 is a list of various dumbalas in relation to the grant of Cherichintala village. These are the materials before the Court from which the proper inference has to be drawn as to whether the grant is of the whole inam village of Cherichintala.

It is argued for the appellants that as there were minor inams and also some poromboke, which was not included in the grant, the inam could not be taken to be a whole inam village and it was further argued that Madras Act II of 1945 could not apply in favour of the defendants, because the minor inams were not service inams, but were Dharamadayam and personal inams and also because poromboke which was excluded, could not be regarded as land reserved for communal purposes. I do not see why personal inams like Bhatta Vrithi inams and Dharmadayam inams to the temple would not come under the expression "other tenure" in explanation (1) to section 3 (2) (*d*) of the Estates Land Act. In *Seshagirirao* v. *Ramayya*[1], the minor inams were Dharmadayam service inams and it was held that Explanation (1) would apply. I agree with the lower Court that this contention of the appellants ought to be rejected.

The second contention is the existence of poromboke to the extent of 44 acres, which was not included in the grant, stands in the way of the applicability of the Explanation. It is not quite clear whether the poromboke was really included in the grant or not, but even assuming that poromboke was excluded, a Bench of this Court has held in *Lakshminarasimhacharyulu* v. *Ratnam*[2], that the exclusion of poromboke does not stand in the way of applying the Explanation (1). Though no specific reasons are given, it must have been because they thought it comes under the expression "lands reserved for communal purposes." In that decision the grant was construed to include the poromboke also. Their Lordships say that even if it were not so, the explanation would apply. As I am bound by the Bench decision, I must hold against his contention of the appellants.

Lastly it is argued that the grant was not of a named village. There is no substance in this contention either. From Ex. P-1 and also Ex. P-2 and D-2, the inference can be drawn that the grant was of a named village.

In the result, C.M.A. Nos. 648 and 649 of 1946 are dismissed with costs. C.R.P. No. 66 of 1946 is adjourned for final orders to the 1st April, 1949.

V.S.

C.R.Ps. 548 *and* 649 *dismissed.*

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1. (1945) 2 M.L.J. 214.

2. (1947) 2 M.L.J. 289.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

Abdul Rahim Saheb .. *Petitioner**

v.

Abdul Salam Sahib .. *Respondent.*

Practice—Partition suit—Prayer in plaint for past mesne profits—Court-fee paid on the prayer—No provision made in the preliminary decree—Subsequent application by plaintiff—Order for provision in the final decree—Jurisdiction of Court to make.

Where a preliminary decree for partition is silent as to the claim for mesne profits, the parties are not precluded from applying or the Court from awarding, mesne profits by its final decree, especially, when the plaint specifically asked for past mesne profits and court-fee on that relief was paid.

Swaminatha Odayar v. *Gopalaswami Odayar*, (1938) 2 M.L.J. 704, followed.

Ghulusam Bivi v. *Ahamadsa Rowther*, (1918) I.L.R. 42 Mad. 296, distinguished..

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the City Civil Judge, Madras, dated 20th October, 1947, in C.M.P. No. 291 of 1947, in O.S. No. 380 of 1945.

V. Srinivasan and *T. R. Ramachandran* for Petitioner.

Messrs. Subramanyam, Rajagopal and *A. Dorairaj* for Respondent.

The Court delivered the following

JUDGMENT.—Petitioner is the first defendant in a Mohamedan family partition suit. In the plaint filed by two members of the family there were specific prayers for past and future mesne profits on the items of property to be decreed to them and in respect of past mesne profits specific court-fee was admittedly paid. At the preliminary decree no provision was made for either past or future mesne profits. Subsequently on the application of the second plaintiff the learned Judge directed an ascertainment of mesne profits both past and future to be determined by the Commissioner working out the final decree.

It is contended that this order is without jurisdiction and is not in accordance with *Ghulusum Bivi* v. *Ahamadsa Rowther*[1], a Bench decision of Ayling and Krishnan, JJ. The facts as set out there do not however show that future mesne profits were asked for in the written statement of the tenth defendant who it was that asked, subsequent to the preliminary decree, for ascertainment of future mesne profits only on some property allotted to her in the preliminary decree. The decision in that case was to the effect that she could not ask for future mesne profit which was not specifically provided for in the preliminary decree. The facts there were rather different to those in the present case. The learned Judge rightly followed a later Bench decision of this Court in *Swaminatha Odayar* v. *Gopalaswami Odayar*[2], where it was specifically held that where a preliminary decree for partition is silent as to the claim for mesne profits, the parties are not precluded from applying, or the Court from awarding, mesne profits by its final decree. There is an observation there that though the Code of Civil Procedure does not specially lay down any procedure in regard to a composite action for partition and possession, the Court may pass a final decree for mesne profits even if it was not preceded by a preliminary decree. In the present case the plaint specifically asked for past mesne profits and paid court-fee on this relief. I am not prepared to accept the technical contention that because the preliminary decree was silent about this relief it must be deemed that this relief was negatived by the Court. I can see no grounds for any interference in revision. The petition is dismissed with costs—one advocate's fee to be shared by the two learned advocates who have appeared for the respondents.

V.P.S. ——— *Petition dismissed.*

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*C.R.P. No. 258 of 1948. 1st March, 1949.

1. (1918) I.L.R. 42 Mad. 296.
2. (1938) 2 M.L.J. 704.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VISWANATHA SASTRI.

Nataraja Pillai (died) and another .. *Appellants**

v.

Appasami Naidu .. *Respondent.*

Hindu Law—Widow—Decree against—Reversionary interest, if bound—Test—Construction of decree—Suit by endorsee of promissory note executed by widow—Decree against the estate if could be passed—Execution against estate in the hands of the reversioners, after her death—If can be had—Adjudication against widow—Estate, when bound.

When a decree is passed against a Hindu widow, the question whether it is passed against her personally or against her as representing the estate of the deceased is one of construction depending on the terms of the decree. Where a decree states that " It is ordered that the defendant (widow) personally and from the estate of her deceased husband in her possession do pay the plaintiff the sum of Rs. . . . ." it binds the estate of the last male owner and is not merely a decree against the widow personally not affecting the estate.

It is not correct to say that in a suit by an endorsee of a promissory note executed by the widow the only decree that could be passed is a decree personally against the maker, (*i.e.*) the widow and not a decree against the estate as upon a debt binding on the estate. Though *prima facie* such a suit is on the personal liability of the widow, if there are allegations in the plaint to show that the debt was incurred for purposes binding on the estate and that the widow was sued as representing the estate and relief was asked for and granted against the estate in her hands, it is not open to the reversioner to object to the execution of the decree passed against the estate in his hands after the death of the widow merely on the ground that the prior suit was by an endorsee on the promissory note.

Maruthamuthu Naicken v. *Kadir Badsha Rowther,* (1938) 1 M.L.J. 378 : I.L.R. 1938 Mad. 568 (F.B.), considered.

Even though section 11, Civil Procedure Code, is not strictly applicable to the case, an adjudication against a Hindu widow will, in certain circumstances, bind the estate. Where the estate of deceased Hindu has vested in a female heir, a decree fairly and properly obtained against her in regard to the estate is, in the absence of fraud or collusion, binding upon the reversionary heir and this rule is not limited to decrees obtained against the widow as a result of suits contested to the end.

Risal Singh v. *Balwant Singh,* (1918) 36 M.L.J. 597 : L.R. 45 I.A. 168 : I.L.R. 40 All. 593 (P.C.) ; *Vaithilinga Mudaliar* v. *Srirangath Anni,* (1925) 49 M.L.J. 769 ; L.R. 52 I.A. 322 : I.L.R. 48 Mad. 883 (P.C.) ; *Munni Bibi* v. *Tirlokh Nath,* (1931) 61 M.L.J. 196 : L.R. 58 I.A. 158 : I.L.R. 53 All. 103 (P.C.). *Ramsumran Prasad* v. *Shyam Kumari,* (1922) 44 M.L.J. 751 : L.R. 49 I.A. 342 : I.L.R. 1 Pat. 741 (P.C.), referred to.

Appeal against the decree of the District Court, East Tanjore at Negapatam, in A. S. No. 88 of 1945, preferred against the decree of the Court of the District Munsiff, Negapatam, in O. S. No. 21 of 1944.

R. Somasundara Aiyar for Appellants.

R. Sundaralingam for Respondent.

The Court delivered the following

JUDGMENT.—The legal representatives of the plaintiff, who originally filed the second appeal and died during its pendency, are the appellants. The suit out of which this second appeal has arisen was filed for a declaration that a decree obtained by the defendant against one Alamelu Ammal, widow of Kothandapani Pillai, was not binding on the estate of Kothandapani to which the plaintiff had succeeded as reversioner on the death of the widow. Kothandapani died on 12th February, 1925, leaving landed properties to which his widow Alamelu succeeded as his heir. On 25th December, 1926, she executed a promissory note (Ex. D-1) for Rs. 600 in favour of one Krishnaswami Naidu who endorsed it on 18th September, 1934, in favour of the defendant in the present suit who sued Alamelu, the maker of the note, and obtained an *ex parte* decree against her in O. S. No. 367 of 1934, on the file of the District Munsiff's Court of Negapatam for the amount due under the promissory note. The relevant portion of the decree (Ex. D-5) was in these terms :

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* S.A. No. 724 of 1946. 10th February, 1949.

"It is ordered that the defendant personally and from the estate of her deceased husband in her possession do pay to the plaintiff the sum of Rs. 1,083 with interest on Rs. 600 at the rate of 12 per cent. per annum from 24th September, 1934. . . . . . ."

Alamelu died in December 1939, and the present plaintiff went into possession of the properties of Kothandapani as the next male reversioner. The present defendant who, as plaintiff, had obtained the decree in O. S. No. 367 of 1934, sought to execute the decree against the estate of Kothandapani in the hands of the present plaintiff and this suit is the sequel to the attempted execution. The plaintiff's case was that the promissory note dated 25th December, 1926, was not supported by any consideration but was collusively and fraudulently executed by the widow; that, in any case, there was no need for the widow to borrow; that, the widow who had first contested O. S. No. 367 of 1934, the suit filed by the endorsee, subsequently suffered an *ex parte* decree to be passed against her without any justification; and that in no event, could the decree passed in favour of an endorsee of a promissory note given by the widow be executed against the estate in the hands of the reversioner. The defendant denied these allegations of law and fact. The Courts below have dismissed the plaintiff's suit holding that the debt under the promissory note was borrowed by the widow for purposes binding on the estate and that the decree was capable of being executed against the estate of the deceased Kothandapani in the hands of the plaintiff. Hence this second appeal.

Counsel for the appellant has put forward various contentions. It is argued that the decree in O. S. No. 367 of 1934 has not been, on a proper construction, passed against the estate of the deceased Kothandapani as such, but only against the widow Alamelu and therefore it is not executable against the properties of Kothandapani in the hands of the plaintiff. The plaintiff is not the heir-at-law or legal representative of the widow. Therefore it is said that the estate of Kothandapani in his hands is not liable to satisfy a decree against the widow. Reference is made in this connection to a decision of Wallace, J., in *Narasimiah* v. *Jawanthraj Sowcar*[1]. With reference to a decree passed under circumstances and in terms similar to those of Ex. D-5, the learned Judge observed that it did not direct that:

"the estate of the deceased now in the hands of the first defendant do pay the decree amount but that the first defendant do pay the decree amount from the estate of the deceased."

The learned Judge then observed as follows :—

"To my mind the judgment-debtor of that decree is clearly not the estate but the first defendant, whose liability again is limited to liability to meet the decree amount from the estate of the deceased, and the present petitioner is not the legal representative of the first defendant but the legal owner of the estate in his capacity as heir of the original owner. It appears to me then that the first defendant is the only person against whom execution of that decree could be taken and that it is executable only against her or her legal representative."

With all respect to the learned Judge, I am unable to agree with this line of reasoning. The estate of a deceased person cannot be a judgment-debtor, for, dead persons lay down their "legal personality" with their lives. As observed by Ranade, J., in *Erava* v. *Sidramappa*[2] :

"The so-called estate of a deceased person is a very convenient legal fiction, but, as a matter of fact, there is in Hindu Law at least no such objective reality as the estate of a deceased person. At the moment of Nagappa's death, the property owned by him ceased to be his, and became the property of his heirs subject, of course, to the liabilities and obligations created by him."

When, therefore, a decree is passed against a Hindu widow, the question whether it is passed against her personally or against her as representing the estate of the deceased is one of construction depending upon the terms of the decree. Even where a creditor seeks to make the estate of the last male owner liable for his debt, he has to sue only the widow. There is no such separate legal entity as the estate of the deceased. It is not even essential that the plaint should state in so many terms that the widow is sued in her representative capacity as representing her

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1. (1926) 52 M.L.J. 299 at 301.

2. (1895) I.L.R. 21 Bom. 424 at 453 (F.B.).

husband's estate or that she should be described as such representative. It is enough if the plaint gives sufficient indication that it was intended to bind the entire estate and not merely to enforce a personal liability of the widow. As the widow represents the entire estate in respect of her own as well as the reversionary interest the creditor must allege that he is seeking a larger remedy and also prove his case. But he need not go further—see *Marudanayakam Pillai* v. *Subramaniam Chettiar*[1]. In my opinion the decree in O. S. No. 367 of 1934, binds the estate of the last male owner. It is not merely a decree against the widow personally not affecting the estate.

The further contention of the appellant's counsel is that the suit O. S. No. 367 of 1934 having been filed on a promissory note by an endorsee thereof, the only decree that could be passed was a decree personally against the maker, *i.e.*, the widow, and not a decree against the the estate as upon a debt binding on the estate. Reliance is placed on the judgment of this Court in *Maruthamuthu Naicken* v. *Kadir Badsha Rowther*[2], for this proposition. In my opinion, this contention is unsound and the decision cited has no relevance. The widow, no doubt represents the estate but her position is not that of a life tenant or a trustee. Her position is that of owner and the whole estate is for the time vested in her though her powers in that character are limited—see *Janaki Ammal* v. *Narayanaswami Iyer*[3]. When she executes a promissory note for a debt borrowed for legal necessity, the creditor looks to the estate for repayment and the widow also obtains the loan as representing the estate. In such cases, the maker of the note is the widow as representing the estate and an endorsee of the promissory note can have a decree against her as representing the estate on proof that the borrowing was for a necessary purpose. The case is different from that of the manager of a joint Hindu family borrowing on a promissory note executed by himself. Junior members in a joint Hindu family are co-owners with the manager and have independent rights of their own in the joint family properties. The manager can, no doubt, incur debts so as to bind the interests of junior members if there is necessity. If the manager borrows money and executes a promissory note which is endorsed (without an assignment of the debt itself), the endorsee can only sue on the note and obtain a decree against the maker and not against persons who are not parties to the note. This is because no one could be made liable on a negotiable instrument unless his name clearly appears as the name of the person liable thereon. In the present case, the endorsee obtained a decree only against the maker of the note, but the maker was a widow representing the estate of her husband in which no other person had then a present interest.

Even assuming that the decision in *Maruthamuthu Naicken* v. *Kadir Badsa Rowther*[2] applies to a case like the present and confines the remedy of an endorsee of a promissory note executed by a Hindu widow to a decree against her personally the decree in O. S. No. 367 of 1934 was passed against the estate in the hands of the widow at a time when the view of the Madras High Court was that an endorsee of a promissory note executed by the manager of a joint Hindu family could sue the maker as well as the other members of the family and obtain a decree against the latter to the extent of the joint family property in their hands on proof that the debt for which the promissory note was executed, was binding on the family *Nataraja Naicken* v. *Ayyasami Pillai*[4]. This view has no doubt been since overruled by the Full Bench. But if the decree in O. S. No. 367 of 1934, obtained against the widow is otherwise binding on the estate, it cannot be challenged by a reversioner who succeeded to the estate on the ground that it was passed on a view of the law declared to be erroneous by later judicial decisions. The bar of *res judicata* does not depend upon the question whether the prior decision is correct or erroneous on the facts or in law. Even though section 11 of the Civil Procedure Code is not strictly applicable to the case, an adjudication against a Hindu widow will, in certain circumstances, bind the estate, the law being thus stated by the Judicial Committee :

1. (1935) 68 M.L.J. 643.
2. (1938) 1 M.L.J. 378 : I.L.R. 1938 Mad. 568 (F.B.).
3. (1916) 31 M.L.J. 225 : L.R. 43 I.A. 207 : I.L.R. 39 Mad. 634 at 637 (P.C.).
4. (1916) 32 M.L.J. 354.

"Where the estate of a deceased Hindu has vested in a female heir, a decree fairly and properly obtained against her in regard to the estate is, in the absence of fraud or collusion, binding upon the reversionary heir."

See *Risal Singh* v. *Belwant Singh*,[1] *Vaithilinga Mudaliar* v. *Srirangath Anni*[2] and *Munni Bibi* v. *Tirlok Nath*.[3]

The next point that arises for consideration is whether the *ex parte* decree in O. S. No. 367 of 1934 could be said to have been fairly and properly obtained against the widow in regard to the estate. There is here no suggestion of fraud or collusion. It is, however, urged that the widow had no need to borrow for the purposes of the estate and that she herself in her written statement in the prior suit (Ex. D-2) pleaded that there was no consideration for the promissory note which had been executed in favour of a relation of her own lessee. By allowing the suit to be decreed *ex parte* the widow, it is said, did not act fairly or properly by the reversion. It is obvious that the rule of *res judicata* as laid down in the cases above cited is not limited to decrees obtained against the widow as a result of suits contested to the end, *Ramsumran Prasad* v. *Shyam Kumari*[4]:

'The widow need not persist in a futile contest but might compromise a claim. No doubt, when an *ex parte* decree is allowed to be passed, the Court will scrutinise the proceedings with great care in order to find out whether the prior suit was really in respect of a debt or liability binding on the estate or in respect of a claim personal to the widow and whether the widow had any honest or tenable defence. In the present case, it has been found by both the lower Courts that the promissory note sued on in O. S. No. 367 of 1934 was borrowed by her for meeting the expenses of hostile litigations which gripped the estate and for protecting the interests of all those who had any interest in the estate as well as her own. The widow had been kept out of possession of her husband's properties and was reduced to a helpless and impecunious condition by the high handed action of the reversioners immediately after the death of her husband. She had to resort to Courts of law to recover the estate and had to find money only by borrowing. These facts are abundantly clear from the evidence. It is admitted by the counsel for the appellant that the plaint in O. S. No. 367 of 1934, alleged facts to show that the debt was borrowed by the widow for purposes binding on the estate and that the plaintiff claimed a decree against the state of her husband in her hands. It is true that the suit was filed by an endorsee of a promissory note executed by the widow and *prima facie* it was a suit on the personal liability of the widow. If, however, there were allegations in the plaint to show that the debt was incurred for purposes binding on the estate and that the widow was sued as representing the estate and relief was asked for and granted against the estate in her hands, it is not open to the reversioner to object to the execution of the decree passed against the estate in his hands after the death of the widow merely on the ground that the prior suit was by an endorsee of the promissory note. It is now found by both the lower Courts that the debt incurred under the promissory note was for purposes binding on the estate and I accept the finding.

In these circumstances, I have to hold that the plaintiff's suit was rightly dismissed by the Courts below. The second appeal is dismissed with costs.

No leave.

V.S. *Appeal dismissed.*

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1. (1918) 36 M.L.J. 597 : L.R. 45 I.A. 168 : I.L.R. 40 All. 593 (P.C.).
2. (1925) 49 M.L.J. 769 : L.R. 52 I.A. 322 : I.L.R. 48 Mad. 883 (P.C.).
3. (1931) 61 M.L.J. 196 : L.R. 58 I.A. 158 : I.L.R. 53 All. 103 (P.C.).
4. (1922) 44 M.L.J. 751 : L.R. 49 I.A. 342 : I.L.R. 1 Pat. 741 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

A. Unnooli .. *Petitioner**

v.

M. Subramaniam and another .. *Respondents.*

Madras Tenants and Ryots Protection Act (XVII of 1946)—*Usufructuary mortgagee and sub-lessee—If "tenant" entitled to deposit arrears of rent and ask for stay.*

A usufructuary mortgagee is a tenant who is entitled to relief under Madras Act XVII of 1946. *Govindan Nair* v. *Appukutty*, (1949) 1 M.L.J. 475, followed.

So also a sub-lessee is entitled to the benefits of the Act and can apply for stay under the Act. Decision of Yahya Ali, J., in C. R. P. No. 1711 of 1947, distinguished.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Calicut, dated 10th March, 1947, and made in I. A. No. 1197 of 1947, in O. S. No. 1158 of 1946.

S. Venkatachala Sastri for Petitioner.

K. P. Ramakrishna Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The respondents filed O. S. No. 1158 of 1946 on the file of the Court of the District Munsiff of Calicut for possession of the suit property. The 1st defendant is the usufructuary mortgagee. The second defendant is a lessee under the first defendant. The second defendant applied for stay of trial of the suit under section 4 (1) of Act XVII of 1946, but the learned District Munsiff dismissed the application on the ground that the first defendant was not a tenant within the meaning of the Act. The second defendant has preferred this revision petition.

Subsequent to the filing of the revision petition a Bench of this Court held in *Govindan Nair* v. *Appu Kutty*[1] (C. R. P. No. 1090 of 1947) that a usufructuary mortgagee is a tenant who is entitled to relief under Madras Act XVII of 1946. As this is a Bench decision I am bound by it. Mr. Ramakrishna Aiyar argued that even so the petitioner is not entitled to the relief, because he is only a sub-lessee, and that it has been held by this Court that a sub-lessee is not a tenant within the meaning of the Malabar Tenancy Act. This argument ignores the scope of section 4 of the Madras Act XVII of 1946. Under section 4 (1) of the Act :

"all suits for eviction of tenants from their holdings shall be stayed subject to the provisions of the following sub-sections."

Under clause 2 the tenant will have to deposit rent for particular periods as a condition precedent for obtaining an order of stay. Under clause 6 such deposit can be made not only by the tenant or the ryot but by any person whose interests are likely to be affected by the eviction or sale of the holding or land. It is impossible to contend that a sub-lessee is not a person whose interests are likely to be affected by the eviction. If so, he would be entitled to deposit the amount. Section 4 or any other section of the Act does not say that the stay can only be granted on an application made by the tenant. When the deposit is made and when the other conditions of the section are satisfied, the Court is bound to stay the suit. In this case, the first defendant is a tenant within the meaning of the Act. It is not disputed that the amounts are deposited. It follows that the petitioner will be entitled to the stay under the Act.

Mr. Ramakrishna Aiyar relied upon the decision of Yahya Ali, J., in C. R. P. No. 1711 of 1947 in support of his contention that a sub-lessee cannot apply for stay of a suit for eviction. The learned Judge based his judgment on the fact that the lease in that case had expired and therefore the sub-lessee under the lessee had

* C. R. P. No. 940 of 1947. 19th February, 1949.

1. Since reported in (1949) 1 M.L.J. 475.

no higher rights than the lessor himself. In effect he held that the sub-lessee's interests were not affected, within the meaning of clause 6 of section 4. That judgment has no application to the facts of this case.

The revision petition is allowed with costs.

K.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE RAGHAVA RAO.

T. C. A. Anandalwar .. *Petitioner**

v.

The Second Judge, Court of Small Causes, Madras and another .. *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XV of 1946), *section* 7 (2) (1)—*Default in payment of rent—Right to evict—Tenant not making tender of monthly rent after refusal of rent tendered for one month—Effect—Section* 12 (4)—*Order of appellate authority—Not subject of revisional jurisdiction of the Court—Proper remedy.*

It cannot be said that, merely because the rent due for one month has been improperly refused when tendered, the rent for succeeding months is neither due nor payable. Under section 7 (2) of Madras Act XV of 1946 the duty is cast on the tenant to make a payment or tender for every month, if he desires to take advantage of the provisions of the Act. Unless there is an unequivocal intimation by the landlord that he would not accept any payment or tender for subsequent months, in the absence of payment or tender for each month the tenant must be considered to be a defaulter.

The order of the Court of Small Causes as an appellate authority cannot be the subject-matter of a revision to the High Court.

Krishna Nair v. *Valliammal*, (1949) 1 M.L.J. 74, overruled.

No other remedy being available, an application for a writ of *certiorari* is competent.

Petitions praying that in the circumstances stated in the affidavit filed in C. M. P. No. 164 of 1949, the High Court will be pleased to issue a writ of *certiorari* calling for the record of proceedings before the Second Judge of the Court of Small Causes, Madras, in H. R. A. Nos. 1867 and 1436 of 1948, and quash the orders dated 27th of December, 1948, made therein.

C. S. Venkatachari and *S. Kuppuswami* for Petitioner.

S. S. Baradwaj for the 2nd Respondent.

The Order of the Court was made by

The Chief Justice.—These two applications for issue of *writs of certiorari* arise in respect of the same subject-matter, namely, Premises No. 118, China Bazaar Road, Madras. The petitioner is the landlord, the contesting respondent is the tenant. The petitioner filed two successive applications before the Rent Controller, Madras, for eviction. The first application was on the ground that the tenant had committed default in payment of rent for February, March and April, 1948. The other application was on the ground that the tenant had committed default in payment of rent for July, August and September, 1948. The Rent Controller passed orders of eviction on both the applications, and there were two appeals to the Court of Small Causes. Both the appeals were allowed by the learned Third Judge of that Court, on practically the same reasoning. The landlord has filed the above two applications to quash the two orders of the learned Judge.

It is sufficient to state the following facts for the disposal of these applications. The rent of the premises for January was payable by the end of February 1948. A telegraphic money order for the rent of January was apparently despatched by the tenant on 29th February, 1948, from Baroda, but actually the money order was delivered to the petitioner only on 1st March, 1948, when he refused to accept it. Thereafter, there is no finding that the tenant made any tender of the rent

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* C. M. P. Nos. 164 and 165 of 1949. 15th February, 1949.

due for any of the subsequent months, February onwards. On these facts, the learned Judge held (1) that there was a valid tender of the rent for January, and an unjustifiable refusal by the landlord and (2) that, because of this unjustifiable refusal, it was not necessary in law for the tenant to go on tendering, month after month, the rent due for each month. According to the learned Judge, in these circumstances, the tenant could not be considered to be a defaulter in respect of the rent due for the months, February to April and July to September, 1948.

We shall assume for the purpose of argument that the refusal by the landlord on 1st March, 1948, to accept the money was an unreasonable and unjustifiable refusal of a valid tender made by the tenant, though if we were compelled to give our decision on that question we would have been inclined to hold that it was not an improper refusal. The question remains whether by reason of the improper refusal of the rent for January, the tenant is exempted from the obligation to tender the rent for the succeeding months within the time limited by law. Under section 7 (2) (*i*) of Madras Act XV of 1946, a landlord is entitled to an order for eviction of the tenant, if the tenant has not paid or tendered the rent due by him in respect of the building by the last day of the month next following that for which the rent is payable. It cannot be said that, merely because the rent due for one month has been improperly refused when tendered, the rent for succeeding months is neither due nor payable. It is clear that under the above provision of the Act, the duty is cast on the tenant to make a payment or tender for every month, if he desires to take advantage of the provisions of the Act. We are not concerned in this case with the contingency of the landlord intimating to the tenant his intention not to receive the rent, even if tendered. Having regard to the facts of this case, it is unnecessary to deal at any length with the decisions cited to us by the learned counsel for the respondent, namely, *Chelikani Venkatarayanim* v. *Zamindar of Tuni*[1], *Bhagwantulayya* v. *Venkandhora*[2] and *Harnath Raibinjraj* v. *Hirdyanarain*[3], because all these decisions lay down the well-known proposition which was enunciated by Wigram, V.C., in the leading case of *Hunter* v. *Daniel*[4], that where there has been an unequivocal refusal to accept a tender, the law does not require a tender to be made. Those cases dealt with cases of mortgages and contracts, and with the particular incidents of tender, default in which was made the subject-matter of the action. In this case it may be that the tenant had a good defence, if the landlord had chosen to apply for an order of eviction on the ground that the tenant had defaulted in the payment of the rent for January, because it was an improper refusal of the tender made by the tenant. But as regards the rent for the subsequent months, the principle enunciated in those decisions can have no application whatever. There is no evidence in this case of an unequivocal intimation by the landlord that he would not accept any payment or tender for subsequent months. The learned Judge was clearly in error in holding that the tenant could not be considered to be a defaulter in respect of rent for months for which admittedly there is no evidence of payment or tender. There is nothing to support the learned Judge's conclusion that after the landlord's refusal of the January rent on 1st March, 1948, the tenant was not bound to tender the rent. There is, therefore, a clear error apparent on the face of the record, and we, therefore, direct the issue of a writ quashing the order of the trial Judge in each of the two appeals.

Learned counsel for the respondent contended that as there was another remedy open to the petitioner, the application for a writ of *certiorari* was not competent. The remedy, according to him, is to apply in revision to this Court against the order of the Court of Small Causes. He relied upon the decision of Panchapakesa Aiyar, J., in *Krishna Nair* v. *Valliammal*[5]. With respect to the learned

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1. (1922) 44 M.L.J. 631 : L.R. 50 I.A. 41 : I.L.R. 46 Mad. 108 (P.C.).
2. (1941) 1 M.L.J. 788 : I.L.R. (1941) Mad. 767 (F.B.).
3. (1946) I.L.R. 25 Pat. 451.
4. (1845) 4 Hare 420 : 67 E.R. 712.
5. (1949) 1 M.L.J. 74.

Judge, we find that his decision loses its value because of the omission to refer to an important statutory provision, namely, sub-section (4) of section 12:

"the decision of the appellate authority and subject only to such decision, an order of the Controller shall be final and shall not be liable to be called in question in any Court of law whether in a suit or other proceeding or by way of appeal or revision."

It has not been contended before us that this provision is invalid. Therefore, the order of the Court of Small Causes as an appellate authority cannot be the subject-matter of a revision to this Court. There is no other remedy available to the petitioner. These applications are, therefore, allowed. The respondent will pay the costs of the petitioner in one of the petitions.

K.S. ——— *Application allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE MACK.

The Province of Madras .. *Appellant**

v.

The Firm of Kanigolla Sivalakshminarayana and another .. *Respondents.*

Madras General Sales Tax Act (IX of 1939), section 8—Scope—Agent buying or selling for principal for a commission—Exemption from tax—Conditions essential for.

A clandestine profit made by a commission agent other than the agreed commission will disentitle him to the benefits of section 8 of the Madras Sales Tax Act. If an agent acting on behalf of a buying principal for an agreed commission, purchases goods in the open market at a particular price and sells the same to his buying principal at a higher price and at the same time collects a commission also, then he cannot claim the advantage of section 8, unless the buying principal knows that his agent had, in the open market, paid a lower sum for the same goods and either explicitly or by action or deed from which consent can be implied, acquiesces in it. The real import of section 8 is that the agent should act only as a medium for the transfer of goods from one party to another and for acting as such a medium, intermediary or agent, he should be paid a remuneration or commission. Such transactions might sometimes result in the medium, intermediary, or agent, acting as vendor or purchase himself, as understood in law. But even then he is only an agent and he should strictly conform to the mandatory provisions of section 8 in order to get exemption.

In cases where such agents acting as agents for selling goods, without paying *rusum* to the dealers from whom they got the goods, collects such *rusum* from their purchasers (their principals) the exemption under section of the Act cannot be invoked.

Merely because an agent collects as *rusum* from his principal the sales tax he might have to pay to the sellers it cannot be said that he is charging more than his commission and that he will be exposed to sales tax on his entire turnover as a violation of section 8.

Per *Mack, J.*—Section of the Act exempts from sales tax a commission agent who buys for a known principal specified in his accounts for an agreed commission or brokerage. The section does not require that the seller be disclosed to the buyer before the purchase is effected. It would be a sufficient compliance with section 8 if the buyer principal and the seller to the commission agent are specified in the latter's accounts.

Appeal against the decree of the District Court of West Godavari at Eluru, dated the 27th November, 1946, and passed in O. S. No. 16 of 1946.

The Advocate-General (*K. Rajah Aiyar*) and The Government Pleader (*K. Kuttikrishna Menon*) for Appellant.

B. V. Subramaniam for Respondents.

The Court delivered the following

JUDGMENTS : *Govinda Menon, J.*—The judgment which my learned brother is about to deliver, which I have, with advantage and pleasure read before-hand, deals with adequate particularity of detail the questions in issue and therefore I propose to add only a few words as regards the legal question arising in the case.

Though fiscal statutes resembling the Madras General Sales Tax Act of 1939, had been in vogue in at least three of the Nations constituting the British Commonwealth before the enactment of the Act in question by the Madras Legislature,

* Appeal No. 514 of 1947. 4th February, 1949.

and General Sales Tax Acts were in force in about 25 States of the U. S. A. as well as in various European countries, our attention has not been drawn to any provision of an enactment similar to section 8 of the Statute which we have to interpret. Such being the case, the decision on the point should rest solely on the interpretation of the words of the section unhampered and uninfluenced by any notions of things prevalent in other countries.

A strict grammatical and etymological interpretation of the word " dealer " as defined in section 2 (*b*) of Act IX of 1939 would include persons like the plaintiffs in the present action even if they had merely acted as commission agents, because either as agents for buying goods on behalf of a known principal or as a selling agent on behalf of a known principal, they should be deemed to be persons who carry on the business of buying or selling goods. If such a person is a " dealer " then section 3 of the Act says that subject to the provisions of the Act every dealer shall pay, in each year, a tax in accordance with the scale specified. There are also various provisos to the section with which we are not actually concerned at this stage. It is only by a later section, *viz.*, section 8, that an agent is excluded. Had it not been for the incorporation of section 8, even a person who, for an agreed commission or brokerage, buys or sells goods on behalf of known principals, specified in his accounts in respect of each transaction, will be a " dealer " within the meaning of the Act and hence liable to be taxed. Therefore the question is how far the exemption contained in the last mentioned section absolves the present plaintiffs from liability to pay the tax in regard to the dealings mentioned in the suit. The real nature of a commission agency in relation to the dominion over goods is defined by Blackburn, J., in *Ireland* v. *Livingston*[1]. The discussion arose there, as a result of the question put to the Judges by Lord Chelmsford, L.C., for which the Judges responded with the answer. At page 408, Blackburn, J., observes as follows :

" It is quite true that the agent who in thus executing an order, ships goods to his principal, is in contemplation of law a vendor to him. The persons who supply goods to a commission merchant sell them to him, and not to his unknown foreign correspondent, and the commission merchant has no authority to pledge the credit of his correspondent for them. There is no more privity between the person supplying the goods to the commission agent and the foreign correspondent than there is between the brickmaker who supplies bricks to a person building a house, and the owner of that house. The property in the bricks passes from the brickmaker to the builder, and when they are built into the wall, to the owner of that wall ; and just so does the property in the goods pass from the country producer to the commission merchant ; and then, when the goods are shipped, from the commission merchant to his consignee. And the legal effect of the transaction between the commission merchant and the consignee, who has given him the order, is a contract of sale passing the property from the one to the other ; and consequently the commission merchant is a vendor, and has the right of one as to stoppage *in transitu*."

Again at page 409, the learned Judge observes as follows :

" My opinion is, for the reasons I have indicated, that when the order was accepted by the plaintiffs there was a contract of agency by which the plaintiffs undertook to use reasonable skill and diligence to procure the goods ordered at or below the limit given, to be followed up by a transfer of the property at the actual cost, with the addition of the commission; but that this super-added sale is not in any way inconsistent with the contract of agency existing between the parties, by virtue of which the plaintiffs were under the obligation to make reasonable exertions to procure the goods ordered as much below the limit as they could . . . . . . A commission merchant using reasonable exertions to get the goods as cheap as possible, ought to buy them in small parcels if the state of the market in the country is such that it is the reasonable way to get them. If the merchant would get the goods cheaper by giving a wholesale order to the manufacturer, which probably would be the case in *England*, where *Manchester* goods are ordered from a *London* or *Liverpool* commission agent, he ought to give the wholesale order."

This dictum of Blackburn, J., has been considered by the Court of Appeal in *Cassaboglou* v. *Gibb*[2], but for the purpose of the present case it is unnecessary to deal with the criticisms or discussions either by the Master of the Rolls or by the Lord Justices in that case.

In the three categories in which the learned District Judge has divided the buying transactions of the plaintiffs, I can find no difficulty whatever in the first

1. (1871) L.R. 5 H.L. 395. 2. (1883) L.R. 11 Q.B.D. 797.

of them, *viz.*, where the plaintiffs acting as buying agents, in addition to what appears in their accounts as an agreed commission, had already paid the *rusum* to the person from whom they purchased the goods and collected such *rusum* from the principal who entrusted them with the task of purchasing goods. In the second category where only a part of the *rusum* collected from the buying principal had been paid over to the person from whom the commission agent purchased the goods, it may be that the transaction may not be strictly exempt by the operation of section 8. But as the learned District Judge observes :

> " there is no reason to think that the difference in *rusum* charged to the principal did not form part of the commission agreed upon."

With this finding it is difficult to disagree, on the evidence let in, and therefore it cannot be said that even in the second category the exemption provided for in section 8 cannot be invoked or availed of.

As regards the third category, *viz.*, instances of *rusum* which the plaintiffs charged to their principal even in cases where they did not have to pay *rusum* to the dealers from whom they bought the goods, which in this case amounted to a sum of Rs. 360-6-6 over a turnover of Rs. 45,797-5-6, it is a matter to be decided on the evidence. The learned Judge found that the plaintiffs' principals being experienced business-men knew, or must have known, that the plaintiffs were collecting the *rusum* which they had not had to incur in purchasing the goods ; and on the materials before the lower Court the learned Judge was justified in concluding that the *rusum* was an additional agreed commission.

Before considering the real import of section 8, we have to see what is really meant by this word " *rusum*." It is an Urdu word and is the plural of " *rasam* ". meaning custom ; settled mode or fees ; duties ; taxes ; perquisites ; commission, etc., *e.g.*, the word *rusum-i-circar* meaning stamp duties and the word *rusum-i-adalat* meaning court-fee. It is therefore clear that in collecting an amount designated " *rusum*," the commission agents were really collecting a commission and as my learned brother has pointed out, it was done at a time when the mercantile community, especially in the mofussil, were not fully alive to or conversant with the nature of the General Sales Tax Act. If *rusum* therefore is a commission or a perquisite, can it be said to be an agreed one ? That depends upon the nature of the business and the contract between the principal and agent. It is not disputed that the plaintiffs are licensed agents possessing licences as evidenced by Exs. P-19 and P-20. What the section requires is that the agent should have a licence which allows him to transact business in that capacity. In doing so, if he mentions in his account books what each of the transactions is, whether it is buying or selling on behalf of a known principal who has agreed to pay a commission, then the Provincial Government can exempt him from the tax or taxes. There are also provisos to the section but we are not concerned with them in this case. In any particular transaction, whether it be of buying or selling, the agent can act only on behalf of one principal and his name should be mentioned in the account as also the agreed commission. In cases where dealing with one and the same goods, at the time of purchase, he acts as the agent of the seller and then as the agent of the buyer in selling the goods it may be difficult to say whether the exemption under section 8 can be availed of. In order to make my position clear, I would like to give the following illustration : Supposing the plaintiffs had been commissioned by certain wholesale merchants to sell 100 bags of gingelly seed for an agreed commission, in selling these bags the plaintiffs act as the agent of the seller and get a commission. Suppose at the same time the plaintiffs were commissioned as buying agents by someone else to purchase 100 bags of gingelly seed, and the plaintiffs sell the same 100 bags of gingelly seeds on which they, as agents of the seller, had already got a commission, to the buyer and get another commission from him. Can it be said that they can claim the exemption under section 8 ? If they keep each of these transactions separate and specify in their accounts the known principal on whose behalf they act and the agreed commission thereof, then, there will be two transactions even though the goods dealt with are

the same. In such a case they can invoke the exemption under section 8 but not where both the transactions are simultaneous as it were and the agent gets one commission for selling and another commission for purchasing. In this case there is no evidence that the plaintiffs have acted at the same time on behalf of two principals

The real point on which the learned Advocate-General wanted us to hold that the plaintiffs cannot claim the exemption under section 8 is that if the agent takes anything other than the agreed commission he will immediately lose the benefits which he would have got if section 8 were applicable. As we have already found that the *rusums* in this case was in the nature of agreed commissions, it cannot be said that there was anything other than an agreed commission which the plaintiffs had collected. If, on the other hand, acting as a buying or selling agent, the plaintiffs had collected any sum of money clandestinely without disclosing its nature to their principal, on such transactions they cannot claim the benefit of section 8. The point of distinction is not that the agent has taken something more than the so-called agreed commission ; but the point is whether the amount taken can be brought within the ambit of the term " agreed commission " by the principal acquiescing in it or allowing the agent to take the money. It is unnecessary, as the section stands, that the agreement should be beforehand. It would be quite sufficient if the agreement comes into existence after the purchase or sale.

Any clandestine profit made by a commission agent other than the agreed commission will, in my opinion, disentitle him to the benefits of section 8. If an agent acting on behalf of a buying principal for an agreed commission, purchases goods in the open market at a particular price and sells the same to his buying principal at a higher price and at the same collects a commission also, then he cannot claim the advantage of section 8, unless the buying principal knows that his agent had, in the open market, paid a lower sum for the same goods and either explicitly or by action or deed from which consent can be implied, acquiesces in it. The real import of section 8 is that the agent should act only as a medium for the transfer of goods from one party to another and for acting as such a medium, intermediary, or agent, he should be paid a remuneration or commission. Such transactions might sometimes result in the medium, intermediary, or agent, acting as vendor or purchaser himself, as understood in law. But even then he is only an agent and he should strictly conform to the mandatory provisions of section 8 in order to get exemption.

In cases where the plaintiffs have acted as agents for selling goods, the matter was not seriously pressed before the lower Court. In such cases where the plaintiffs, without paying *rusum* to the dealers from whom they got the goods, collected such *rusum* from their purchasers, from them who in fact were their principals, the exemption under section 8 cannot be invoked.

In these circumstances the decision of the learned District Judge is correct and I agree with the judgment about to be delivered by my learned brother.

Mack, J.—The appellant is the Provincial Government of Madras who were sued by a firm of commission agents doing business at Ellore and Tadepalligudam in the West Godavari District, for the recovery of Rs. 6,508-9-0, sales tax, alleged to have been illegally collected from it. The firm was granted licences (Exs. D-19 and D-20) under section 8 of the Madras Sales Tax Act, 1939, to do business in both these places. Under section 8 and the conditions of the licence a person is exempt from sales tax in respect of transactions if he :

" for an agreed commission or brokerage buys or sells on behalf of known principals specified in his accounts in respect of each transaction."

The firm did both a buying and selling agency business. The learned District Judge held that no sales tax was leviable on their buying agency turnover, but that it was rightly levied on the turnover of the selling agency business in respect of which the plaintiffs were given a decree for Rs. 4,922-2-9. The Government appeals against this decree. A memorandum of cross-objections has been filed

by the plaintiffs against the dismissal of their claim for a refund of sales tax on their selling agency turnover amounting to Rs. 1,060-1-0.

The main ground on which the learned Advocate-General presses for sales tax on both the buying and selling businesses is that the plaintiff firm collected in addition to the agreed and customary commission of one per cent. and some other necessary charges such as cart hire, loading charges, etc., incurred on behalf of their principals, a charge of quarter per cent. which was called *rusum*. It is common ground that this charge was made for the first time in 1940 and followed closely on the Sales Tax Act which was enacted in 1939; it corresponded with the sales tax payable. The plaintiff firm did not collect it in all cases. The practice appears to have originated in dealers billing for these *rusum* charges as a provision for the anticipated sales tax demand being made against them. The learned District Judge differentiated the buying and selling agency business according to the manner in which this *rusum* was dealt with in these lines of business.

To take up first the buying agency business with which the main appeal is concerned its salient characteristics are these. The *rusum* was not collected in all cases; in fact, on a turnover of Rs. 1,54,371-11-3 no *rusum* at all was charged by the plaintiff firm to the buyer's principals on whose behalf they bought. According to another category of transactions listed in Ex. P-13 (*c*) showing a total turnover of Rs. 174,927 *rusum* was collected from the buyers principals and paid over to the sellers except for a small sum of only Rs. 49-2-8. In a third category of cases listed in Ex. P-13 (*d*) with a turnover of Rs. 45,797-5-6, the plaintiff firm charged their buyers with *rusum*, but did not pay it to their sellers apparently because the latter did not include this charge in their respective bills or pattis. A total sum collected as *rusum* of Rs. 360-6-6, which remained undisbursed was appropriated though not in the circumstances perhaps intentionally by the plaintiff firm.

The learned District Judge was inclined to place this charge of *rusum* in the circumstances in the buying agency business as a little additional commission, the principals on behalf of whom they bought, were prepared and willing to pay.

There can be no doubt, nor is it disputed, that this charge of *rusum* was a new practice which arose out of the Sales Tax Act, 1939. It appears to have originated from prudent sellers making this charge and ensuring against a sales tax levy being made on their total turnover. The precise incidence of sales tax immediately after this novel Act came in was then in doubt particularly in its application to commission agents like the plaintiff firm who did both a buying and selling agency and daily put through transactions of sale with a heavy total turnover. Doubts have been set at rest as regards the responsibility for collecting and paying sales tax by an additional section 8-B in the Sales Tax Act enacted in 1947 which lays down that no person who is not a registered dealer shall collect any amount by way of tax subject to exemptions the Provincial Government may grant till 1st April, 1948; but during the years immediately succeeding the Act, there was obviously considerable doubt as to the respective liability of the seller and the buyer to pay such tax to the authorities. Under section 3, the dealer, that is, the seller, has normally to pay tax on his total turnover and would naturally seek to pass the incidence of this tax on to the buyer. The charge, therefore, of *rusum* by the seller to the commission agent is in order, and so is the collection of *rusum* by the commission agent from his buyer principal in order to meet the charge of Rusum in the seller's bill to him. Sales by persons who are themselves agriculturistis-producers are exempt from sales tax, and cases in this category appear to account mainly for no *rusum* being charged by the sellers or collected at all by the commission agent from his buyer principals on a substantial portion of the turnover of the buying agency business. We are, therefore, unable to accept the learned Advocate-General's contention that *rusum* is in the circumstances something charged by the commission agent in addition to the agreed or customary

commission of one per cent. ; and that the collection of *rusum* would expose the commission agent to sales tax on his entire turnover as a violation of section 8 and the conditions of his licence.

We have had the advantage of an argument on the scope of section 8 of the Act and the precise meaning of the words :

> " buys or sells on behalf of known principals specified in his accounts in respect of each transaction."

Some decisions on commission agencies both in Indian and English law long prior to the Sales Tax Act, have been placed before us to which we need not refer. The language of the section appears to us plain and to present no difficulty. Nor is any nice question of breach of contract or agency liability involved, the point for determination being merely whether within the scope of section 8 there is a liability to pay sales tax. The section clearly exempts from sales tax in the first place a commission agent who buys for a known principal specified in his accounts for an agreed commission or brokerage. It may be that the commission agent buys on behalf of his principal in the open market. The section does not require that the seller be disclosed to the buyer, before the purchase is effected ; and it is a sufficient compliance with section 8 if the buyer principal and the seller to the commission agent are specified in the latter's accounts. For instance, if the commission agent purchases goods for his buyer principal from some shops or dealers, he must show in his accounts the names of the shops or dealers and charge the buyer principal only the precise price he actually paid. Similarly in a selling agency business the accounts of the commission agency should specify the names of the seller and the buyer with one sole transaction put through at one price. The section presents no real difficulty even in the case of commission agents, who, like the present plaintiffs, do both a buying and selling agency business. Each sale they put through will necessarily be liable to sales tax to be normally paid by the seller unless it is exempt under the Act, and the seller will pass on the incidence of the tax to the buyer. The commission agent has nothing to do with the collection of any sum towards the sales tax, but, if and when charged by the sellers to him as will invariably be the case, it can and in fact should be included by the commission agent in his bill to his buyer principal as a legitimate charge in the same category as other items such as cartage, loading charges, and other expenses actually incurred which the Advocate-General concedes the commission agent can legitimately charge without exposing his whole turnover to a levy of sales tax. The simple criterion is as we read section 8 that the commission agent cannot make any profit for himself other than his agreed commission or brokerage. If he does not make this perfectly clear from his accounts, he will do so at the peril of becoming disentitled to exemption from sales tax on his entire turnover.

We are quite satisfied on a careful scrutiny of the accounts exhibited that both the buying and the selling transactions were on behalf of known principals specified in the plaintiff's accounts. To take only one concrete case, L. S. M. Kandaswami Pillai of Tanjore (P.W. 2) placed an order for 251 bags of gingelly with the plaintiff firm. The patti Ex. P-17 (*a*) for Rs. 9,764-4-0 recites that these bags were purchased by him in person and includes several miscellaneous charges including *rusum*. These purchases were made from three other firms whose pattis are exhibited as Ex. P-21 (*a*), P-21 (*b*) and P-21 (*c*) which include charges for *rusum*. The plaintiffs' firm paid this charge and included it in the bill to Kandaswami Pillai, a perfectly legitimate charge, the *rusum* in such cases being clearly no profit whatever to the commission agency. A business man and a commission agent will not ordinarily volunteer to pay anything to anybody unless billed for. This doubtless accounts for the three different categories of cases referred to supra in the buying agency business. *Rusum* was probably charged to buyers by this commission agency from sellers who were considered not exempt from sales tax, but who did not take the precaution of including *rusum* in their own bills to the commission agency. It will therefore be seen that in the buying agency business, the great bulk of the *rusum* was charged by the sellers to the commission agency

and legitimately passed on to the buyers. We are in agreement with the learned Subordinate Judge that so far as the buying business is concerned the mere fact that the plaintiff firm did not actually pay to the sellers all the *rusum* collected from the buyers, will not make the entire turnover of the buying agency liable for the full sales tax.

So far as the selling agency business is concerned the position is entirely different, the accounts showing that the plaintiffs collected *rusum* as sellers from the dealers who bought from them, and their accounts nowhere show that they paid this *rusum* to the principals on whose behalf they sold, presumably because the latter made no demand for *rusum* on them. It may be that the seller principals for whom they acted were agriculturist producers, sales by whom were exempt from sales tax. In such cases, the plaintiff firm were clearly not entitled to colect any *rusum* at all from the buyers and pocket it for themselves without passing it on to the sellers. We would emphasise again that the commission agent exposes himself to liability to sales tax on the transactions of sale he puts through if he charges as a seller for a known principal, *rusum* to the buyer without this being charged to him by the principal on behalf of whom he sells and if he pockets it himself. *Vice versa* where a commission agent buys on behalf of a known principal he can only charge that principal with *rusum* only if it has been charged and collected from him by the seller from whom he purchased. In view of there being no evidence or material to show that the sellers' principals even agreed to such *rusum* being collected from the buyers and being appropriated by this commission agency, the charge and appropriation of *rusum* cannot be held to be either an addition to agreed commission or an item of expenditure legitimately incurred by the commission agent on behalf of the principal for whom he sold as such as cart hire, loading charges and so on. As the accounts stand, the collection of *rusum* merely swelled the profits of the commission agency. Had the plaintiffs' selling agency business showed as in the case of the buying agency business that as a general rule they passed on the *rusum* they collected without appropriating it for themselves, we should have been inclined to have placed the selling agency business in the same category as the buying agency business, and to have exempted it also from sales tax on the total turnover. Even this not having been established by the plaintiff firm, we think that the learned District Judge was quite correct in his finding that the sales tax was legally and correctly levied on the entire turnover of the selling agency business.

The Appeal and the Memorandum of Cross-objections are both dismissed with costs.

K.S. ——— *Appeal and Memorandum of Cross-objections dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MACK.

Annamreddi Pichireddi .. *Petitioner**

v.

Sri Vighneswara Swami Varu of Nagamambapuram represented by its trustee Kalahasti Venkatachalam and another .. *Respondents.*

Civil Procedure Code (*V of* 1908), *section* 115—*Orders of Collector acting under section* 44-*B* (2) (d) *of the Madras Hindu Religious Endowments Act—Liability to revision by High Court.*

The Collector acting under section 44-B (2) (*d*) of the Madras Hindu Religious Endowments Act is not a Civil or Revenue Court whose orders are liable to revision under section 115, Civil Procedure Code.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Collector of Nellore dated 24th January, 1947, in R.C.B. 8, No. 1188 of 1946 on appeal from the order of the Revenue Divisional Officer, Kavali, dated 10th September, 1946, in D. Dis. No. 177 of 1946.

K. Umamaheswaram for Petitioner.

Alladi Kuppuswami for Respondents.

* C. R. P. No. 269 of 1947. 28th February, 1949.

The Court delivered the following

JUDGMENT.—The Collector acting under section 44-B (2) (*d*) of the Hindu Religious Endowments Act is not a Civil or Revenue Court whose orders are liable to revision under section 115 of the Code of Civil Procedure.

The petition is dismissed as not maintainable with costs.

K.C. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE BALAKRISHNA AYYAR.

Salagrama Subramanyam and others .. *Appellants**

v.

Salagrama Narayanamma and another .. *Respondents.*

Hindu Women's Rights to Property Act (XVIII of 1937)—*Agricultural land—Tests—Lands used as salt pans for producing salt—Non-agricultural in character.*

In coming to a conclusion whether a land is agricultural or not the commonsense test must be applied according to which the general character of the land may be determined. Such a test should not be based upon hypothetical possibilities or potentialities which are merely notional and not practicable. This test would to a large extent consist in the user of the land for such a long course of time that it may be taken to indicate its general character.

Where plaintiffs as the undivided brothers of 1st defendant's deceased husband claimed ownership in themselves of certain lands which were being used as salt pans to the exclusion of the 1st defendant in whose name also licence for manufacturing of salt was issued by the Central Excise Officer, on the question whether the suit lands were agricultural so as not attract the operation of the Hindu Women's Rights to Property Act (XVIII of 1937),

Held, the fact that for seventy years previously the lands had been used only for manufacturing salt would be sufficient to make the lands by user and character non-agricultural.

Appeal against the decree of the Court of the Subordinate Judge, Kakinada, dated 6th August, 1945, in O.S. No. 12 of 1945.

K. Bhimasankaram for Appellants.

P. Somasundaram and *P. Suryanarayana* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—Plaintiffs are the appellants. The first defendant's husband was their undivided brother who died leaving him surviving the first defendant his widow. The suit relates to certain lands, which according to the learned Subordinate Judge's finding which has not been challenged, have been and are being used as salt pans for producing salt under licences granted by the Government. The licences in respect of the suit lands were issued in the name of the paintiffs and the first defendant's husband ; but on his death the licences were renewed in the name of the plaintiffs and the first defendant. The suit is for a declaration that the order of the Central Excise Collector dated 18th October, 1944, including the first defendant as joint owner of the suit property is illegal.

The case of the plaintiffs rests entirely on the ground that the suit lands are agricultural lands in which the first defendant would not be entitled to any right under Act XVIII of 1937 because as held by the Federal Court that Act is *ultra vires* so far as it affected devolution of agricultural lands. The learned Judge has held that both by use and character of the lands, the suit property is non-agricultural land to which the first defendant will have a title under Act XVIII of 1937. According to the evidence and the admission of the plaintiffs, for the past seventy years these lands have been used only for manufacturing salt. This fact alone would in our opinion be sufficient to describe the lands as non-agricultural. It has not been contended before us, nor can it be contended in view of the ruling in *Commissioner of Income-tax, Madras* v. *Linga Reddi*[1], that the manufacture of salt is

* Appeal No. 12 of 1946. 21st February, 1949.

1. (1927) 53 M.L.J. 377 : I.L.R. 50 Mad. 763 (F.B.).

an agricultural operation. In coming to the conclusion whether a land is agricultural or not, we consider that a commonsense test must be applied according to which the general character of the land may be determined. Such a test should not be based upon hypothetical possibilities or potentialities which are merely notional and not practicable. This text would to a large extent consist in the user of the land for such a long course of time that it may be taken to indicate its general character. Applying this test this case does not present any difficulty because so far as anything is known about the land, it has always been used for the purpose of manufacture of salt. Certain observations of a learned Judge of the Calcutta High Court in *Nil Govinda Misra* v. *Rukmini Deby*[1], were referred to us but they are of very little assistance to us in the decision of this case, because they do not indicate how to determine the general nature and character of any particular land.

We are in agreement with the view taken by the learned Subordinate Judge as to the nature of the land. The appeal therefore fails and is dismissed with costs of the first respondent.

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

Chunilal .. *Appellant**

v.

The Governor-General in Council as representing G.I.P. Railway .. *Respondent.*

Railways Act (IX of 1890), *sections* 58 (1) *and* 78—*Scope and effect of—Description of consignment contemplated by—Loss of consignment—Liability—Value of goods more than that declared by consignor—Right of consignor to claim actual value.*

All that section 58 of the Railways Act contemplates is a description of such a general nature as may be sufficient to determine the correct freight chargeable. There is no statutory obligation on a consignor of a box containing miscellaneous articles to hand in a precise invoice describing separately every article in it. The description in the forwarding note of a consignment containing miscellaneous articles like lead and colour pencils, brass nibs, sewing machine needles, and playing cards (in respect of all of which the freight payable is the same) as " stationery pencils " cannot be regarded as materially false so as to absolve the railway of liability to pay compensation for the loss of the consignment.

Where a consignor takes it upon himself specifically to value the contents of a box consigned by rail and it is lost in transit it is not open to him to claim from the railway company anything in excess of that valuation on the ground that the box really contained things of greater value. He cannot recover more than the value declared by him, though the Court may find that the box in fact contained goods of greater value.

Appeal against the judgment and decree of the City Civil Court, Madras, dated 25th August, 1947, in O.S. No. 330 of 1946.

Ramanujam and *Venkataseshayya* for Appellant.

V. K. Ramanatha Aiyar instructed by *Messrs. King and Partridge* for Respondent.

The Court delivered the following

JUDGMENT.—Appellant is the plaintiff. One Chunilal, who consigned by goods train a dealwood-box containing goods to Bombay on 12th May, 1945. The box was lost in transit. He sued the M. & S. M. and the G.I.P. Railways represented by the Governor-General in Council to recover the value of its contents, namely, Rs. 2,031-12-0. The Principal City Civil Judge gave him a decree only for Rs. 142 with proportionate costs against the G.I.P. Railway only, it not being disputed that it actually received the box in transit from the M. & S. M. Railway. The learned Judge found that the box in question actually contained the following articles as claimed by the plaintiff (1) two gross red-blue pencils worth Rs. 72, (2) 5 gross black lead pencils worth Rs. 70, (3) 20 gross swadeshi brass nibs worth Rs. 480, (4) 700 dozen sewing machine English needles worth Rs. 1,400, (5) 3 dozen playing

1. A.I.R. 1944 Cal. 421.

*C.C.C.A. No. 56 of 1947. 23rd February, 1949.

cards worth Rs. 9-12-0. Plaintiff examined P.W. 2, the proprietor of the shop who supplied these goods to the plaintiff and also packed them and found on his evidence and also his account book and a cash bill that all these articles were in fact in this box consigned by goods train. The forwarding slip handed in by the plaintiff (Ex. B-1) described the contents of the box as follows : " One G. Parcel stationery pencil, value Rs. 900." Holding plaintiff strictly to the description of " pencils " the learned Judge gave him a decree for Rs. 142 being the value only of the red and blue and black lead pencils.

I am far from clear as to the legal reasoning on which the learned Judge acted in holding that plaintiff could only recover the value of " pencils " and not even other articles of stationery to which category brass nibs and also needles which can be used for sewing account books and other office purposes can fall. The learned Judge was guided by an old Bombay decision in *Ishwardas Gulabchand* v. *The Great Indian Peninsula Railway Co.*[1] and section 78 of the Railways Act. The Bombay decision is an interesting one. On the facts in that case, a plaintiff consigned 12 bags of sugar candy describing them in the consignment note as 12 bags of alum. A Bench of the Bombay High Court held that the plaintiff could only recover the value of alum bags instead of sugar candy bags. The learned trial Judge failed to observe the very important differentiation between the facts there and the present case, namely, that a higher rate of freight was chargeable for sugar candy and that by describing the bags as containing alum plaintiff got sugar candy transported at a lower rate of freight. It is not suggested in the present case that any of the articles found to be in this box came within the scope of Schedule II as articles requiring special declaration or valuation under section 75 of the Railways Act. It is not disputed that all the articles in the box would be liable to precisely the same rate of freight. The learned Judge then went on to observe that it was clear from section 78 of the Railways Act and also this Bombay decision that in view of the description given in the forwarding slip, the plaintiff would be entitled to get only the value of the pencils. Section 78 protects the railway administration from responsibility for loss, destruction or deterioration of any goods,

> " with respect to the description of which an account materially false has been delivered under sub-section (1) of section 58 if the loss, destruction or deterioration is in any way brought about by the false account."

Two conditions are necessary before the railway company can be protected from loss. In the first place the description must be found to be materially false and to have been delivered under sub-section (1) of section 58. Section 58 (1) imposes an obligation on a consignor of goods to deliver an account containing a description of goods sufficient to determine the rate of freight at the request of the railway servant. It may be presumed for purposes of this case that the forwarding slip (Ex. B-1) was handed in at the request of the railway staff. There is however nothing to show either that the description is materially false or that the second condition required by section 78 is satisfied, namely, that the loss, destruction or deterioration has been in any way brought about by the false accounts. The learned Judge appears to have taken a narrow and unwarranted view of section 78 of the Railways Act and also to have misapplied the Bombay decision. The contents of the box cannot be said to have been described with material falsity as " stationery pencils." There is no statutory obligation on a consignor of a box containing miscellaneous articles of this description to hand in a precise invoice describing separately every article in it. All that section 58 contemplates is a description of such a general nature as may be sufficient to determine the correct freight chargeable, there being no suggestion even that any article in the box would have rendered it liable to a higher rate of freight. The description in the forwarding note cannot therefore be regarded by any stretch of language or imagination to be materially false.

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1. (1878) I.L.R. 3 Bom. 120.

The next point stressed on behalf of the railway and not specifically determined by the trial Judge is whether plaintiff should not be bound by his own valuation of Rs. 900 admittedly put by him on this box in his forwarding slip Ex. B-1 which he admittedly gave to the railway clerk. There is on the reverse of the railway receipt (Ex. A-1), which reproduces the description of the goods as "stationery pencils" but does not mention the value of Rs. 900, a clause that where goods insured have been lost or destroyed, compensation payable shall not exceed the value declared. There appears to have been no legal obligation on the plaintiff to declare in Ex. B-1 the value of the goods in the box. Nor will such valuation in any way bind the railway company who are only liable in any event to pay for the actual value of the contents of the box which may well be considerably less than the amount declared. An interesting point for determination is whether if plaintiff, though under no legal obligation to value the contents of the box, does so of his own accord, the railway company is legally liable to pay him compensation in excess of his own valuation at the time of consignment. The only explanation plaintiff has given for his valuation of the contents at Rs. 900 in Ex. B-1 is that it was a mistake. It is a little difficult to follow how there could have been a mistake in under-valuation to less than half the real value now claimed. A possible explanation may be that P.W. 2 when packing the box found some extra room and put in the Swadeshi brass nibs and the playing cards which he had not sold to the plaintiff, but which he admittedly wanted the plaintiff to sell in Bombay on his account. However, this may be, I am of the opinion that where a consignor takes it upon himself specifically to value a box and its contents consigned by rail, it is not open to him to claim from the railway company anything in excess of that valuation and to contend that the box contained more valuable things, an averment, which the railway company may have great difficulty in refuting. It is true that in this case, the learned Judge has accepted the evidence of plaintiff and P.W. 2 and his account books and found that the box did actually contain all the articles alleged in the plaint. I hold, however, that this finding notwithstanding plaintiff cannot recover from the railway more in compensation than the value of the box and its contents he declared at the time of consignment, namely, Rs. 900.

The decree passed by the lower Court will be modified accordingly. The plaintiff will have a decree for Rs. 900 with costs to the extent to which he has succeeded against the G.I.P. Railway (the second defendant) only in the trial Court and in this Court. The railway will bear its own costs in the lower Court and in this Court.

V.S. — *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

B. Chandappa Indra .. *Petitioner**

v.

M. Jagathpala and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 1, rule 8—Granting of permission under—Conditions—Application by a member of a society—Other members opposing application and filing affidavits—No attempt by applicant to refute allegations in those affidavits—Leave under Order 1, rule 8 if can be granted.

The first condition for the operation of Order 1, rule 8, Civil Procedure Code, is that there should be "numerous persons having the same interest in one suit." In such a case, one or more such persons may, with the permission of the Court, sue or be sued on behalf of all persons so interested. It is not necessary that all members of a sangham or an Association should have an identical interest in the suit. There may be opposition between two groups and *bona fide* representatives of each group can file a representative suit to have such disputes resolved under Order 1, rule 8 to save multiplicity of suits. The sole criterion is whether the plaintiff or the plaintiffs are representatives of numerous persons having the same interest in one suit.

Where a member of a sangham applied to sue on behalf of the members of that sangham and after the Court had given publicity to it as required by Order 1, rule 8, twelve members file affidavits strongly opposing the applicant's right to represent them or the majority of the members of the sangham and no attempt was made by the applicant to rebut those statements,

* C.R.P. No. 1265 of 1947. 3rd March, 1949.

Held, that though the opposition by the other members would not *per se* deprive the plaintiff of his right to file a representative suit, in the circumstances, it was not a case where permission to file a representative suit should he granted.

Harikisandas Shivlal v. *Chhaganlal Narsidas*, (1915) I.L.R. 40 Bom. 158, not followed.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, South Kanara, dated 22nd February, 1947, in R.I.A. No. 1653 of 1946 in O.S. No. 171 of 1946.

T. Krishna Rao for Petitioner.

K. Y. Adiga and *K. P. Adiga* for Respondents.

The Court delivered the following

JUDGMENT.—Petitioner is the plaintiff who sued as a member of a charitable Jain Sangham, an institution which sought to provide for the education of Jains, the maintenance of a school and so on. He sought permission under Order 1, rule 8, Civil Procedure Code, to sue in a representative capacity the Secretary of the Sangham and 9 committee members for certain reliefs, *inter alia* for a direction to call a general body meeting, elect new office-bearers, render account, etc. After the Court had given publicity as required by Order 1, rule 8, 12 members of this Sangham filed affidavits strenuously opposing the petitioner's right to represent them or the majority of the members of the Sangham. The learned Subordinate Judge, on the strength of *Harikisandas Shivlal* v. *Chhaganlal Narsidas*[1], held that in view of these affidavits, the plaintff cannot be allowed to represent or sue on behalf of the members of the Sangham. This Bench decision of the Bombay High Court is no longer followed in this Presidency and has been specifically dissented from in *Sivathal Periyava Nadar* v. *Nana, Chuna, Velumuruga Nadar*[2], by Napier and Krishnan, JJ. In a recent decision *A. Mohammad Hassan Sahib* v. *The Podanur Sunnath Jamath by President C. A. Alli Sahib*[3], Govinda Menon, J., held that where there are large numbers on both sides contending respective rights against each other, leave cannot be refused on the ground that parties are equally balanced and that the main question that the Court should decide is whether the plaintiffs *bona fide* wanted to file the suit.

The first condition for the operation of Order 1, rule 8 is that there should be "numerous persons having the same interest in one suit." In such a case, one or more such persons may, with the permission of the Court, sue or be sued on behalf of all persons so interested. It is not necessary that all members of a Sangham or of an Association should have an identical interest in the suit. There may be opposition between two groups and *bona fide* representatives of each group can file a representative suit to have such disputes resolved under Order 1, rule 8, to save multiplicity of suits. The sole criterion is whether the plaintiff or the plaintiffs are representatives of numerous persons having the same interest in one suit. In the present case, the mere fact that 12 members of the Sangham have appeared and filed affidavits dissociating themselves from the petitioner's suit and strongly opposing him, would not *per se* deprive the plaintiff of his right to file a representative suit. But as matters stand, he is in a position of splendid isolation and has taken no steps to rebut the affidavits filed against him by bringing forward before the Court any representative members of the numerous body whom he claims to represent. I observe in the written statement filed a claim made that a general body meeting has in fact been held since the suit and that fresh office-bearers have been elected. The main grievance appears to be that the office-bearers elected in 1943 for a period of 3 years are still in office.

On the materials available before the Subordinate Judge at the time he passed his order, I am not satisfied that the petitioner should have been given permission to file a representative suit, he having taken no steps to satisfy the Court, in view of

1. (1915) I.L.R. 40 Bom. 158.
2. (1920) 30 M.L.T. 47.
3. (1948) 1 M.L.J. 379.

these affidavits opposing his claim, that he did really and *bona fide* represent "numerous Jains" in the suit he sought to file. In the circumstances, I see no grounds for interference in revision, although I have corrected the learned Subordinate Judge's error in law in following the Bombay Bench decision which, so far as this Presidency is concerned, is no longer law. The petition is dismissed without any order as to costs in the circumstances.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VISWANATHA SASTRI.

Sankara Pursa .. *Appellant**

v.

Govinda Bhatta and others .. *Respondents.*

Receiver—Execution sale after decree on mortgage—Decree-holders with leave to bid and set-off purchasing—Sale if valid when one of the decree-holders had been appointed receiver in the suit.

A purchase in a sale in execution of a mortgage decree by a receiver in the suit without the leave of the Court is liable to be set aside on that ground or for that reason alone, without any enquiry as to whether any person interested in the property has been in fact prejudiced. A grant of permission to the decree-holders (one of whom was a receiver) to bid at a Court auction and to set-off the decree amount under Order 21, rule 72, Civil Procedure Code, is not equivalent to the grant of permission to the receiver to bid at the Court sale and buy the property in his possession. The two things are quite distinct and must be separately applied for and sanctiond by the Court.

Having regard to the fact that the receiver is in possession of the property and has opportunities of knowing all the details about the income and value of the property—information which is not ordinarily available to the outside public—Courts will not authorise a receiver to bid at a sale in the absence of special circumstances. The fact that only one of the decree-holders (two brothers) was a receiver would not protect both of them at the Court sale.

Appeal against the order of the District Court, South Kanara, dated 31st August, 1946, in A.S. No. 41 of 1946 preferred against the order of the Court of the Subordinate Judge, South Kanara, in R.E.A. No. 386 of 1943 in R.E.P. No. 269 of 1940 in O.S. No. 84 of 1934.

T. Krishna Rao for Appellant.

K. Vittal Rao for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal is preferred against an order of the District Judge of South Kanara setting aside an execution sale under section 47, Civil Procedure Code, on the application of the judgment-debtors.

The facts necessary to be stated for the purpose of the appeal are these. On 11th May, 1931, the property forming the subject-matter of this appeal was mortgaged by its owners to one Suppi Hengsu who died leaving 9 children governed by the Aliyasanthana law. Under a family karar (Ex. D-1), dated 23rd September, 1931, the mortgage debt along with some other property was kept apart for the seven sons of Suppi Hengsu and two of them, namely, Aitha Purusha and Sankara Purusha were appointed *adaltedars* (managers) on behalf of all the seven sons with power to realise the mortgage debt. These two individuals filed a suit on the mortgage, O.S. No. 84 of 1934, on the file of the Court of the Subordinate Judge of South Kanara and obtained a final decree for sale on 7th September, 1935. On the application of the two decree-holders, one of them, Aitha Purusha, was appointed a receiver of the mortgaged properties and he took possession of the same on 12th February, 1936. The receiver has remained in possession ever since. E.P. No. 269 of 1940 was filed by the two decree-holders for sale of the hypotheca in execution of the mortgage decree. Notice of the sale proclamation went to the judgment-debtors and, apparently on their objection, the decree-holders were directed by an order made on 25th November, 1941, to deduct a sum of Rs. 359-7-3 from the

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* A.A.A.O. No. 82 of 1947. 4th March, 1949.

amount claimed by them, the said sum representing the rents and profits of the mortgaged properties received by one of the two decree-holders who was in possession as receiver. Leave to bid at the Court sale and set-off the decree amount towards the price, was granted to the decree-holders under Order 21, rule 72, Civil Procedure Code, after notice to the judgment-debtors. The mortgaged property was purchased by the decree-holders on 25th November, 1941, for a sum of Rs. 2,020 and this sum was set-off against the amount of the decree. The judgment-debtors filed an application under section 47 and Order 21, rule 90, Civil Procedure Code, impugning the Court sale on various grounds, of which the only one now material, is that, the purchase by the two decree-holders one of whom was a receiver, without obtaining the express leave of the Court in that behalf, was liable to be set aside on that very ground. The Courts below set aside the sale relying on the authority of a decision of this Court in *Subramanyam* v. *Damavarapu Reddi*[1].

This civil miscellaneous second appeal is preferred by the decree-holder (purchaser) other than the receiver and Mr. T. Krishna Rao appearing on his behalf states that his client was not the receiver and is therefore unaffected by the rule laid down in *Subramanyam* v. *Damavarapu Reddi*[1]. He further contends that the Court was fully aware at the time it granted leave to bid to the two decree-holders, that one of them was a receiver of the property and that the judgment-debtors were also aware of the application for and the grant of leave to bid and purchase the property. He contends that the purchase was openly made and for a proper price. Finally he states that the purchase at the Court sale which was really for the benefit of the family represented by the two decree-holders was not vitiated by the disability of one of the decree-holders to purchase the property at the Court sale.

It may be stated at the outset that though the mortgage debt was a family asset, the two decree-holders alone were authorised by the karar to which reference has already been made, to realise the debt. On the joint application of both the decree-holders, one of them, the elder of the two brothers, was appointed receiver. The receiver was no doubt appointed in the interests of the mortgagees and it is a significant circumstance that he never paid into Court anything out of the collections but retained them in his hands presumably in reduction of the mortgage debt. It was for this reason that the Court directed the two decree-holders to deduct a sum of Rs. 359-7-3 from the amount shown as due to them in the sale proclamation. It is therefore clear that both the decree-holders were jointly interested in the realisation of the mortgage debt and they appropriated to themselves the realisations from the property though the person who realised the moneys was the receiver. It is true that the receiver was the only person to whom the Court looked for the proper management of the property as its own officer, but this does not make any difference in the application of the rule disabling receivers from purchasing the property of which they are in charge without the express leave of the Court, to the present case.

The most authoritative exposition of the law on this subject is to be found in the decision of the Court of Appeal in *Nugent* v. *Nugent*[2]. It was there held that a receiver appointed by the Court cannot purchase the property of which he is receiver without the leave of the Court even where the sale is made, not in the action in which he was appointed, but at the instance of a stranger mortgagee with a power of sale. In the present case, the receiver, though not a trustee for the mortgagors, occupied a fiduciary position with reference to them and was under an obligation to see that the property was realised to the best advantage. As a person holding a fiduciary position, the receiver was disabled under the ordinary rule of equity, from becoming a purchaser directly or indirectly of any part of the mortgaged property for his own benefit or for the joint benefit of himself and others except on the condition of making a full disclosure of all the material facts about his position as a receiver, and the present and potential value of the property and obtaining the express permission of the Court for purchasing the property which is in his possession. If the receiver purchases without such leave of the Court expressly asked

1. (1935) 68 M.L.J. 597. 2. (1908) 1 Ch. 546 (C.A.).

for and granted, he cannot retain the benefit of his purchase as against the persons interested, even though the sale fetched a fair price and was unattended by any circumstances of fraudulent concealment. The policy of the law is that nobody should allow himself to get into a position in which his interest and his duty may conflict and as in most cases, it is impossible to ascertain whether the receiver has or has not taken undue advantage of his position, the law strikes at all such purchases by the receiver and does not pause to examine each particular case and weigh the details of the conflict between interest and duty present therein. Consequently, a purchase by a receiver without leave of the Court is liable to be set aside on that ground or for that reason alone, without any enquiry as to whether any person interested in the property has been in fact prejudiced. This principle has been applied by this and the Calcutta High Court, *Subramanyam* v. *Damavarapu Reddi*[1], *Kandasami Goundan* v. *Subramania Aiyar*[2] and *Jiteswari Dasi* v. *Sudhakrishna Mukerji*[3].

The contention of Mr. Krishna Rao that leave of the Court must be deemed to have been granted in the circumstances of this case is, in my opinion, untenable. It is no doubt true that the Court granted leave to the decree-holder to purchase the property under Order 21, rule 72, Civil Procedure Code and also directed the decree-holders to deduct the realisations made by the decree-holder-receiver and not accounted for. A grant of permission to bid at a Court auction and to set-off the decree amount under Order 21, rule 72, Civil Procedure Code, is not equivalent to the grant of permission to the receiver to bid at the Court sale and buy the property in his possession. The two things are quite distinct and must be separately applied for and sanctioned by the Court—see *Jiteswari Dasi* v. *Sudhakrishna Mukerji*[3]. Having regard to the fact that the receiver is in possession of the property and has opportunities of knowing all the details about the income and value of the property—information which is not ordinarily available to the outside public—Courts will not authorise a receiver to bid at a sale in the absence of special circumstances. In this case, having regard to the past conduct of the receiver in not paying into Court or even giving credit to the receipts from the mortgaged property, the Court would not have granted leave to buy if it had known that it was a receiver's application that it was asked to consider and not a mere decree-holder's application under Order 21, rule 72, Civil Procedure Code.

The mere fact that the appellant decree-holder was not, and his brother and co-decree-holder alone was, the receiver would not protect the purchase by both of them at the Court sale. The responsibility which attaches to a trustee may extend in equity to a person who is not a trustee but who knowingly assists or participates in a breach of trust to the injury of the *cestui que trust*. See *Barnes* v. *Addy*[4] and *Soar* v. *Ashwell*[5]. I hold that the receiver decree-holder and his brother, the other decree-holder, always acted in concert and that the purchase by them without the leave of the Court being applied for or granted to the receiver was bad and was rightly set aside at the instance of the judgment-debtors under section 47, Civil Procedure Code.

The civil miscellaneous second appeal is, therefore, dismissed with costs.

The memorandum of cross-objections relates to the costs which were disallowed to the judgment-debtors on the ground that they failed to take objection to the application for leave to bid made by the decree-holders. The matter was one within the discretion of the Court below and it could not be said that the discretion has been perversely exercised. In these circumstances, I do not consider that any interference is called for.

The memorandum of cross-objections is dismissed but without costs. Leave refused.

K.S. *Appeal and memorandum of cross-objections dismissed.*

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1. (1935) 68 M.L.J. 597.
2. (1943) 1 M.L.J. 193.
3. (1931) I.L.R. 59 Cal. 956.
4. (1874) 9 Ch. App. 244, 251, 252.
5. (1893) 2 Q.B. 390 (C.A.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

Ghadiyaram Seshayya .. *Appellant**

v.

Chintalapati Seetharamamma and others .. *Respondents.*

Madras Hindu Religious Endowments Act (II of 1927), *section* 58—*Scope and effect*—Swasthivachakam *service inam—Succession—Woman—No disqualification—Partition of emoluments—If can be recognised in making appointment to office.*

It may be that in the past, service inams of a hereditary character have been for the purposes of enjoyment divided between members of a family and that in such cases it may not always be possible to put the clock back, and insist on only one office-holder for a registered religious inam service.

It is illegal for a trustee to recognise any partition of a service inam subsequent to the enactment of section 58 of the Madras Hindu Religious Endowments Act. This section gives an office-holder or his family no such right. The section merely recognises a hereditary right to the office in the officer-holder's family. That simply means that when a registered and unrecognised officer-holder dies the vacancy shall be filled up *ceteris paribus* subject to the provisions of section 58 by the next in the line of succession. If the next in the line of succession happens to be a woman, for instance and if a daughter has to be preferred to a divided brother she certainly is entitled to the office and can perform it by proxy. It follows from this that no suit on the basis of any partition of a religious service inam (in this case *Swasthivachakam* service) will lie subsequent to the enactment of section 58 of the Act. If the hereditary office-holder of an inam is permitted to partition the inam amongst his family, and each member of the family in turn allowed to partition, the service inam will in a few generations be so fragmented and responsibility for service so divided that the religious service will become impossible of performance and enforcement.

Appeal against the decree of the Court of the Subordinate Judge of Guntur in A.S. No. 453 of 1944 preferred against the decree of the Court of the District Munsiff, Narasaraopet, in O.S. No. 92 of 1943, etc.

B. V. Ramanarasu for Appellant.

P. Satyanarayana Raju and *M. B. Rama Sarma* for Respondents.

The Court delivered the following

JUDGMENT.—The appellant is the plaintiff. He sued to recover 3·20 acres of inam land from the possession of Seetharamamma, the first defendant, the daughter of his deceased brother Venkatapayya. This land is a portion of an inam grant of 18·91 acres under inam title deed No 99 for the performance of *Swasthivachakam* service in the temple of Sri Vennamudda Krishnaswami. The inam was admittedly confirmed in favour of Ghadiyaram Dikshitalu in the year 1860 as evidenced by the inam register extract Ex. P-1. It is common ground that this grant was amicably and, it would appear, informally divided for the purpose of enjoyment in equal shares between Dikshitalu's descendants one Surayya who is the father of the plaintiff, the 7th defendant and Venkatapayya and Surayya's brother, Ramayya, the father of the 8th defendant. It is also common ground that subsequently there was a similar partition between the brothers, plaintiff, the 7th defendant and Venkatapayya, which resulted in each obtaining separate enjoyment of about 3 acres. On Venkatapayya's death on 22nd October, 1941, a dispute arose as to who should enjoy the share allotted to him which is the suit property. The plaintiff and his brother on the one hand, and their brother Venkatapayya's daughter and her minor sons through her husband Chintalapati Venkatapayya who is said to be a suits clerk under some merchant, competed with separate petitions for recognition as hereditary heirs in place of the deceased Venkatapayya. The brothers claimed that their names should be included in the Devasthanam record. On behalf of their brother's daughter a similar claim was made for herself and her minor sons. The daughter's petition was dismissed by the trustee in an order Ex. P-8 and the names of the two brothers as male heirs of Venkatapayya were recorded. The District Munsiff decreed the plaintiff's suit mainly on the basis of Ex. P-8 which he considered to be a decision under section 43 of the Hindu Religious Endowments Act. The learned Subordinate Judge in appeal found that the inam was divisible and had been enjoyed in distinct shares, that the brother's daughter and her sons

* Second Appeal No. 324 of 1946 and Civil Miscellaneous Petition Nos. 577 and 7233 of 1948. — 8th December, 1948.

were nearer heirs to Venkatapayya who had divided from his brothers, and that the trustee could not validly interfere with the hereditary right of succession to the office or emoluments in violation of Hindu law. He accordingly directed the dismissal of the suit with costs throughout.

There were some subsequent developments after the suit was filed. The trustee passed a formal order dismissing the 1st defendant, from the office of "*Swasthivachakam*" service-holder on the grounds that she did not obtain the consent of the trustee for getting the service done by her husband as proxy, (2) that the proxy did not render service properly as he was absent from the village on his own business, and (3) on the ground that the proxy was not well versed in vedas. The Madras Hindu Religious Endowments Board on 23rd November, 1945, after the judgment of the learned Subordinate Judge dismissing the suit, allowed the appeal and restored the first defendant to her place as *Swasthivachakam* servicedar permitting her to get the service performed by her husband as proxy. I permitted the Board's order to be marked as evidence in this appeal in C.M.P. No. 7233 of 1948 not for purposes of evidence as such but for some comments, I desire to make on the illegality of the entire procedure which appears to be adopted as regards the recognition of partitions of religious service inams, and the right to enforce hereditary rights to fragmented portions of these inam grants.

In the present case, both sides are on common ground as regards the right of the family to whom the inam grant was originally made to partition the inam itself and to go on doing so in each succeeding generation. It is also common ground that the plaintiff, the 7th defendant and Venkatapayya had divided their half share in the inam amongst themselves and they cannot get away from the position that they are on their own showing divided brothers. If strict hereditary right is to be applied to the succession to this portion of the inam so divided, there can be no doubt that Venkatapayya's daughter is a nearer heir than his divided brothers and that from this point of view the learned Subordinate Judge's dismissal of the suit is correct. Even treating the trustee's order Ex. P-8 as an administrative order under section 43 of the Religious Endowments Act the subsequent dismissal of the first defendant has been upset in appeal by the Board itself which has re-instated her in *Swasthivachakam* service.

There is plenty of authority for the position that sex does not bar a woman in the absence of proof of a special custom or user to the contrary from succeeding to the office and emoluments of an archaka and to have the service performed by a proxy. (See *Raja Rajeswari* v. *Subramania Archakar*[1].) On the legal ground on which both parties have taken their stand the plaintiff is therefore clearly not entitled to succeed as against his divided brother's daughter and her sons and his suit was rightly dismissed with costs by the learned Subordinate Judge.

I am also far from satisfied that such a suit as that filed by the plaintiff lies in law. I find that one of the issues framed was "whether the plaint disclosed a cause of action" and on this issue the learned District Munsiff found that as the plaintiff alleged that he was doing this service and the emoluments were out of his possession this was a cause of action enough. The Subordinate Judge made no comment on this issue which was not raised before him nor indeed has it been raised before me. The point of law arising is such that it cuts away the common legal ground on which all the members of the family take their stand, namely, a right to partition service inams in this way, and to apply strictly the law of inheritance to each portion so divided from generation to generation. The succession to office-holders such as those who have to perform such services as *Swasthivachakam* whether hereditary or non-hereditary is governed by section 58 of the Madras Religious Endowments Act. This prescribes that where the office of service is hereditary, the next in the line of succession shall be entitled to succeed. Section 58 (3) is very important and reads as follows :—

"In making an appointment under the proviso to sub-section (2) the trustee shall have due regard to the claims of members of the family, if any, entitled to the succession."

1. (1915) 30 M.L.J. 222 : I.L.R. 40 Mad. 105.

This section clearly contemplates one hereditary office-holder and confers no right on an office-holder in enjoyment of emoluments to partition those emoluments amongst members of his family, and then those members similarly to go on partitioning their shares of each member with a right to enforce hereditary rights under Hindu law to fragments of the original inam in suits such as these. Section 58 was enacted in accordance with the following observations of the Select Committee which recommended these provisions :

"The indefiniteness of the existing law as regards the powers which trustees of temples could exercise over office-holders and servants therein especially those possessing hereditary rights has been a fruitful source ef litigation hitherto."

These clauses are an attempt to define these powers in a clear manner. It may be that in the past such service inams have been for the purpose of enjoyment divided between members of a family, and that in such cases it may not always be possible to put the clock back, and insist on only one office-holder or a registered religious inam service.

I should like to give expression here to the illegality of a trustee recognising any partition of a service inam subsequent to the enactment of section 58 of the Religious Endowments Act. This gives an office-holder or his family no such right. The section merely recognises a hereditary right to the office in the office-holder's family. That simply means that when a registered and unrecognised office-holder dies the vacancy shall be filled up *ceteris paribus* subject to the provisions of section 58 by the next in the line of succession. If the next in the line of succession happens to be a woman, for instance, and if a daughter has to be preferred to a divided brother as in the present case, she certainly is entitled to the office and can perform it by proxy. It follows from this that no suit on the basis of any partition of a religious service inam will lie subsequent to section 58 of the Act. If the hereditary office-holder of an inam is permitted to partition the inam amongst his family, and each member of the family in turn allowed to partition, the service inam will in a few generations, as indeed it has become in my own experience of suits which have come up before me, be so fragmented and responsibility for service so divided that the religious service will become impossible of performance and enforcement. I have thought it fit to give expression to this view of the law for future guidance in the very difficult task which confronts temple administration that of effective enforcement of religious inam service.

The second appeal is dismissed with costs.

C.M.P. No. 577 of 1948 has been filed by the Government Pleader as regards pauper court-fee for which the Subordinate Judge made no provision. The suit was filed by the plaintiff *in forma pauperis* and he has also filed this second appeal *in forma pauperis*. He must pay the pauper court-fee payable to Government in the suit and in second appeal. Leave refused.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT :—MR. JUSTICE YAHYA ALI.

Mrs. Yvonme Gwendoline Marie Lewis .. *Applicant**

v.

Aloysius Lewis .. *Respondent.*

Divorce Act (IV of 1869), section 7—Husband's petition for dissolution of marriage—Right of wife to have an order for payment of an amount in advance to enable her to defend the suit.

The husband who has brought an action for dissolution of marriage on a charge of adultery must enable his wife, if she has no means whatever, to meet the charge on equal terms. The wife is entitled to an order against her husband for the payment in advance of the costs upto the setting down of the cause and incidental to the trial or hearing of the case.

Authorities reviewed.

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* Application No. 3141 of 1948 in O. M. S. No. 17 of 1948. 6th December 1948.

G. A. Chelliah Nadar for Applicant.

N. Gopala Menon for Respondent.

The Court delivered the following

JUDGMENT.—This is an application under section 7 of the Indian Divorce Act by the respondent in O. M. S. No. 17 of 1948 against her husband, the petitioner therein, for an order directing him to pay to the applicant a sum of Rs. 300 in order to enable her to meet the expenses incidental to the defence of the suit. Mr. Gopala Menon on behalf of the respondent herein has raised a series of objections. The first objection is that the application is not maintainable under the Indian Divorce Act. Section 7 of that Act reads thus :

"Subject to the provisions contained in this Act, the High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief."

This is followed by a proviso.

The applicant has relied on rule 74 of the Matrimonial Causes Rules in force in England and contends that by the combined force of section 7 of the Indian Divorce Act and rule 74 of the English Rules, the applicant is entitled to an order for costs. Sub-rules (2) and (3) of rule 74 of the Matrimonial Causes Rules provide for the wife filing her bill of costs for taxation as against her husband and asking for security for her costs of and incidental to the trial or hearing of the cause. Upon taxing the same the Registrar or taxing officer may order the husband to pay to the wife or into Court her costs up to the setting down of the cause and to pay into Court or secure the costs of and incidental to the trial or hearing. Mr. Gopala Menon's contention is that the principles and rules on which the Matrimonial Court in England acts are not applicable *en masse* to divorce actions in this country as their applicability is made under section 7 subject to the provisions of the Indian Divorce Act and so long as there is no specific provision in the Indian Divorce Act, the gap cannot be filled by up invoking the application of one of the rules in the Matrimonial Causes Rules. Reliance for this purpose is placed on section 16 and section 35 of the Indian Divorce Act which are the only two sections in that enactment dealing with costs and they do not cover a case of this description.

This question has come up for consideration in a series of decisions in the various High Courts in India. So far as this Court is concerned in a line of cases headed by *Natal* v. *Natal*[1], it has been held that a wife without property of her own was entitled to have provision made by her husband for payment of her costs in the suit notwithstanding section 4 of the Indian Succession Act, the principle being that as the wife has no property of her own, the same reason for securing costs would apply, *viz.*, her inability otherwise to continue the proceedings and to meet her husband on equal terms. This view has been adopted in the Bombay and Allahabad High Courts. It was pointed out in one of the Bombay decisions, *Mayhew* v. *Mayhew*[2] that the passing of the Married Women's Property Act in England made no difference with regard to the securing of wife's costs and that having regard to section 7 of the Indian Divorce Act, the practice prevailing in England should be followed in India, *viz.*, that unless the husband can show that costs should not be allowed, the wife will be entitled to her costs. In a recent decision of the Allahabad High Court, *Yaqub Masih* v. *Christina Masih*[3], the case-law was reviewed and it was held that a wife in India is entitled to claim her costs from a husband who institutes proceedings against her for dissolution of marriage on the ground of adultery and the petition should be adjourned till the husband pays the money in Court. In a decision of Reilly, J., in *Iswarayya* v. *Swarnam Iswarayya*[4], some doubt was cast upon the applicability of the statutory provisions and statutory rules of the English law to cases arising under the Divorce Act. The learned Judge was of the view that the words "principles and rules" in section 7 of the Indian Act mean principles

1. (1885) I.L.R. 9 Mad. 12.
2. (1894) I.L.R. 19 Bom. 293.
3 I.L.R. (1940) All. 802.
4. (1929) 58 M.L.J. 29.

and rules of law, of evidence, of interpretation, of practice, and of procedure but not statutory provisions nor statutory rules and this view was taken because of the expression found in the commencement of the section, *viz.*, that the principles and rules were to be subject to the provisions of the Act. This case went up in appeal to the Judicial Committee and Their Lordships' decision is reported as *Iswarayya* v. *Swarnam Iswarayya*[1]. At page 782 of the report, the Board observed :

> " Section 7 of the Act (which occurs under the heading 'jurisdiction') makes it abundantly clear that the legislative authority in enacting the Indian Divorce Act had in view the principles and rules upon which the Courts in England then acted and gave relief. It is therefore not irrelevant to enquire how matters stood and stand in England in relation to this question."

Again we find the following passage at pages 785 and 786 :

> " Their Lordships fully realise that an Indian Act does not fall to be construed in the light of statutes enacted by another Legislature. But this is a case in which the Indian Act makes express reference to the Court in England to which the relevant jurisdiction of the Ecclesiastical Courts was transferred, and to the principles and rules on which that Court acts and gives relief. If it had been intended that the Courts in India, acting under this Act, should not have, in relation to a wife who had obtained a decree for judicial separation, the power which the Court in England enjoyed, of increasing the amount of her permanent alimony as and when the circumstances justified an increase, but that they should be restricted to the making of one order only for permanent alimony, their Lordships feel that this intention would have been declared in express and unequivocal terms."

The matter came to be considered in a subsequent decision of a Full Bench of this Court in *Sumathi Ammal* v. *Paul*[2]. The majority of the Full Bench consisting of Stone and Mockett, JJ. (Wadsworth, J., dissenting), held following the latest amendment of the statutory rules in England, the proper form of a decree to be passed in the first instance in a suit for a declaration of nullity of marriage filed on the Original Side of the High Court was that of a decree *nisi* and not a decree absolute. In that decision, the whole history of the legislation terminating in the Indian Divorce Act was set out and reference was made to the decisions of this Court and of the Judicial Committee in *Iswarayya* v. *Swarnam Iswarayya*[1] and it was significantly pointed out that the words 'principles and rules' occurring in section 7 of the Indian Divorce Act were found in the English Act of 1857, section 22, which, in the same terms as section 7, had provided that :

> " the Court shall proceed and act and give relief on principles and rules, which in the opinion of the said Court, shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained, and to the rules and orders under this Act."

It was held that by the majority in the Full Bench case that a distinction cannot be drawn between those principles and rules which are derived from statute and those which are derived from any other source. The result was that according to the view of the Full Bench the words included not only principles and rules of law, etc., but also statutory provisions and statutory rules in force and in application in the Courts for divorce or matrimonial causes in England. I must here point out before leaving this part of the case that the Calcutta High Court had once taken a different view with regard to this matter although in one of the decisions in *Broadhead* v. *Broadhead*[3], Phear, J., held on being satisfied that the wife had no separate property and means of paying the costs of a divorce suit, that she was entitled to an order for security for costs in spite of the fact that the parties were governed by section 4 of the Indian Succession Act. The latest decision of that Court in *Forrester* v. *Forrester*[4] ultimately resolved the question into one of the discretion of the Court holding however that the matter was entirely within the jurisdiction of the Court. Having regard to this array of authority, which has now become more or less uniform, it has to be held that there is no substance in the objection that the application is not maintainable under section 7 of the Indian Divorce Act.

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1. (1931) 61 M.L.J. 367 : L.R. 58 I.A. 350 : I.L.R. 54 Mad. 774 (P.C.).
2. (1935) 70 M.L.J. 321.
3. (1870) 5 Beng.L.R. App. 9.
4. (1930) I.L.R. 57 Cal. 1350.

The next substantial objection put forward is that even under rule 74 of the Matrimonial Causes Rules, the authority which should deal with the matter is the Registrar or the taxing officer and against an adverse order, the party aggrieved would have a right of appeal to the Court and as such no application would directly lie to the Court the remedy of the present applicant being to file her bill of costs before the Registrar. That is no doubt the procedure in England ; but from the various cases decided in the Indian High Courts with regard to this matter, I find that applications which were made directly to the Court were entertained, as a matter of uniform practice.

On the merits two contentions were put forward ; that the wife has no right to a remedy of this kind but that the relief was entirely within the discretion of the Court and having regard to the circumstance that in India unlike in England before the Married Women's Property Act came into force, a woman has independent status and right to own and deal with property on her own, being *feme sole* in the eye of the law. Even this aspect of the matter has been considered in most of the decisions cited above and in spite of the circumstance that a woman has certain rights under the Indian Succession Act, in a case where the husband charges her with adultery and seeks dissolution of the marriage, it has been held that if she is found to have no means to defend the suit, she is entitled to an order against her husband for payment of her costs to enable her to arrange for her defence.

Turning to the actual facts of the case, it is pointed out that ever since 1942 when she is said to have been discarded, the applicant has been able to get on without asking for any maintenance from her husband and that this shows that she has some independent means of livelihood. It is also urged that in a letter which she addressed to the husband she assured him that he need not give her any maintenance. These grounds are, in my opinion, of no avail. With regard to her having been able to get on without any maintenance all this time, she explains that she was employed as a governess for a considerable portion of the time but latterly she has been discharged and she has fallen on the hands of her father who himself has very little income for subsistence. It is not contended that she has any property or any independent source of income. With reference to the letter, it is alleged that it was extorted under coercion and the facts have been vividly set out by her in her reply affidavit. The circumstance that she has her father and her brothers on whose charity she has to depend and the argument that the means of the husband himself are of a precarious nature are not material as the consideration of the question rests upon the principle that the husband having brought an action for dissolution on a charge of adultery, he must enable the wife, if she has no means whatever, to meet the charge on equal terms. The applicant is, in my opinion, entitled to an order against her husband for the payment of the costs up to the setting down of the cause and incidental to the trial or hearing of the case. A sum of Rs. 300 has been asked but no details have been furnished. I think having regard to the nature of the case and the amount of evidence that may be necessary, a sum of Rs. 100 ought to be sufficient. Time for payment one month. The respondent should pay the applicant the costs of this application.

K.S. ——— *Application ordered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE BALAKRISHNA AYYAR.

Mrs. Barbara Goorgina Debnam .. *Petitioner**

v.

Mr. Fredrick Cecil Burnie Debnam .. *Respondent.*

Divorce Act (IV of 1869), section 7—Appeal by husband against decree nisi *for dissolution of marriage—Wife, if entitled to order for payment of costs in advance to enable her to contest the appeal.*

The rationale of the rule for making the husband supply the wife with funds to conduct a suit for dissolution of the marriage are twofold ; firstly, the doctrine of common law agency of necessity

* C. M. P. No. 688 of 1949. 28th February, 1949.

and secondly, public policy in relation to the protection of the married status. But in a case where after a decree *nisi* has been passed for dissolution of the marriage the husband appeals and the wife wants to support the decree directing a dissolution of the marriage, neither of those grounds can exist. Obviously after the decree the wife cannot pledge her husband's credit and it cannot be said that she is seeking to protect the married status. The husband who has appealed against the decree *nisi* cannot be directed to furnish the wife with funds to contest the appeal. He must however be directed to furnish security for costs of the appeal in case the wife is successful.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order directing the (appellant) respondent herein (1) to pay Rs. 350 (Rupees Three hundred and fifty only) to the petitioner-respondent in O. S. A. No. 85 of 1948 (High Court) to enable her to pay counsel's fees, (2) to pay the necessary amount for paying the printed papers, (3) to pay the taxed costs of Rs. 338 (Rupees Three hundred and thirty-eight) only of the trial Court, and (4) for directing the costs of this application to be costs in the appeal, and (5) to furnish security for costs in O. S. A. No. 85 of 1948, preferred to th High Court against the judgment and decree of the Hon'ble Mr. Justice Bell, dated 29th September, 1948 and passed in O. M. S. No. 2 of 1948 in the exercise of the original Matrimonial Jurisdiction of the High Court (Original Side).

K. K. Sridharan for Petitioner.

I. A. Salam for Respondent.

The Order of the Court was pronounced by

The Chief Justice.—This is an application by the respondent in O. S.A. No. 85 of 1948 for a direction from this Court to the appellant to pay her a sum of Rs. 350 as counsel's fee and the amount required for buying printed papers to enable her to conduct the appeal, or in the alternative, to direct the appellant to furnish security for costs of the appeal. There was also a prayer that the appellant may be directed to pay her the taxed costs of the suit, but since the application was taken out, the appellant has paid this amount. The respondent was the wife of the appellant.

It is clear from the authorities which have been reviewed in a recent judgment of Yahya Ali, J., in *Mrs. Yvonme Gwendoline Marie Lewis* v. *Aloysiu Lewis*[1] that in a matrimonial suit the wife will be entitled to an order against her husband for payment of the costs of the suit in advance to enable her to conduct the suit. But no authority has been brought to our notice for an application of this rule to appeals either by the wife or by the husband. The practice however seems to be for the wife to pray for an order to direct the husband to furnish security for her costs of the appeal and it has been assumed by English Courts that security will not be ordered as a matter of course merely because a wife has no means of her own, but the Court has jurisdiction to make an order and will do so in appropriate cases. *See* Lately on Divorce, XIII Edn., page 768.

The rationale of the rule for making the husband supply the wife with funds to conduct a suit for dissolution of the marriage appears to be twofold : firstly, the doctrine of common law agency of necessity and secondly, public policy in relation to the protection of the married status. (Vide *King* v. *King*[2].) In a case like the present in which the learned Judge has passed a decree *nisi* for dissolution of the marriage, neither ground can exist. Obviously after the decree, the wife could not pledge her husband's credit and it cannot be said that in this case the wife is seeking to protect the married status. She evidently wants to support the decree directing a dissolution of the marriage. Even on the facts we are not inclined to hold that there are special equities in favour of the wife for making the husband deposit the costs of the appeal in advance. The husband has been directed to pay her alimony and she admits that in January, 1948, a sum of Rs. 1,200 was paid to her by the husband, out of which he borrowed from her Rs. 200. No doubt she claims that this sum was given to her absolutely as a gift, but the husband disputes this. Having regard to these facts and to the general principle adverted

1. Application No. 3141 of 1948. Since reported in (1949) 1 M.L.J. 547.

2. (1943) Probate 91 at 95.

to above, we do not think this is a case in which we should direct the appellant to furnish the respondent with funds to conduct the appeal.

We are however of the opinion that the appellant must be directed to furnish security for the costs of the appeal. The costs of the lower Court were paid by him only after the present application was filed by the respondent. The respondent is a lady with two children and it is likely that she will not be easily able to recover the amount of the costs of the appeal in case she is successful. We therefore direct the appellant to furnish security in the sum of Rs. 400 for the costs of the appeal within four weeks from to-day to the satisfaction of the Second Assistant Registrar of this Court. In default, the appeal will be posted for orders under Order 41, rule 10 (2) of the Civil Procedure Code.

K.S. ——— *Ordered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE BALAKRISHNA AYYAR.

Chiratla Venkatarayudu and another .. *Appellants**

v.

Chiratla Seshamma and another .. *Respondents.*

Hindu Law—Adoption by widow—Consent of nearest sapinda*—Refusal on the ground that proposed boy was not a* sapinda, sagotra *or* gnati*—Propriety and effect.*

It may be that in a case where the *sapinda* refused his consent to the adoption of a boy by a widow on the ground that the boy was disqualified, say, on the ground of leprosy or idiocy, the refusal would be proper. But a refusal on the ground that the proposed boy was not a *sapinda* or *sagotra* or a *gnati* will not be proper and an adoption made with the consent of remoter *sapindas* in such a case will be valid.

Subramaniam v. *Venkamma,* (1903) 13 M.L.J. 239 : I.L.R. 26 Mad. 627 and *Venkatapathi* v. *Punnamma,* (1915) M.W.N. 236, referred to and distinguished.

Appeal against the decree of the Court of the Subordinate Judge, Kakinada, in O. S. No. 98 of 1943.

K. V. Rangachari for Appellants.

Alladi Kuppuswami for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The only question in this appeal is whether the adoption of the second defendant by the first defendant to her late husband Venkatapathi is valid in law. The appellants, who were the plaintiffs in the lower Court, are admittedly the nearest presumptive reversioners, they being the uncle's son's sons of the last male holder Venkatapathi. In the plaint, even the factum of the adoption was denied, but at the trial it was not questioned. The first defendant, the widow, applied to the plaintiffs on 1st November, 1942, for their consent to adopt the second defendant to her husband. The second defendant was her sister's son's son. The plaintiffs refused their consent by their letter, dated 12th December, 1942 (Ex. D-13). Thereafter, the first defendant obtained the consent of four other persons alleged to be reversioners more remote than the plaintiffs. The evidence of their consent is furnished by Exs. D-14, D-15 and D-16. Under Ex. D-14, one Chiratla Satheyya gave his consent. Under Ex. D-15, Chiratla Suranna, examined as D. W. 3, gave his consent, and two brothers, P. W. 6, and his younger brother not examined, gave their consent under Ex. D-16. It was in pursuance of the consent of these alleged reversioners that the widow purported to make the adoption on 13th June, 1943.

The validity of the adoption was attacked on two main grounds: (1) that the refusal by the plaintiffs to give their consent to the adoption of the second defendant was valid, and (2) that the consent given by the executants of Exs. D-14, D-15 and D-16 was not valid and proper, because they were not related to the last male holder, and also because their consent was purchased by passing of illegal

* Appeal No. 9 of 1946. 24th February, 1949.

gratification. The learned Subordinate Judge held against the plaintiffs on all the points and dismissed the suit.

Before us, Mr. P. Somasundaram, the learned counsel for the appellants, did not seriously challenge the finding that the persons who gave their consent under Exs. D-14, D-15 and D-16 were remoter reversioners to the late husband of the first defendant. He, however, pressed upon us the two other points, namely, that the refusal by the plaintiffs was not improper and that the consent of the remoter reversioners was purchased.

The reasons for the plaintiffs' refusal are contained in their reply, Ex. D-13. They gave three reasons : (*a*) that the boy proposed to be adopted was not a *sannihita sapinda, sagotra* or *gnati*; (*b*) that he was the only son of his father ; and (*c*) that the proposed adoption was only a cloak for conveying the properties to the widow's relation. They wound up by saying that if he had really thought of making an adoption, she would have resolved to adopt a boy from one among the *sannihita sapinda, sagotra gnatis* of Chiratlavari lineage and not made attempts in a different manner. They therefore categorically refused to give their consent to the proposed adoption. Mr. Somasundaram did not maintain that reasons (*b*) and (*c*) were good reasons for the plaintiffs' refusal. But he argued that reason (*a*) was a proper one relying upon certain observations of Bashyam Ayyangar, J., in *Subrahmanyam* v. *Venkamma*[1], *viz* :

> "There is nothing improper in a *sapinda* proposing to give his assent to the widow adopting his own son, if such *sapinda* be the nearest *sapinda*, and refusing to give his assent to her adopting a stranger or a distant *sapinda*, if there be no reasonable objection to the adoption of his own son."

It may be mentioned that these observations were *obiter*, because in the case before the learned Judge, the plaintiff *sapinda* was not asked to give consent to the adoption and he deposed that he could not say what he would have done if he had been asked. Assuming, however, that the learned Judge's observations are sound law, they have no application to the facts of the present case, because the plaintiffs did not offer one of their sons in adoption. They did not even suggest that there was a *sapinda* or a *sagotra* available and desirable. Learned counsel also referred us to the decision of a Bench of this Court in *Venkatapathi* v. *Punnamma*[2]. But no assistance can be derived from that case, because it was there held that the refusal by the *sapinda* was improper, because the refusal was on the ground that the widow might wait till he got a son, whom she could adopt. As Mayne (Hindu Law, tenth edition) remarks at pages 221 and 222 it is very difficult to conceive of a case, where a refusal by a *sapinda* can be upheld as proper.

> "The practical result of the authorities therefore appears to be that a *sapinda's* refusal to an adoption can seldom be justified."

It may be that in a case where the *sapinda* refused his consent to the adoption of a boy on the ground that the boy was disqualified, say, on the ground of leprosy or idiocy, the refusal would be proper. In this case, we have no hesitation in holding that the refusal by the plaintiffs on the ground that the proposed boy was not a *sapinda* or *sagotra* or a *gnati* was not proper.

We have been taken through the oral evidence relating to the plea of the appellants that the consent of executants of Exs. D-14, D-15 and D-16 was purchased. We entirely agree with the learned Judge's estimate of the evidence and we share his opinion that the story of the plaintiffs as regards the payment of illegal gratification to these executants is too improbable and absurd to believe. So far as Satheyya who gave his consent under Ex. D-14 is concerned, he was dead, and the only witnesses examined by the plaintiffs about his consent are P. Ws. 2 and 3. P.W. 2 eventually confessed that he was not present when money was paid to Satheyya. According to him, he was told by Satheyya of the payment. P. W. 3 is the grandson of Satheyya a boy in his teens, and even he had to admit that he was not present when the money was paid. So, there is no legal evidence to support the plaintiffs' case.

1. (1903) 13 M.L.J. 239 : I.L.R. 26 Mad. 627. 2. (1915) M.W.N. 236.

As regards the executant of Ex. D-15 examined as D. W. 3, the plaintiffs' case is that the daughter of the natural father of the second defendant was given in marriage to the son of D. W. 3 and the marriage performed hastily a few weeks before the adoption took place and that at the marriage a *katnam* of Rs. 2,000 was paid and there was also a promise to make a gift of 3 acres of land belonging to the estate of Venkatapathi to the bridegroom if the adoption took place. The evidence relating to this part of the case is that of P. W. 4, the elder brother of D. W. 3, and P. W. 5, the purohit alleged to have officiated at the marriage. It is impossible to place any reliance upon the testimony of either witness. P. W. 4 admitted in his cross-examination that he was not present when the promise regarding the land was made. It may be also mentioned that there is nothing sinister in a *katnam* being paid at the time of the marriage, in the absence of anything to connect the payment with the consent obtained from D. W. 3.

Of the two brothers who gave their consent under Ex. D-16, one of them, P. W. 6 gave evidence that he received Rs. 100 in consideration of giving his consent. But, here again, in cross-examination, he admitted that the money was paid 15 days after he gave his consent, and till he and his brother affixed their thumb impressions to Ex. D-16, they were not told that they would be paid Rs. 100, and the question of money payment did not crop up till then. His evidence does not certainly support the plaintiffs. On this evidence, we cannot arrive at any other conclusion than that arrived at by the trial Judge, that the plaintiffs have hopelessly failed to establish that the consent of the executants of Exs. D-14, D-15 and D-16 was procured by illegal gratification.

The appeal, therefore, fails and is dismissed with costs.

K.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE VISWANATHA SASTRI.

Om Prakasha Gupta .. *Petitioner.**

Criminal Procedure Code (V of 1898), sections 151 and 491—Arrest by police officer under section 151—Questions whether police officer is justified in coming to the conclusion that cognizable offence is about to be committed and that there were no other means of prevention—Jurisdiction of Court to inquire into the justification in a petition under section 491.

The 'knowledge' and 'appearance' in section 151 of the Criminal Procedure Code, are those of the police officers concerned and are not capable of an independent investigation. If the police officer had authority under the section to arrest the petitioner, it is not open to the Court exercising its jurisdiction under section 491 of the Code to go into the question whether, in fact, the police officer was justified in concluding that the person sought to be arrested was about to commit a cognizable offence and whether the police officer was equally justified in concluding that there were no other means by which the perpetration of the offence could have been prevented. The discretion is vested solely in the police officer and that discretion cannot be questioned or canvassed in a proceeding under section 491, Criminal Procedure Code. The object of section 151 is to prevent the commission of an offence which a person designs or intends to commit. The facts are not capable of investigation in order to find out whether in fact, a cognizable offence was intended to be committed or not, as the offence would still be at the stage of an intention and has not passed into the region of facts.

Petition under section 491, Criminal Procedure Code, 1898, praying that in the circumstances stated therein the High Court will be pleased to issue a writ in the nature of *Habeas Corpus* to produce the body of the petitioner herein before the High Court and direct that he be set at liberty.

S. Suryaprakasam for Petitioner.

The Crown Prosecutor (*A. S. Sivakaminathan*) on behalf of the Crown.

The Order of the Court was made by

Satyanarayana Rao, J.—This is an application under section 491, Criminal Procedure Code to issue an order in the nature of *Habeas Corpus* to produce

* Crl. M. P. No. 400 of 1949. 28th February, 1949.

the body of the petitioner who is now in the custody of the Commissioner of Police, Madras, and to set him at liberty.

The petitioner was arrested by the Inspector of Police, Intelligence section, Madras City Police, on 22nd February, 1949 and was produced by him before the Commissioner of Police on 23rd February, 1949 and was remanded to custody for a period of ten days. The arrest as appears from the affidavit filed by the Inspector of Police was made under section 151 of the Criminal Procedure Code. That section reads as follows :

"A police officer knowing of a design to commit any cognizable offence may arrest, without orders from a Magistrate and without a warrant, the person so designing, if it appears to such officer that the commission of the offence cannot be otherwise prevented."

This section, it must be noted, occurs in the chapter, headed "Preventive Action of the Police," and was designed to prevent the commission of offences by arresting the person beforehand.

The contention urged on behalf of the petitioner is that the arrest under section 151, Criminal Procedure Code, is illegal as the police officer had no information or facts before him to conclude that the petitioner entertained a design to commit a cognizable offence, and, further, that it was possible for the police officer to have prevented the commission of an offence by other methods. The affidavit of the Inspector of Police filed to-day clearly states that the Commissioner of Police received instructions from the Superintendent of Police, Special Branch, C.I.D., Madras, under instructions from the Deputy Commissioner of Police, Special Branch, Bombay, to arrest the petitioner under section 151 of the Criminal Procedure Code. He adds that after satisfying himself that the petitioner was designing to commit a cognizable offence, he had arrested the petitioner on 22nd February, 1949 and produced him before the Commissioner of Police on 23rd February, 1949, who remanded him to custody. The section, it will be seen, authorises a police officer to arrest if he had knowledge that the person sought to be arrested entertained a design to commit a cognizable offence, it must also further appear to the police officer that the commission of the offence could not be otherwise prevented. Both the "knowledge" and the "appearance" are those of the police officers concerned and are not capable of an independent investigation. If the police officer had authority under section 151 of the Criminal Procedure Code to arrest the petitioner, which undoubtedly he has, it is not open to this Court exercising its jurisdiction under section 491 to go into the question whether, in fact, the police officer was justified in concluding that the person sought to be arrested was about to commit a cognizable offence and whether the police officer was equally justified in concluding that there were no other means by which the perpetration of the offence could have been prevented. The discretion is vested solely in the police officer and that discretion cannot be questioned or canvassed in a proceeding under section 491 of the Criminal Procedure Code. The object of the section is to prevent the commission of an offence which a person designs or intends to commit. The facts are not capable of investigation in order to find out whether, in fact, a cognizable offence was intended to be committed or not, as the offence would still be at the stage of an intention and has not passed into the region of facts. There is nothing therefore on the face of the record to show that the arrest was illegal or improper within the meaning of section 491 (1), clause (*b*) of the Criminal Procedure Code.

It was also contended on behalf of the petitioner that the proper procedure for the police officer was to have followed the procedure laid down in section 54 (*ix*) of the Criminal Procedure Code, and that if he had followed it, the requisition would have shown the person intended to be arrested as well as the offence or other causes for which the arrest was to be made. It is unnecessary for us to consider whether, on the facts as disclosed in the affidavit, it would not be a case also falling under that section. All that we are now concerned here is whether the custody of the petitioner is illegal or not. On the face of these proceedings, as stated already, there is nothing to indicate that the detention or custody of the petitioner is illegal or improper. For these reasons, we dismiss the petition.

V.P.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

Kayanna Variyan Madhathil Ramunni Variyar, Karnavan and Manager of Puthravakasam Tavazhi .. *Petitioner**

v.

Patinaari Veetil Narayani Varassiyar and another .. *Respondents.*

Madras Tenants and Ryots Protection Act (XVII of 1946), *section* 4 (5)—*Extended time—If should be in continuation of the two months allowed.*

On the question whether on a construction of section 4, sub-section (5) of the Madras Tenants and Ryots Protection Act (Act XVII of 1946), the lower Court had power to extend the time beyond four months from the date when rent accrued due,

Held, sub-section (5) of section 4 does not in express terms confine the jurisdiction of a Court to extend only up to a continuous period of four months. The fact the Legislature instead of using the word 'extend' used the expression 'further' in the sub-section (4) shows that the power is not to extend but grant time which can be at any time when the Court is asked to exercise the discretion.

Petitions under section 115 of Act of 1908 praying that the High Court will be pleased to revise the orders in R.E.A. Nos. 910 and 909 of 1947 respectively, dated 12th September, 1947, in O.S. No. 525 of 1945, District Munsiff Court, Payoli.

A. Achuthan Nambiar for Petitioner.

D. A. Krishna Variar for Respondents.

The Court delivered the following

JUDGMENT.—The point that arises for consideration in revision turns upon the construction of section 4, sub-section (5) of the Madras Tenants and Ryots Protection Act (Madras Act XVII of 1946). The section reads as follows :—

"Where a suit or other proceeding is stayed under sub-section (1), the tenant or ryot shall, so long as this Act is in force, deposit or continue to deposit in Court, for payment to the landlord, each year's rent as it accrues due, within a period of two months from the date on which it becomes payable or such further period or periods not exceeding two months in the aggregate as may be allowed by the Court."

The lower Court held that it had no power to extend the time beyond four months from the date the rent accrued due. The sub-section does not in express terms confine the jurisdiction of a Court to extend only up to a continuous period of four months. Mr. Variar for the respondent argues that the words "further period" in sub-section (5) can only mean a further period in continuation of a prior period of two months. The use of the words "further period" does not necessarily show that the additional period should be in continuation of the prior period. One can easily visualise the various contingencies when this power of giving additional time would be valueless if it was confined only to a continuous period of four months. If the intention of the Legislature was to confine the period to a continuous period of four months, it should have said so in clearer terms. It is further argued that the different words used in sub-sections (4) and (5) would necessarily show that the intention of the Legislature was different. In sub-section (4) the words are

"allow the deposit to be made within a specified period not exceeding one month and may extend it by such period or periods not exceeding one month in the aggregate."

In sub-section (5), words are "such further period or periods not exceeding two months." The omission of the word "further" in sub-section (4) and the mention of it in sub-section (5) it is argued must have been made to indicate different ideas and that the word "further" in the context can only mean in continuation of the prior period. It has been held by this Court that the Court under sub-section (4) has power to give time which need not necessarily be in continuation of the prior period. That sub-section itself draws a distinction between giving time and extending time. The use of the word "extension" clearly brings out the idea that the period so extended is a continuation of the prior period. The fact that the

* C. R. P. Nos. 3 and 4 of 1948. 11th March, 1949.

Legislature instead of using the word "extend" used the expression "further" in sub-section (5) shows that the power is not to extend but grant time which can be at any time when the Court is asked to exercise the discretion. Mr. Justice Panchapakesa Ayyar in C.R.P. No. 1469 of 1947 though he decided the case on a different point, made observations which seems to support Mr. Variar's argument; but the observations are merely obiter. The lower Court's order is set aside and the matter is remanded to the lower Court to be disposed of in accordance with law. The costs to abide the result.

K.C. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VISWANATHA SASTRI.

Yajju Adinarayana .. *Appellant**

v.

Gurala Jagannadha Rao .. *Respondent.*

Specific performance—Suit for specific performance of prior contract of sale—Defence of bona fide *purchase by later purchaser—Onus.*

It lies upon the party seeking to defeat a prior contract for sale of land to prove that he is a purchaser for value *bona fide* and without notice of the previous contract. The initial burden is upon the purchaser. It may be that very little evidence on the part of the purchaser is sufficient to discharge the onus in a particular case.

Where there is evidence that the subsequent purchaser had actual notice of the prior agreement to sell he cannot be held to be a *bona fide* purchaser for value without notice.

Appeal against the decree of the Court of the Subordinate Judge, Chicacole, in A.S. No. 167 of 1945 preferred against the decree of the Court of the District Munsiff, Rajam, in O.S. No. 159 of 1944.

K. Satyanarayana for Appellant.

C. V. Dikshitulu for Respondent.

The Court delivered the following

JUDGMENT.—The first defendant is the appellant in this second appeal. On the 11th February, 1943, defendants 1 to 4, the owners of the suit property, agreed to sell the same to the plaintiff for Rs. 380 under an agreement for sale marked as Ex. P-1. On the date of the said agreement a sum of Rs. 50 was paid as advance and the balance was made payable at the time of the execution of the sale deed. Time for performance was fixed at six months. Shortly after the agreement, defendants 3 and 4 sold their moiety of the property to the fifth defendant under Ex. D-2, dated 11th March, 1943. On the same day, the fifth defendant purported to purchase from D.W. 2, in the case, a quarter share of the property under Ex. D-1. It is found by the lower appellate Court that D.W. 2 had no title to the property and that the purchase by the fifth defendant was merely a make believe affair. On 24th November, 1943, defendants 1 and 2 purported to sell a fourth share of the property to the fifth defendant. The plaintiff has brought the present suit for specific performance of the contract of sale, Ex. P-1 alleging that defendants 1 to 4 have committed default in the performance of their part of the contract and have sold the property to the fifth defendant with a view to deprive the plaintiff of the benefit of the agreement in his favour. The fifth defendant denies the truth of the contract set up by the plaintiff, Ex. P-1 and further pleads that he is a *bona fide* purchaser for value without notice. It is found by the Courts below that Ex. P-1 is a true and valid agreement supported by consideration and therefore capable of specific performance. On the question whether the fifth defendant is a *bona fide* purchaser for value without notice the Courts below have differed, the lower appellate Court holding that he was not. It lies upon the party seeking to defeat a prior contract for the sale of land to prove that he is a purchaser for value *bona fide* and without notice of the previous contract. The initial burden is upon the purchaser. It may be that very little evidence on the part of the purchaser is sufficient to discharge the onus in a particular case. But here, we have the express state-

* S. A. No. 1234 of 1947. 15th February, 1949.

ment of P.W. 2 whose evidence has been accepted by both the courts that on the day after the execution of the agreement (Ex. P-1) he informed the fifth defendant of the contract of sale. Further, it is found from the document (Ex. 2) admitted as additional evidence on appeal by the learned Subordinate Judge, that at the time of the registration of Exs. 1 and D-2 as well, as at the time of registration of Ex. D-3, the plaintiff raised an objection to the registration of the sale deeds on the ground that there was a valid and subsisting contract for the sale of the property in his favour and therefore the deeds should not be registered. It is therefore clear on the evidence and on finding of the lower appellate Court that the fifth defendant was not a purchaser for value without notice and has no valid defence to the suit for specific performance.

I therefore agree with the conclusion of the lower appellate Court and dismiss the second appeal with costs.

No leave.

K.C. ——— *Second appeal dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice.*

Vellingiri Naicken and another .. *Petitioners**

v.

Sree Patteswaraswami Devasthanam by its Managing trustees S. Beemiah Chettiar and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 33, rule 1, Explanation (iii) (Madras)—Leave to sue as pauper in a representative capacity—Test of pauperism.

Under the Madras Explanation (*iii*) to rule 1 of Order 33, Civil Procedure Code, when a plaintiff sues in a representative capacity, the question of pauperism has to be determined with reference to the means possessed by him in such capacity. For instance, the particular plaintiff suing in a representative capacity may be himself a pauper; but if he is suing on behalf of other persons who cannot be described to be paupers, he is certainly not entitled to the benefit of Order 33 by reason of his individual pauperism.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Coimbatore, dated 16th August, 1946, in O.P. No. 38 of 1946.

T. K. Subramania Pillai for Petitioners.

K. V. Ramachandra Aiyar, S. T. Srinivasagopalachari and *K. R. Rangaswami Aiyangar* for Respondents.

The Court delivered the following

JUDGMENT.—There is no substance in this civil revision petition. The petitioners applied for leave to file *in forma pauperis* a suit on their own behalf and on behalf of the public residents of Perur for certain reliefs including a relief of declaration that the properties in suit were communal lands available to the residents of Perur for public charitable purposes and for securing to the residents the benefits arising out of such user of the suit properties. The only question which arose before the learned Subordinate Judge was whether the petitioners could be held to be paupers within the meaning of Order 33, rule 1 read with Explanation (*iii*) of the Civil Procedure Code. I entirely agree with the learned Subordinate Judge that if the suit is on behalf of the residents of Perur, it cannot be said that they are not possessed of sufficient means to enable the court-fee to be paid. Under Explanation (*iii*) when a plaintiff sues in a representative capacity, the question of pauperism shall be determined with reference to the means possessed by him in such capacity. For instance, the particular plaintiff suing in a representative capacity may be himself a pauper; but if he is suing on behalf of other persons who cannot be described to be paupers, he is certainly not entitled to the benefit of Order 33 by reason of his individual pauperism.

The civil revision petition is therefore dismissed with costs.

V.S. ——— *Petition dismissed.*

* C. R. P. No. 92 of 1947. 7th March, 1949.

[THE FEDERAL COURT OF INDIA.]

PRESENT :—H. J. KANIA, *Chief Justice*, S. FAZL ALI, M. PATANJALI SASTRI, MEHRCHAND MAHAJAN AND B. K. MUKHERJEA, JJ.

[Appeal under section 205 of the Government of India Act, 1935, from the Chief Court of Oudh, Lucknow.]

Rai Bahadur Durga Prasad .. *Appellant**

v.

The Government of the United Provinces and the Governor-General of India .. *Respondents.*

Government of India Act (1935), sections 244 and 246 and Rules framed under section 246—Appointment to the Indian Police Service—Scope of the relative powers of the Secretary of State and the Governor-General—Suit for declaration of status and legal character of permanent Superintendent of Police—Facts to be proved to obtain relief.

Section 244 of the Government of India Act expressly provides that appointments to the Indian Police Service have to be made by the Secretary of State. Section 246 and the Rules made thereunder authorise provisional appointments being made by the Governor-General or the Governor as the case may be pending appointments by the Secretary of State. The Rules safeguard against the Governor-General or the Governor keeping indefinitely vacant any reserved post without the knowledge of the Secretary of State, when a permanent vacancy occurs. But it cannot be said that it is illegal for the Secretary of State or the Provincial Government or Governor-General to omit to make a substantive appointment to any of the reserved posts after it had become permanently vacant. While under section 246 and Rule 4, it may not be open to the Governor or the Governor-General not to make a provisional appointment for over three months, after a vacancy had occurred, without the knowledge of the Secretary of State, there is nothing illegal in the Secretary of State not making a substantive appointment after a permanent vacancy had occurred for any length of time.

A plaintiff who seeks to obtain a declaration that he held the status and legal character of a permanent Superintendent of Police, has to produce an order of such appointment in his favour. It is not within the powers of the Court to make any such appointment. The Court can only give a declaration to that effect if the plaintiff held that character by virtue of an appointment by the appropriate authority. But where in such a case all that is proved is that the Governor of the Province concerned appointed the plaintiff to "officiate" as Superintendent of Police and it is equally clear that the Secretary of State at no time had appointed the plaintiff as Superintendent of Police in the Reserved post and eventually declined to confirm him in the permanent post of the Superintendent of Police, the plaintiff cannot get the declaration prayed for by him.

The Appellant in person.

Peary Lal Banerji, Advocate-General of the United Provinces (*Nasir Ullah Beg*, Advocate, Federal Court, with him) instructed by *Tarachand Brijmohanlal*, Agent, for Respondent No. 1 (The Government of the United Provinces).

Sir Noshirwan P. Engineer, Advocate-General of India (*K. S. Thappar*, Advocate, Federal Court, with him), instructed by *Porus A. Mehta*, Agent, for *K. Y. Bhandarkar*, Agent, for Respondent No. 2 (The Governor-General of India).

The Judgment of the Court was delivered by

Kania, C.J.—The facts material to the disposal of this appeal are these. The appellant (plaintiff) belonged to the Police force in India and on the 8th July, 1925, was promoted to the post of a Deputy Superintendent of Police in the United Provinces. On the 24th August, 1938, he was appointed to act as the Superintendent of Police in place of Mr. Abdul Qasim, who was the permanent holder of the substantive reserve post of Superintendent of Police. After having acted in that way for two brief periods, he was appointed to act again from 2nd January, 1939, as Superintendent of Police, Basti District, and continued to act as such till he retired on the 1st July, 1940. During the time he acted as Superintendent of Police, he drew the salary of that post. In paragraph 4 of the plaint, he alleged that he had a legal right to be assigned in 1938 the legal character of a substantively appointed "member of the Indian Police Service", but nevertheless completely passed through all the stages which were necessary for his being deemed in law as

* Case No. II of 1948. 16th December, 1948.

" substantively " appointed Superintendent of Police in accordance with the Rules and he legally became entitled to all the privileges (including those mentioned under sections 246-250 of the Government of India Act, 1935) of that post consequent on his retirement from it from 1st July, 1940. As this last appointment was not permanent, he was treated as having retired as a Deputy Superintendent of Police and his rights to pension, etc., were allowed on that footing. The plaintiff was aggrieved at the decision of the Government and sent a memorial in May, 1941, and an appeal in July, 1942. The same were not forwarded to the higher authorities by the Governor of the United Provinces, in his discretion. The plaintiff thereafter on the 20th March, 1943, gave notice under section 80 of the Civil Procedure Code and filed the present suit for a declaration that at the time of his retirement he held the legal character and status of the holder of a substantive post of Superintendent of Police on the permanent Indian Police Reserve post cadre and not as a Deputy Superintendent of Police. He also asked for a declaration that the action of defendant No. 1 in withholding his memorial in May, 1941, and appeal in July, 1942, was unlawful. Several defences were raised on behalf of the defendants, but the principal one was that the plaintiff only " officiated " as a Superintendent of Police, and was never appointed and never acted in the capacity of the substantive holder of the substantive post and was therefore not entitled to the declarations asked for. The statements in paragraph 4 of the plaint were denied and it was denied that the plaintiff was deemed to have been a Superintendent of Police when he retired. In the trial Court issues (1) and (2) which only are now material for discussion, were raised in these terms.

(1) Was the plaintiff substantively appointed to the post of Superintendent of Police in the Indian Police Service?

(2) Whether he should be deemed to be so appointed under the law? If so, its effect.

In order to appreciate the points in dispute, it is necessary to bear in mind the structure of the Police force and the Rules regulating their appointment and promotion in India. The service has been divided in two classes, which can be broadly described as Superior and Subordinate. In the Government of India Act, 1919, the Indian Police Service was not expressly referred to, but Rules were framed under section 96 (*b*) (2) of that Act which covered all civil service including the Police service. Rules 14 and 15 of the Civil Service (Classification, Control and Appeal) Rules gave the classification of public services in India.

Rule 14.—The public services in India shall be classified as follows :—

(1) The All India Service

(2) * * * * *

Rule 15.—The All India Service shall consist of

(a) Members of the Services included in Schedule One to these Rules.

(b) * * * * *

Schedule One to the Rules mentioned the Indian Police as coming under All India Service.

Rule 23 runs as follows :

" Save as provided by sections 99 and 100 of the Government of India Act, 1919, all first appointments to an All India Service shall be made by the Secretary of State in Council and the rules regulating recruitment to All India Services shall be made by the Secretary of State in Council ". . . (The rest of the Rule is not material).

Some time after the Government of India Act, 1919, was passed and the Rules were framed thereunder, the Secretary of State accepted the proposals of the Government of India for promotion of a limited number of officers from the Subordinate service to the Superior service. Paragraph 6 of his Despatch, dated the 10th September, 1925, is in these terms :—

" I accept your proposals regarding the promotion from the Provincial Police Service to the Indian Police Service, *viz.*, (1) that 20 per cent. of the Superior posts in the Indian Police Service should be filled by promotion from the Provincial Police Service."

In the United Provinces, the "Superior posts," which included the posts of Superintendent of Police, were 60 in number and by virtue of this Despatch 12 were to be filled up by promotion from the subordinate service. Rules 1, 2 and 3 of the Indian Police Service (Recruitment) Rules made by the Secretary of State for India and published in the *Gazette of India*, dated the 17th December, 1927, Part I, page 1159, were in these terms :

"*Rule* 1.—These Rules may be called the Indian Police Service (Recruitment) Rules, 1927.

Rule 2.—The Indian Police Service shall be recruited by the following methods :—

(*a*) * * * * *

(*b*) * * * * *

(*c*) * * * * *

(*d*) by the promotion in accordance with paragraph 5 of these Rules on the recommendation of the local Government of members of Provincial Police Service.

Rule 3.—(1) All appointments to the Indian Police Service shall be made by the Secretary of State for India in Council."

These Rules which were made under section 96 (*b*)(2) of the Government of India Act, 1919, so far as they are not inconsistent with the Government of India Act, 1935, are in operation by virtue of section 276 of the later Act. In the Government of India Act, 1935, sections 244 and 246, expressly deal with the appointment and recruitment to the Superior Police Service. They run as follows :

"Section 244. (1) As from the commencement of Part III of this Act appointments to the civil services known as the Indian Civil Service, the Indian Medical Service (Civil), and the Indian Police Service (which last-mentioned service shall thereafter be known as 'the Indian Police') shall, until Parliament otherwise determines, be made by the Secretary of State.

(2) Until Parliament otherwise determines, the Secretary of State may also make appointments to any service or services which at any time after the said date he may deem it necessary to establish for the purpose of securing the recruitment of suitable persons to fill civil posts in connection with the discharge of any functions of the Governor-General which the Governor-General is, by or under this Act, required to exercise in his discretion.

(3) The respective strengths of the said services shall be such as the Secretary of State may from time to time prescribe, and the Secretary of State shall in each year cause to be laid before each House of Parliament a statement of the appointments made thereto and the vacancies therein.

(4) It shall be the duty of the Governor-General to keep the Secretary of State informed as to the operation of this section, and he may after the expiration of such period as he thinks fit make recommendations for the modification thereof.

In discharging his functions under this sub-section, the Governor-General shall act in his discretion.

Section 246. (1) The Secretary of State shall make rules specifying the number and character of the civil posts under the Crown (other than posts in connection with any functions of the Governor-General which the Governor-General is by or under this Act required to exercise in his discretion) which subject to the provisions of this sub-section are to be filed by persons appointed by the Secretary of State to a civil service of, or a civil post under, the Crown in India, and except under such conditions as may be prescribed in the rules no such post shall, without the previous sanction of the Secretary of State—

(*a*) be kept vacant for more than three months ; or

(*b*) be filled otherwise than by the appointment of such a person as aforesaid ; or

(*c*) be held jointly with any other such post.

(2) Appointments and postings to the said post (hereinafter in this Part of this Act referred to as 'reserved posts') shall—

(*a*) in the case of posts in connection with the affairs of the Federation, be made by the Governor-General exercising his individual judgment ;

(*b*) in the case of posts in connection with the affairs of a Province, be made by the Governor of the Province, exercising his individual judgment.

(3) All rules made under this section shall, so soon as may be after they are made, be laid before each House of Parliament and, if either House of Parliament within the next subsequent twenty-eight days on which that House has sat after any such rule has been laid before it resolves that the rule shall be annulled, the rule shall thenceforth be void but without prejudice to the validity of anything previously done thereunder or to the making of a new rule."

After the Government of India Act, 1935, came into force in 1937, the Secretary of State made the Reserved Posts (Indian Police) Rules, 1938. The undermentioned rules are relevant.

* * * * * *

"*Rule* 2.—The posts specified in the Schedule to these Rules (hereinafter referred to as ' Reserved posts ') shall be filled either by members of the Indian Police or by persons not being members of the Indian Police, appointed in accordance with the provisions of these Rules.

* * * * * *

Rule 4.—(1) Notwithstanding the foregoing provisions, the Governor or the Governor-General, as the case may be, if the exigencies of the public service so require, appoint Police officers in the Civil Service of the Crown in India to any reserved post other than the post of Inspector-General or Deputy Inspector-General, or Commissioner of Police or Commandant of a Military Police Battalion.

(2) Every such appointment shall be provisional only, and if the person so appointed is intended to hold the appointment for a period exceeding three months, shall be forthwith reported to the Secretary of State with the reasons for making it and if the Secretary of State so directs, the Governor-General or the Governor, as the case may be, shall thereupon cancel the appointment.

(3) No person appointed to hold a Reserved post under this Rule shall be employed in the post for a period exceeding 12 months save with the sanction of the Secretary of State.

Rule 5.—If the Governor-General or the Governor, as the case may be, proposes to keep any Reserve post vacant for a period exceeding three months he shall forthwith make a report to the Secretary of State of the reasons for the proposal, the period for which he proposes to keep the post vacant, the provision made for the existing incumbent of the post and whether it is proposed to make any, and if so what, arrangements for the performance of the duties of the post held in abeyance."

After the suit was filed, the plaintiff served interrogatories on the defendants, as a result of which it was elicited that out of the 12 Superior posts, which were capable of being filled up from the Subordinate service, 11 posts were filled up while one had not been done. This is also supported by the reports for the years 1938, 1939 and 1940 sent by the Deputy Secretary to the Government of the United Provinces to the Secretary to the Government of India, Home Department. (Exts. 45, 46 and 47). In the interrogatories, it appears to be admitted on behalf of the defendants that between 1935-40 all the eleven posts, that were made open by the Secretary of State to the Provincial Police Service officers, were being held by such officers and that out of 5 vacancies which occurred in the senior grade of the Indian Police Reserve posts allotted to the Provincial Service from 20th April, 1937, plaintiff was appointed to officiate against the fifth vacancy from the 2nd January, 1939 to the 30th of June, 1940. From the notifications of the United Provinces Government published in the local Government Gazettes, it appears that on the 24th August, 1938, a vacancy occurred in the ranks of Indian Police on the retirement of Mr. Abdul Qasim and it was to be filled by the promotion of an officer from the Provincial Police Service. On the 5th April, 1940, the Chief Secretary to the United Provinces Government pointed out to the Government of India that a vacancy had occurred on the retirement of Mr. Abdul Qasim. He then stated :

"The next officer below Mr. Rafique Ahmed, who was due for promotion, was the plaintiff, and that he had officiated as Superintendent of Police from the 8th February to 13th October, 1938, was on leave from 4th October, 1938, to 1st January, 1939, and had been officiating since 2nd January, 1939. He had a good record of service and deserved to be promoted to the Indian Police. He was due to retire from the 1st July, 1940."

The Governor agreed with the Inspector-General of Police that the plaintiff was fit for permanent promotion to the Indian Police and recommended that he may be confirmed in that vacancy (Ext. 41). As there was delay in obtaining the sanction of the Secretary of State to the permanent promotion of the plaintiff, the Chief Secretary to the Government of the United Provinces again wrote to the Government of India on the 23rd April, 1940, that pending the confirmation of the plaintiff to the post of the Superintendent of Police, the interim sanction of the Secretary of State to the "continued employment" of the plaintiff in post reserved for the Indian Police be obtained. On receipt of that letter, the Government of India wrote to the Secretary of State on the 3rd June, 1940, asking for the sanction of the Secretary of State to the continued employment of the plaintiff to the post of Superintendent of Police. This sanction was evidently required for the provisional appointment made by the Governor for a period exceeding 12 months under Rule 4 of the Reserved Posts Rules mentioned above. This fact is abundantly made clear by the heading of that letter which is in these terms :

"Subject :—Appointment of the members of the United Provinces Police Service to the Reserved posts in the Indian Police for a period exceeding twelve months."

The reply of the Secretary of State to this letter dated the 29th July, 1940 (Ext. 40) is in these terms :

"I am directed to inform you that the Secretary of State has sanctioned the continued employment in the reserved post of Rai Sahib Durga Prasad Malhotra until he reaches the age of 55 or until a decision is reached regarding his confirmation whichever is earlier."

The plaintiff admitted (Ext. 23) that the Secretary of State eventually declined to confirm him to the permanent post of the Superintendent of Police.

The Civil Judge, Malihabad, held against the plaintiff on the above mentioned two issues and dismissed the suit. The plaintiff filed an appeal to the Chief Court of Oudh but his appeal was dismissed. The Court, however, granted a certificate under section 205 (1) of the Government of India Act, 1935, and hence the appeal to this Court.

The plaintiff appeared before us in person and contended that as there was a permanent vacancy in the Superior cadre from August, 1938, he was appointed Superintendent of Police in that vacancy. In the alternative, he contended that in fact he had performed the duties of the Superintendent of Police and as there was no permanent incumbent of the reserved post, in whose place he was performing the duties, in law, he should be deemed to have been appointed as the Superintendent of Police if he was not, in terms, so appointed. In the alternative he further contended that under sections 244 and 246 of the Government of India Act, 1935, and para. 6 of the Despatch of the Secretary of State it was illegal for the defendants to keep the permanent post of Superintendent of Police vacant for over three months and their action in asking the plaintiff to perform the duties of the Superintendent of Police till his retirement should be construed by the Court as the appointment of the plaintiff to the substantive post of Superintendent of Police.

The documents mentioned above in connection with the plaintiff's service make it clear that the Secretary of State at no time had appointed the plaintiff as Superintendent of Police in the Reserved post. It is equally clear that the Governor of the United Provinces had only appointed the plaintiff "to officiate" as the Superintendent of Police, Basti. Although the word "officiate" is not used in the Government of India Act or in the Rules mentioned above, it is defined in rule (19) of the United Provinces Fundamental Rules as follows :

"A Government servant officiates in a post when he performs the duties of a post on which another person holds a lien. The Government may, if they think fit, appoint a Government servant to officiate in a vacant post on which no other Government servant holds a lien."

It is therefore clear that when the Governor of the United Provinces appointed the plaintiff "to officiate" as the Superintendent of Police, Basti, in the Notification, he was not appointed to be the permanent incumbent of the post. Indeed, the order read with the communications addressed to the Central Government or the Secretary of State make it clear that the Governor of the Province at no time had intended to make the appointment a permanent one, because all along he had considered that the first appointment to the Indian Police was to be made by the Secretary of State. His orders making the officiating appointment were only a stop-gap arrangement till the Secretary of State decided the question of the permanent appointment to the Indian Police Service in which a permanent vacancy had occurred.

On these facts it appears to me that the plaintiff cannot succeed. In order to obtain a declaration that he held the status and legal character of a permanent Superintendent of Police, the plaintiff has to produce an order of such appointment in his favour. It is not within the powers of this Court to make any such appointment. The Court can only give a declaration if the plaintiff held that character by virtue of an appointment by the appropriate authority. Relying on the wording of section 246 of the Government of India Act, 1935, read with

the Rules, it was argued by the plaintiff that as he was asked to perform the duties of the Superintendent of Police till he retired, his appointment must be considered as validly made and of a permanent nature. It was argued that as he held the post from January, 1939, till 30th June, 1940, it must be construed that his appointment was not provisional and therefore it was permanent. I am unable to accept these arguments in view of the express wording of the order. Under section 246 of the Government of India Act, 1935, read with the rules made in pursuance thereof, the Governor of the United Provinces had the authority to make a provisional appointment for twelve months out of persons eligible to fill any vacancy in the Reserve posts. If the appointment, although provisional, was to run over twelve months, the sanction of the Secretary of State was required and that was asked for and given. Except by completely ignoring the word "officiate" in the order of appointment, for which there is no justification whatever, the order cannot be read as giving the plaintiff the substantive post permanently. If that word was not used, in the order, it might have been argued that as the nature of the appointment was not expressly mentioned in the order, it was ambiguous and the Court should construe it in favour of the plaintiff. In face of the express words used in the order, that cannot be done by the Court. Both the Courts below have held that the plaintiff's appointment as the Superintendent of Police, Basti, from January, 1939, was in an officiating capacity. On that ground the plaintiff's suit and first appeal failed. In its judgment the Chief Court stated as follows :

"Thus these proceedings reveal that although the United Provinces Government desired that the plaintiff should be promoted permanently to the Indian Police, the Secretary of State did not agree to this proposal and only sanctioned the continued employment of the plaintiff in a post reserved for officers of the Indian Police. Further the Provincial Government itself never appointed the plaintiff to the post of Superintendent of Police but always appointed him to officiate in that post."

The conclusion of the trial Judge was to the same effect. I agree with the conclusion of both the lower Courts and in that view the plaintiff's contention that he was appointed the Superintendent of Police in fact or should be deemed to have been so appointed, cannot succeed.

The plaintiff further contended that it was illegal for the Secretary of State and the Governor of the United Provinces to keep a reserved post vacant for more than three months after the permanent incumbent retired without appointing some one else permanently in his place. In my opinion, sections 244 and 246 of the Government of India Act, 1935, on which the plaintiff relies for this purpose, do not support him. Section 244 expressly provides that appointments to the Indian Police Service have to be made by the Secretary of State. Section 246 and the Rules made thereunder authorise provisional appointments being made by the Governor-General or the Governor, as the case may be, pending appointments by the Secretary of State. The Rules safeguard against the Governor-General or the Governor keeping indefinitely vacant any reserved post, without the knowledge of the Secretary of State, when a permanent vacancy occurs. Apart from that there is no foundation for the contention that it was illegal for the Secretary of State or the defendants to omit to make a substantive appointment to any of the reserved posts after it had become permanently vacant. While under section 246 and Rule 4 it may not be open to the Governor or the Governor-General not to make a provisional appointment for over three months, after a vacancy had occurred, without the knowledge of the Secretary of State in my opinion there is nothing illegal in the Secretary of State not making a substantive appointment after a permanent vacancy had occurred for any length of time. In any event, having regard to the wording of the orders passed in respect of the paintiff's appointment, even if an illegality had occurred (which is not admitted), the Court cannot give the relief sought by the plaintiff. The orders appointing the plaintiff are not ambiguous in any way and therefore the argument of the plaintiff that the Court should construe the orders as intending to carry out a legal obligation rather than spell out an illegal omission, cannot be accepted. Furthermore, if the order appointing the plaintiff as an officiating Superintendent of Police is illegal and

therefore void, the plaintiff's position would not be improved as there would be no order of appointment of any sort in his favour.

The result is that the appeal fails and is dismissed with costs. Separate sets of costs are allowed to the respondents.

The appellant applies for leave to His Majesty in Council. The Court does not consider this a fit case for granting such leave.

Fazl Ali, J.—I agree.

Patanjali Sastri, J.—I agree.

Mehrchand Mahajan, J.—I agree.

Mukherjea, J.—I agree.

V.S. *Appeal dismissed.*

[THE FEDERAL COURT OF INDIA.]

(On appeal from the High Court of Judicature at Patna.)

PRESENT :—H. J. KANIA, *Chief Justice*, S. FAZL ALI, M. PATANJALI SASTRI, MEHRCHAND MAHAJAN AND B. K. MUKHERJEA, JJ.

Raja Bahadur Girwar Prasad Narain Singh .. *Appellant**

v.

Ganeshlal Saraogi .. *Respondent.*

Usurious Loans Act (*X of* 1918) *and Bihar Money-lenders* (*Regulation of Transactions*) *Act* (*VII of* 1939), *section* 8—*Right to claim benefit of Usurious Loans Act—Facts to be established—Fair dealing—Nature of the provisions of section* 8 *of the Bihar Money-lenders* (*Regulation of Transactions*) *Act—Interference by the Federal Court with the exercise of discretion by the High Court.*

In order to be entitled to the benefit of the Usurious Loans Act, a person must establish (1) that the interest payable on the loan is excessive and (2) that the transaction was as between the parties thereto substantially unfair.

Where there is no evidence as to the circumstances under which the debtor borrowed moneys from the lender, the availability of credit facilities and possibility of borrowing on easier terms in that part of the country where the transactions took place and the High Court finds that no ground was made out for holding that the rate of interest charged was in excess of the "commercial rate prevailing at the time," there is no ground for interference by the Federal Court with the finding of the Judges of the High Court who had the advantage of better local knowledge and experience.

The non-allowance of a commission to the debtor by the lender in respect of a car purchased through him and the charging to the debtor of a small sum as travelling expense of the lender in going to the place of the debtor to receive a part-payment, are circumstances which cannot vitiate the fair character of a transaction which covered numerous dealings extending over a number of years and involving large sums.

Section 8 of the Bihar Money-lenders (Regulation of Transactions) Act is not mandatory but discretionary and the Federal Court would not interfere with the exercise of discretion by the High Court under section 8 unless it appeared that the High Court did not apply its mind at all to the question before it or acted capriciously or in disregard of some legal principle or was influenced by some extraneous considerations wrong in law.

Jaigobind Singh v. *Lachmi Narain Ram*, (1940) F.C.R. 61, followed.

Pandit Gopi Nath Kunzru, Senior Advocate, Federal Court (*C. S. Saran*, Advocate, Federal Court, with him), instructed by *S. P. Varma*, Agent, for Appellant.

Rang Behari Lall, Senior Advocate, Federal Court (*Sri Krishan*, Advocate, Federal Court, with him), instructed by *Mohan Behari Lal*, Agent, for Respondent.

The Court delivered the following

JUDGMENTS : *The Chief Justice*.—I have read the judgment prepared by Sastri, J., for the Court. I agree with the reasoning and conclusion of the judgment and have nothing to add.

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* Civil Appeal No. XIII of 1948.

Patanjali Sastri, J.—This is an appeal from a judgment and decree dated 1st August, 1946, of the High Court of Judicature at Patna varying the judgment and decree of the Court of the Additional Subordinate Judge at Palamau which had allowed in part the respondent's claim on foot of a promissory note.

The respondent is a money-lender and trader, and it is not disputed that in the course of such business he was advancing loans and supplying sundry articles from time to time to the appellant. This case is not concerned with transactions that took place before 1929. It is the respondent's case that in respect of moneys advanced and goods supplied in and after 1929 there was a settlement of account as a result of which a sum of Rs. 49,747-12-0 was found due from the appellant and accordingly he passed in favour of the respondent a promissory note for that sum on 8th September, 1932, agreeing to pay simple interest at 9 per cent. per annum. The amount was made up of Rs. 23,321-7-0 being advances in cash, Rs. 15,294-3-3 being the price of articles supplied and Rs. 12,132-1-9 being compound interest due at 12 per cent. per annum on the above two sums for the period prior to the note. This note was renewed on 6th August, 1935, for a sum of Rs. 61,662-6-0 which included a sum of Rs. 13,805 as interest due under the earlier note. The new note on which the suit was based carried simple interest at 9 per cent. per annum.

In the suit brought in 1941 the respondent claimed a sum of Rs. 93,707-14-0 as the balance of principal and interest due on the note. The appellant raised various pleas in defence to the suit such as undue influence, misrepresentation, etc., but they were all rejected in both the Courts below, and those findings were not seriously challenged before us. The appellant also claimed relief under the Usurious Loans Act (No. X of 1918) and the Bihar Money-lenders (Regulation of Transactions) Act, 1939 (hereinafter referred to as the Bihar Act) and the only points pressed in this appeal relate to these claims.

In order to be entitled to the benefit of the Usurious Loans Act, 1918, the appellant must establish (1) that the interest payable on the loan is excessive and (2) that the transaction was as between the parties thereto, substantially unfair. It was frankly admitted before us that the appellant adduced no evidence as to the circumstances under which he borrowed moneys from the respondent, the availability of credit facilities and possibility of borrowing on easier terms in that part of the country where the transactions took place. The learned Subordinate Judge, however, worked out the average rate of interest on the various transactions on the basis of simple interest and, finding that it was over 13 per cent. per annum, held that the interest charged was "exorbitant and excessive." He was of opinion that 6 per cent. per annum was a reasonable and just rate having regard to the fact that the appellant was the "premier zamindar" of the place and had no other debts to pay. The High Court, on the other hand, was of opinion that no ground was made out for holding that the rate of interest charged was in excess of "the commercial rate prevailing at the time." The term "commercial" used in such context by the Privy Council has been explained by Their Lordships in *Sunder Mull* v. *Satya Kinker Sahana*[1] (to which reference was made in the judgment of the High Court) as meaning, in the case of non-mercantile transactions, "such terms as can be arranged freely between borrower and lender under the circumstances of the particular case," and it is presumably in this sense, that the High Court has used the expression. If so, their finding is not open to criticism, as the appellant as already stated had adduced no evidence to show that more advantageous terms were available at the time and in the place where the transactions in question took place. The High Court was accordingly of opinion that the rates of interest actually charged, namely, 12 per cent. compound between 1929 and 1932, and 9 per cent. simple under the bonds of 1932 and 1935 were reasonable. On such a subject, the learned Judges had the advantage of better local knowledge and experience and we see no grounds to interfere with their finding.

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1. (1927) 54 M.L.J. 427 : L.R. 55 I.A. 85 : I.L.R. 7 Pat. 294 (P.C.).

As regards the question whether the transaction was substantially unfair, the trial Court found that the respondent took advantage of "the goodness or weakness" of the appellant in that he did not allow any commission to the latter on a motor car purchased by him through the respondent. The learned Judge also found that a sum of Rs. 15 was unjustifiably charged to the appellant as travelling expenses incurred by the respondent in going to the appellant's place to receive a part-payment. On these grounds the learned Judge held that the transaction was unfair. The High Court held that these two circumstances afforded no ground for holding that the transaction as a whole was substantially unfair as between the parties, and we entirely agree with that view. The allowance of a commission on the purchase of a motor car is a matter of bargain between the dealer and the purchaser, and its non-allowance cannot be regarded as necessarily inconsistent with fair dealing. The charge of a small sum as travelling expenses of the respondent, even if it was not strictly justifiable in the circumstances, was too trivial a fault to vitiate the fair character of a transaction which covered numerous dealings extending over a number of years and involving large sums.

The appellant has thus failed to satisfy either of the conditions necessary for granting relief under the Usurious Loans Act, 1918.

Turning next to the appellant's claim to the benefit of the Bihar Act, the learned Subordinate Judge disallowed the claim following certain decisions of the High Court of Patna, which were binding on him, to the effect that the Act had no application to a suit based on a hand note. At the hearing of the appeal, however, it was conceded on behalf of the present respondent that by reason of Ordinance XI of 1945 the Act had become applicable to the case and the learned Judges accordingly considered the appellant's claim under the provisions of that Act. They held that section 6 which provides that an agreement for the payment of compound interest on loans advanced after the commencement of that Act shall be void, had obviously no application to this case which was concerned only with loans advanced before the commencement of the Act. This was not disputed before us. Similarly section 7 was found to be of no assistance to the appellant.

The learned Judges held that the concluding words of that section, namely:

> "If the loan is based on a document, the amount of loan mentioned in, or evidenced by such document"

referred not to any earlier document between the parties but to the document upon which the suit was brought and that, as the interest claimed by the respondent was less than the amount mentioned in the promissory note of 1935 on which the suit was brought, there was no room here for the application of that section. They relied on certain previous rulings of their own Court including *Deo Nandan Prasad* v. *Ram Prasad*[1] and the decision of this Court in *Jaigobind Singh* v. *Lachmi Narain Ram*[2], in support of their view of the construction of section 7. While the decisions in Patna undoubtedly support that view, we are unable to find any clear pronouncement by this Court on the point in *Jaigobind Singh* v. *Lachmi Narain Ram*[2]. In that case the parties settled accounts in respect of a pre-existing liability and agreed that part of the money borrowed from the same lender under a later mortgage should be applied in discharge of the pre-existing liability, though cash did not actully pass between the parties by way of advance and repayment. Varadachariar, J., held that the mortgage should, in such circumstances, be regarded as a loan by itself for the purposes of section 7. The learned Judge, however, left open the question as to how ordinary cases of renewals should be dealt with under section 7 having regard to the definition of a "loan" in section 2 (*f*) which includes "a transaction on a bond executed in respect of a past liability." Sulaiman, J., did not express any definite view on the point. We consider it unnecessary to express a concluded opinion on the construction of this section, for, even if the first promissory note of 1932 were to be regarded as the loan to which the provisions of

1. (194 I.L.R. 23 Pat. 618 (F.B.). 2. (1940) F.C.R. 61.

the section have to be applied, it would not assist the appellant as the interest claimed by the respondent would still fall below the amount mentioned in the document.

Lastly, the appellant relied on section 8 of the Act and claimed that the entire transaction should be re-opened since 1929 and an account taken between the parties calculating simple interest at 12 per cent. per annum on the principal sums advanced, so as to relieve the appellant of any liability for interest in excess of that statutory rate. The learned Judges rejected the claim holding that the section was not mandatory but discretionary, and that there were no circumstances in the case calling for the exercise of their powers under the section in favour of the appellant. They observed further that, even if an account were taken as claimed by the appellant, the resulting reduction of interest would be so insignificant as to make it inadvisable to reopen the whole transaction. The learned Judge's view on the construction of section 8 is in accord with the decision of this Court in *Jaigobind Singh* v. *Lachmi Narain Ram*[1], where it was further held that this Court would not interfere with the exercise of its discretion by the High Court under section 8 unless it appeared that that Court :

"did not apply its mind at all to the question before it or acted capriciously or in disregard of some legal principle or was influenced by some extraneous considerations wrong in law."

No such grounds have been suggested in the present case by the appellant's learned counsel, and accordingly we must decline to interfere.

In the result the appeal fails and is dismissed with costs.

V.S. *Appeal dismissed.*

[THE FEDERAL COURT OF INDIA.]

(On appeal from the High Court of Judicature at Madras.)

PRESENT :—H. J. KANIA, *Chief Justice*, S. FAZL ALI, M. PATANJALI SASTRI, MEHRCHAND MAHAJAN, AND B. K. MUKHERJEA, JJ.

Gangadara Ayyar and two others .. *Appellants**

v.

Subramania Sastrigal and two others .. *Respondents.*

Benami transaction—Onus—Duty of Court—Concurrent findings—Rule against interference with—Scope of—Adherence to the Rule by the Federal Court—Evidence—Suppression of—Effect.

The onus of establishing that a transaction is *benami* is on the plaintiff and it must be strictly made out. The decision of the Court on such a question cannot rest on mere suspicion, but must rest on legal grounds and legal testimony. In the absence of evidence the apparent title must prevail. Where it is asserted that an assignment in the name of one person is in reality for the benefit of another, the real test is the source whence the consideration came and when it is not possible to obtain evidence which conclusively establishes or rebuts the allegation, the case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts.

The rule as to concurrent findings is not a rule based on any statutory provision. It is a rule of conduct which the Privy Council had laid down for itself. Following this rule the Judicial Committee usually declined to review the evidence a third time unless there were special circumstances which would justify a departure from this practice. The practice is not a cast iron one and the grounds given in the decisions justifying departure from the above rule are merely illustrative. In an appropriate case and on a suitable occasion the matter may have to be fully considered and elucidated in all its aspects. In the absence of circumstances justifying departure from this rule, the Federal Court would adhere to the practice developed by the Judicial Committee during the course of a century.

Where a party has been guilty of suppression of evidence no conclusion in his favour should be arrived at merely on the ground of paucity of evidence which is of his own creation and a trial Judge would not be justified in giving his decision in favour of such a party on a mere application of the rule of onus of proof.

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1. 1940 F.C.R. 61.

* C. A. No. XVIII of 1948. 16th December, 1948.

K. P. Ramakrishna Aiyar, Advocate, Federal Court, instructed by *S. Subramanian*, Agent, for Appellants.

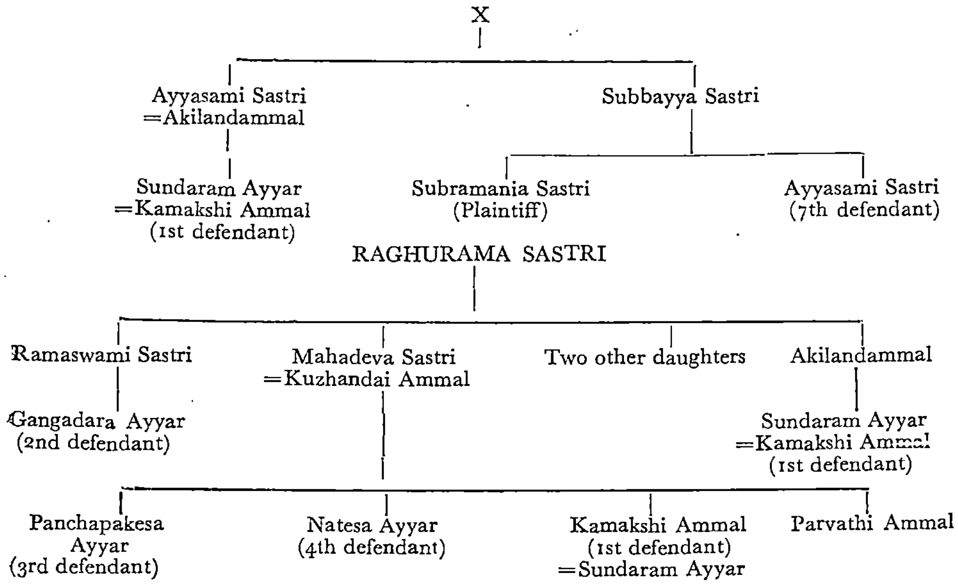
N. Rajagopala Aiyangar, and *S. Amudachari*, Advocates, Federal Court, instructed by *M. S. Krishnamoorthi Sastri*, Agent, for Respondents.

The Court delivered the following

JUDGMENTS : *The Chief Justice*—I have read the judgment prepared by Mahajan, J. I agree with the reasoning and conclusion of the judgment and have nothing to add.

Mahajan, J.—This appeal is directed against the decree of the High Court of Judicature at Madras modifying the decree of the Subordinate Judge of Trichinopoly in Original Suit No. 86 of 1947. It is unfortunate that the parties who are very close relations are fighting out a matter which should have long been settled by amicable arrangement to avoid bitterness between them.

Ayyasami Sastri, an original resident of Nangavaram, was married to Akilandammal, whose parents were residents of Allur. The former place is within twelve miles of Trichinopoly and the latter is situate at a distance of six miles from that place. The following table of the two families indicate the relationship of the parties to the appeal.



The plaintiff and the 7th defendant are the collaterals of Ayyasami Sastri's son, Sundaram Ayyar, while the first defendant is his widow and the second, third and fourth defendants are his brothers-in-law. This litigation is being fought out between close relations of the same family.

Ayyasami Sastri died in 1889, leaving him surviving Sundaram, a minor son eighteen months old, and a widow. The only property admittedly possessed by him was under mortgage. Soon after his death, his widow along with the minor child went to her parents' house in the village of Allur. Apparently she had not any good means of subsistence in her husband's village. When Sundaram came of school-going age, the mother shifted her residence to Trichinopoly and put him in school some time in the year 1894. When he was quite young, she performed his marriage, selecting a daughter of one of her brothers as a bride for him. It appears that to meet the funeral expenses of her husband, the marriage expenses of her son, and to maintain herself and the child she incurred debts. To liquidate these debts the mortgaged property was sold in 1901 for Rs. 1,000. She was able

to save a sum of Rs. 400 to meet the future needs of herself, her son and daughter-in-law. With this small amount however it was not possible to educate the son and to maintain the family in Trichinopoly. It is alleged that she supplemented her slender resources by opening a boarding house there, in which she kept eight or ten school children. These boys brought their own rations, not only for themselves but for Akilandammal and her son and daughter-in-law, and in all probability she charged a small amount from them as fee for her own labours. This state of affairs continued till the year 1908 when Sundaram matriculated. From 1908 to 1910 the family lived in Allur and it was in that year that Sundaram got a small job in the railway on a salary of Rs. 10. He used to go from Allur to Trichinopoly every day and return home after he had attended to his duties. He left this service in 1916 when he was drawing a salary of Rs. 16. It appears that whatever little money the mother had was supplemented by the small income of the son and it became possible to effect some savings. In the year 1912 a promissory note for a sum of Rs. 50 is traced in the name of the mother. In the year 1915 a sum of Rs. 400 was similarly lent, and two other notes for Rs. 646 and Rs. 200 were taken in 1916 and 1918 respectively. It is a moot point whether it was the son's money or the mother's that formed part of these transactions. Sundaram Ayyar remained unemployed between 1916 to 1919 and eventually in that year he got a job in the Collectorate of Bellary on a salary of Rs. 40, where he remained employed, though deputed in different districts on income-tax duty, till the year 1937 when he died. At that period his salary had gone up to Rs. 65 a month.

It seems that while he was employed in the Collectorate of Bellary, Sundaram acquired considerable wealth. The proof in support of this statement is furnished by the unimpeachable evidence of his bank accounts. In the Imperial Bank of India, Bellary, he had an account, copy of which is Exhibit P-16 (*a*). This account started on the 2nd May, 1921, with a deposit of Rs. 2,517-8-0 and continued till the 8th February, 1926. Exhibit P-16 is an account of the fixed deposit of Sundaram in the Trichinopoly District Co-operative Central Bank, Ltd., from 1920 to 1937. The first deposit in this account, as appears from the extract, is dated 3rd April, 1923 and is in the sum of Rs. 4,000. Several deposits were made, renewed and withdrawn upto 1929. In that year he withdrew a sum of Rs. 4,200 from this account. The savings fund account and the fixed deposit account were running simultaneously. In August, 1924, Sundaram invested a sum of Rs. 3,000 in a mortgage of certain property [Exhibit D-1 (b)]. He also purchased certain Government Promissory Notes of the value of about Rs. 2,500. On this evidence the trial Judge found that till 1924 Sundaram had accumulated a sum of Rs. 11,000 in his own account, though he was drawing a small salary of Rs. 40 to 50 a month during that period. The accounts since the year 1929 kept by Natesa Sastri have been exhibited and are marked as Exhibit P-1 and Exhibit D-33. (A point has been raised whether these are Sundaram's accounts or that of his mother). The first entry in those accounts begins with a credit of Rs. 370 on account of certain bonds and is dated 11th December, 1929. A large number of entries have been made therein showing considerable investments in money-lending business and in purchase of properties. Akilandammal was growing old. By the year 1929, she was nearing her 64th birthday. She had, so far as the record shows, no desire or necessity to amass separate wealth or to acquire properties for herself after her son had begun to earn well.

Between 1919 to 1926 certain promissory notes exist in the name of Akilandammal and from 1929 to 1937, eleven properties were acquired and they stand in her name. The question is whether these are the son's properties, purchased *benami* in the name of the mother or whether the mother, who was 64 years old, started acquiring properties in her own name and for her own benefit and out of moneys earned from sources disclosed by the defendants. The first property was acquired on the 23rd October, 1929, for a sum of Rs. 5,000, the second on the 28th October, 1932, for Rs. 1,500, the third on the 30th October, 1932, for Rs. 5,000, the fourth on the 24th March, 1933, for Rs. 1,790, the fifth the same year for Rs. 1,860

the sixth on 4th July, 1934, for Rs. 1,925 and the seventh on the 19th June, 1935, for Rs. 2,800 and the eighth on the 24th June, 1935, for Rs. 900. The ninth, which is no longer in dispute, was acquired for Rs. 900 the same year, the tenth was acquired for Rs. 8,627 in the years 1936-37 and the eleventh for Rs. 1,000 during the same period. Had Sundaram outlived his mother, it would not have been very material whether the properties stood in the name of the mother or in his own name (if it was he who acquired them). It would be quite safe for him to put them in the name of his mother. She was the best person to be trusted as a name-lender for the acquisition of properties which could not have been purchased with the savings out of Sundaram's salary. The fates had however decreed otherwise and it is this miscalculation on the part of Sundaram that has led to the present litigation.

As already stated, Sundaram died on 14th September, 1937. The family lived amicably till one year after his death. They were living at Allur to which place they had returned after the death of Sundaram at Guntur. Akilandammal got ill and went for treatment to Trichinopoly and within three days of her departure from Allur she executed a will at Trichinopoly on the 15th October, 1938, in favour of Gangadara Ayyar, the second defendant in the case and the 7th witness on behalf of the defendants. Gangadara Ayyar, as indicated above, is the son of Ramaswami Sastri, elder brother of Akilandammal. The whole benefit under this will was taken by Gangadara Ayyar and other relations were ignored. The widow of Sundaram was practically left unprovided for. It is this will that is the starting point of troubles in the two families. It was asserted in this document that all the properties that were being bequeathed in favour of Gangadara Ayyar formed part of the stridhanam of the testator. This assertion overlooked the fact that for a period of about eighteen years Sundaram Ayyar had been earning and otherwise acquiring wealth and that he had considerable funds in his possession at the time of his death. No satisfactory explanation was forthcoming on defendants' case as to what happened to the funds which were in the possession of Sundaram Ayyar. Obviously he left nothing if the properties in suit are left out of consideration. The probability is that Sundaram Ayyar had converted whatever moneys he had into immoveable properties and what the mother was claiming as her stridhanam was really not her stridhanam. It has to be borne in mind that as soon as the son started earning money there was no further need for the mother who was advancing in years to toil and start any business on her own account or think of earning money by her own exertions and labour. There was no necessity to earn any more when the son's earnings were more than ample for the needs of the family and were growing in quantum every year.

As soon as the widow of Sundaram Ayyar was apprised of this will, she naturally resented the treatment meted out to her in it. During the absence of her mother-in-law she took possession of all the documents. Her mother-in-law filed a complaint against her. The object was to get back the documents. The widow produced the documents before the police at Tiruchendurai, with the result that some documents were kept by the police ; others were handed over to her brother on the assurance that after taking legal advice a suit to challenge the will would be filed in a civil Court. Before the police she made a statement (Ex. P-15) on 18th October, 1938, and in this she asserted that all the properties belonged to her. Defendants 3 and 4 who were dissatisfied with the will made common cause with the widow against the second defendant and threatened litigation. Notices were issued to the different debtors not to pay the amounts due from them either to Akilandammal or to the second defendant. These notices were issued on or about the 24th October, 1938. The result of the trouble created by defendants 1, 3 and 4 was that a registered settlement deed was executed by Akilandammal in favour of defendants 2 to 4, giving the properties mentioned in the different schedules annexed to that document to the various defendants, more or less in equal shares. So far as the widow, the first defendant, was concerned, a maintenance deed was executed in her favour, Exhibit D-22, dated 3rd November, 1938, by which she was given 100 kalams of Samba paddy per year, roughly speaking, equiva-

lent to a sum of Rs. 300 a year. The sum and substance of what took place under this arrangement was that instead of the first defendant alone getting all the properties mentioned above, they were divided between defendants 2, 3 and 4, and the widow was given maintenance allowance and a right to adopt, but not outside the families of these three persons. The plaintiff and the 7th defendant, the reversioners of Sundaram Ayyar, stood completely deprived of all chance of succeeding to these properties under the arrangement above described, and in February 1940, they issued notices challenging this settlement. These notices were followed by the institution of the suit under appeal on the 17th June, 1940. The plaintiff sued for a declaration that the eleven properties described in the two schedules annexed to the plaint belonged to the estate of Sundaram Ayyar, who died on the 14th September, 1937, and that the deed of settlement executed by Akilandammal, Sundaram Ayyar's mother, of the 3rd November, 1938, was void. The contesting defendants, *inter alia*, pleaded that the properties belonged to Akilandammal and that she was entitled to make this settlement.

The learned Subordinate Judge held that six properties out of the eleven in suit had been bought with Sundaram Ayyar's money and therefore his mother must be regarded as a *benamidar*, but that it had not been proved that Sundaram Ayyar had provided the funds for the purchases of the other five properties. On these findings the Subordinate Judge granted the relief claimed in the plaint in respect of the six properties but dismissed the suit so far as the five properties were concerned.

An appeal was filed by defendants 2, 3 and 4, contesting the Subordinate Judge's decree about six of the properties. The plaintiff filed a memorandum of cross-objections regarding the rest. The claim to the eleventh property mentioned in Exhibit D-9 was given up. Defendants 5 and 6 had been joined in the suit, as they had effected a mortgage of certain property in favour of Akilandammal on the 25th September, 1937. As that mortgage had been repaid, the plaintiff was given no relief in respect of it and the matter is no longer in dispute in the appeal.

The High Court dismissed the appeal preferred by the defendants and allowed the cross-objections filed on behalf of the plaintiff and in the result decreed the plaintiff's suit in respect of all the properties in suit excepting property No. 9 and the mortgage. As the judgment of the High Court varied the decision of the trial Judge and the value of the subject-matter of the suit as well as of the appeal was a sum exceeding Rs. 10,000 leave to appeal to His Majesty in Council was granted to the defendants by the High Court. The records in the case had not been transmitted to the Privy Council before the amendment of the law under which the jurisdiction of this Court was enlarged, the appeal was therefore transmitted to this Court and was heard by us.

It is convenient first to deal with the appeal preferred on behalf of the defendants as regards the properties covered by the sale deeds, Exhibits D-1, D-5, D-6, D-7, D-10 and D-11, in respect of which the Subordinate Judge and the High Court concurrently found that the consideration for these sale deeds passed from Sundaram Ayyar and hence these must be held to be *benami* transactions in the name of the mother on behalf of the son.

It was contended by the learned counsel for the appellants that the decision of the Court below against the appellants regarding these properties had been reached because of a wrong approach to this matter in law and that the rule of onus of proof as regards *benami* transactions had not been fully appreciated. It is settled law that the onus of establishing that a transaction is *benami* is on the plaintiff and it must be strictly made out. The decision of the Court cannot rest on mere suspicion, but must rest on legal grounds and legal testimony. In the absence of evidence, the apparent title must prevail. It is also well established that in a case where it is asserted that an assignment in the name of one person is in reality for the benefit of another, the real test is the source whence the consideration came and that when it is not possible to obtain evidence which conclusively establishes

or rebuts the allegation, the case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts. The Courts below proceeded to decide the case after fully appreciating the above rule and in our judgment their decision does not suffer from the defect pointed out by the learned counsel for the appellants.

There are certain facts which have been held established in the two Courts below and on the basis of which a decision has been reached against the appellants. These are : (1) that Sundaram Ayyar had the means to acquire these properties. The trial Judge found, and the High Court concurred in its finding, that as early as 1924 he had at least funds to the tune of Rs. 11,000 standing in his name in different banks and in other forms of investments and that he was also accumulating wealth during his later employment in the Collectorate at Bellary. (2) That Akilandammal had some promissory notes in her name up to 1924 approximately of the value of Rs. 2,000, but she had no other means of acquiring properties. The latter finding was affirmed by the High Court and the former finding was reversed. It had been asserted on behalf of the defendants that she was running a boarding house in Trichinopoly and out of that business she effected certain savings, the extent of which was mentioned in the evidence at about Rs. 200 a year. It had further been asserted that Akilandammal carried on a very successful business in money-lending, her capital being her jewels worth Rs. 400, a sum of Rs. 500 given by her parents after the marriage of her son and Rs. 2,000 which she had obtained from her sister, Kuzhandai Ammal, who lived with her, that when she went to Bellary with her son, she had a sum of Rs. 15,000 with her and that she later on started a motor bus service and earned considerable money therefrom and was thus in a position to acquire the properties in suit. The evidence on these points was given by one Natesa Sastri, D.W. 8 ; but his testimony was not accepted and both the Courts negatived these assertions. (3) (*i*) That the bulk of the consideration for the transaction evidenced by Exhibit D-1 came from Sundaram Ayyar and Sundaram Ayyar also defrayed the costs of repairing the house. (*ii*) That out of the total consideration of Rs. 1,860 for which the sale deed, Exhibit D-5, was effected, Rs. 1,667-4-0 was directly traced to Sundaram Ayyar as his money. (*iii*) That the bus service was the business of Sundaram Ayyar and the money for the sale transaction (Exhibit D-6) Rs. 1,925, was taken out of the funds earned out of the business. (*iv*) That the purchase under Exhibit D-10 was made by Sundaram Ayyar because negotiations for the purchase were made with him and that he had made endorsements on the mortgage bond, which formed part of the consideration for the sale, and that there was evidence of the plaintiff's witness No. 1 in support of the plaintiff's case as well as direct evidence furnished by the letters, Exhibit P-3 series. (*v*) That the transaction evidenced by Exhibit D-11 for Rs. 1,000 dated 7th July, 1937, was done by Sundaram Ayyar. He sent the money and he also conducted the negotiations for the purchase.

In view of these conclusions concurrently reached by the two Courts below, I do not consider that the appellants have any case regarding the six properties in dispute and it is not open to them to ask us to re-consider these findings.

Their Lordships of the Privy Council have always expressed unwillingness to depart from the general rule which prevents the fresh examination of facts for the purpose of disturbing concurrent findings by the lower Courts. In *Moung Tha Hnyeen* v. *Moung Pan Nyo*[1], Lord Hobhouse, in delivering the opinion of the Board, observed as follows :—

"Although acute criticisms have been made upon some points in the case, there has been nothing to show that there has been a miscarriage of justice, or that any principles of law or of procedure have been violated in the Courts below. This case is one which very decidedly falls within the valuable principle recognized here, and commonly observed in second Courts of Appeal, that such a Court will not interfere with concurrent judgments of the Courts below on matters of fact, unless very definite and explicit grounds for that interference are assigned."

1. (1900) L.R. 27 I.A. 166 : I.L.R. 28 Cal. 1 (P.C.).

The rule was again re-stated by Lord Lindley in *Rani Srimathi* v. *Khagendra Narayan Singh*[1] and by Lord Macnaghten in *Sanwal Singh* v. *Satrupa Kunwar*[2], and recently by Viscount Sumner in *Mahomed Ali* v. *William Stansfield Grosvenor Harvey*[3]. In *Jehangir Shapoorji* v. *Revd. Savarkar*[4], Lord Wright observed as follows :—

"their Lordships have examined the whole history in some detail, because in regard to issue No. 7 the question is rather one of law, and in any case there are not on that issue concurrent findings of fact ; accordingly the whole case had to be considered in order to deal with that issue. But their Lordships must not be taken to have in any way failed to give effect to the rule that on an issue of fact concurrent findings should be conclusive, unless indeed where the enforcement of the rule would work obvious injustice, or the violation of some principle of law or procedure. The importance of the rule is to discourage bringing before this Board issues of fact in which the appellant has failed in two Courts. The present case as regards the issue to which the rule applies, affords a complete illustration of the wisdom of the rule. Apart from their decision on the merits, their Lordships are for dismissing the appeal on that issue simply on the ground of the concurrent findings."

All the cases bearing on the point commencing from 1849 have been reviewed by Lord Thankerton while delivering the judgment of the Board in *Bibhabati* v. *Ramendra Narayan*[5] and a number of propositions have been enunciated explaining the scope of the rule.

I have considered it necessary to refer to these cases because this is really the first case that came before us after the enlargement of the jurisdiction of the Court and in which an attempt was made to re-open conclusions on questions of fact concurrently arrived at in the two Courts below. The rule as to concurrent findings is not a rule based on any statutory provision. It is a rule of conduct which the Privy Council had laid down for itself. Following this rule the Judicial Committee usually declined to review the evidence for a third time unless there were special circumstances which would justify a departure from this practice. As observed by Lord Thankerton in *Bibhabati* v. *Ramendra Narayan*[5], the practice is not a cast iron one and the grounds given in the decisions justifying departure from the above rule are merely illustrative. In an appropriate case and on a suitable occasion this matter may have to be fully considered and elucidated in all its aspects, but for the purposes of this case it is enough to state that in the absence of circumstances justifying departure from this rule, this Court would adhere to the practice developed by the Judicial Committee during the course of a century.

In this case there is no pretence for saying that there is any error of law, and that the concurrent findings of fact are not conclusive. The learned counsel for the appellants particularly wished to attack the findings of the lower Courts in respect of the sale deed, Exhibit D-6 and contended that here the two Courts had erred in law. He contended that the decision of the Courts that the property covered by this deed belonged to Sundaram Ayyar was based on the conclusion that the motor bus service belonged to him. He urged that this conclusion was vitiated inasmuch as the two Courts in arriving at the decision as to the ownership of the bus service had failed to apprehend the full extent of the rule of onus of proof. It was argued that all the documents relating to the bus service were in the name of Akilandammal, and that being so, that business should have been presumed to be hers till it was proved by some evidence that the funds invested therein belonged to Sundaram Ayyar or that it was he who really started it. In our view, this contention cannot be sustained. Both the Courts below have approached the question from the point of view which the learned counsel has urged. On the circumstances of the case, however, it has been found that the business could not have been started by this old lady and that she had really no interest in venturing on an undertaking of this character when she was 64 years old and that it was Sundaram Ayyar alone who invested his surplus income, which he could not legitimately disclose, in this business. The business was carried on in Bellary where Sundaram Ayyar was

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1. (1904) L.R. 31 I.A. 127 : I.L.R. 31 Cal. 871 (P.C.).
2. (1905) 16 M.L.J. 77 : L.R. 33 I.A. 53 : I.L.R. 28 All. 215 (P.C.).
3. (1929) 115 I.C. 722 (P.C.).
4. (1932) 63 M.L.J. 403 : 138 I.C. 774 (P.C.).
5. (1946) 2 M.L.J. 442 : 51 C.W.N. 98 (P.C.).

employed and where he had some influence. The mother was simply living with him and would only be known there in that capacity.

Be that as it may. Both the lower Courts on the circumstantial evidence have reached this conclusion and it is not competent to the appellants to re-open it in this Court. For the reasons given above it must be held that the appeal relating to these properties is totally void of force and cannot be seriously considered.

As regards the rest of the properties regarding which the High Court reversed the decision of the trial Judge, it has to be considered whether there were substantial grounds for doing so. The High Court's judgment on this part of the case is very brief and the matter has been disposed of rather summarily in the following words :—

> " There is no evidence directly tracing the consideration for these purchases to Sundaram Ayyar, apart from the accounts kept by Natesa Sastri. If Akilandammal had means of her own and these accounts were kept on her behalf by Natesa Sastri, the memorandum of cross-objections would have to be dismissed. For the reasons given we have held that Akilandammal had no means of her own and that the accounts kept by Natesa Sastri were Sundaram Ayyar's accounts. We have also pointed out that if Akilandammal had no means, all of the purchases standing in her name must have been made out of Sundaram Ayyar's money. Then it is to be borne in mind that it has been proved that the first loan lent by Akilandammal was of her son's money and no purchase of property was made until Sundaram Ayyar had been in the Income-tax Department for ten years. This being the position, the Subordinate Judge should have held that the plaintiff had discharged the burden of proof which lay on him in respect of the transactions represented by Exhibits D-2, D-3, D-4 and D-8."

The learned counsel for the appellants subjected this part of the judgment to a severe criticism and contended that the finding that Akilandammal had no funds of her own was contrary to the evidence on the record, and that no grounds existed for disturbing the decision of the trial Judge on this point. He stressed the point that the High Court had also lost sight of the rule of onus of proof while reaching its conclusions about these properties. It was said that the High Court was not right in the observation that the very first loan lent by Akilandammal was from her son's money, and that there was no justification for the conclusion that three other promissory notes taken between 1915 to 1919 were taken for money which belonged to Sundaram Ayyar, and that from the mere circumstance that one promissory note was taken in the name of the mother out of the son's money it did not follow that the money for the other promissory notes regarding which no evidence was led, was advanced by the son.

The trial Court's finding, with regard to these properties was based on the following observation :—

> "Having due regard for the paucity of evidence as to the source of consideration for the pronotes in the name of Akilandathammal and that some of the sale deeds are taken out of amounts realised under the pronotes that stood in her name, I find that Exhibits D-2, D-3, D-4 and D-8 are not benami for Sundaram Ayyar."

The learned counsel for the plaintiff-respondent urged that the trial Judge failed to notice that the responsibility for the paucity of evidence rested on the shoulder of the defendants and that the accounts and letters produced in the case conclusively proved that all these properties were purchased with Sundaram Ayyar's money in the name of his mother and that since the purchase they were managed by him, the accounts both of income and expenditure were rendered to him, revenue instalments were paid by him and whenever any money was required he sent it and that the salary of the second defendant, who was in actual management of this property, was also paid by him. It was also argued that the High Court was right in its conclusion that the accounts maintained by Natesa Sastri, D.W. 8, were not the accounts of the mother but were the accounts of Sundaram Ayyar. We now proceed to examine the validity of these contentions.

In the first instance it is necessary to consider the contention of the respondents, whether the defendants are guilty of suppressing material which it was their duty to place before the Court and whether they have been picking and choosing the documents and producing such of them as helped their case and withholding others which would go against them, and they are thus responsible for the paucity of

evidence in the case. It has already been pointed out that at the moment when Akilandammal went to Trichinopoly to execute the will, all the documents and account books of Sundaram Ayyar came into the possession of his widow, Kamakshi Ammal. Her mother-in-law, on her return from Trichinopoly discovered this and filed a complaint against her. As a result of this complaint, most of the documents were produced before the police officer. Some of these were kept by him, while the others were returned to the second defendant to be kept on behalf of the widow. It was not denied that these documents did come into the possession of the defendants and were with them. During the pendency of the suit, documents, Exhibits D-1 series, on which reliance was placed by the defendants, were produced by them on the 7th July, 1942. Some of the documents were produced by them in October 1942 as well. These documents did not include the accounts, which are contained in the books, Exhibit P-1 or Exhibit D-35. They came to the Court from the Stationary Sub-Magistrate, Trichinopoly, on 20th October, 1942. How these accounts reached the Court of the Magistrate is disclosed by a copy of the complaint, Exhibit D-32, filed by Kamakshi Ammal, wife of Sundaram Ayyar against the second and fourth defendants under section 406 of the Indian Penal Code. In this complaint she stated that the documents were produced before the police at Tiruchendurai, and that some of the documents were kept by the police and the rest were retained by her brother on the assertion that he would keep them with him for legal advice and file a suit on her behalf in a civil Court and that he had not returned these documents in spite of repeated demands. She prayed that a search warrant be issued for seizing the documents from the house of these persons. In pursuance of that complaint a warrant was actually issued and a search was conducted on the 8th October, 1942, in the houses of the defendants. The account books were discovered in that search along with various other documents. In spite of the fact that the search was conducted thoroughly and these documents came to the Magistrate's Court, these defendants later on produced a number of documents from their possession which are not included in the search list. Exhibit D-25, a letter of the year 1933 and some other documents relating to the years 1935-36 were produced by the defendants on the 18th November, 1942, *i.e.*, a month and ten days after the search. From this fact it appears that certain documents that were helpful to the defendants' case were carefully preserved by them in some other place and were not discovered in the search. The letters discovered in the search disclose that Sundaram Ayyar was writing to the second defendant and the letters now discovered are replies given by him to these letters. This defendant was asked to produce Sundaram's letters, but he took shelter behind the answer that he had thrown them in the dustbin, though he had preserved several documents in his custody of the years, 1933, 1934, 1935 and 1936. On these facts there can be no doubt at all that the contention of the learned counsel for the respondent that the defendants are guilty of suppression of evidence in the case and that therefore no conclusion in their favour should be arrived at merely on the ground of paucity of evidence which is of their own creation, must be upheld. The trial Judge, in our opinion, was not justified in giving his decision as regards these properties on a mere application of the rule of onus of proof in view of the paucity of evidence created by the conduct of the defendants themselves. The circumstances of the case warranted a different conclusion. The withholding of the account books by the defendants was by itself a sufficient ground for an adverse finding against them in regard to all the properties in respect of which account was maintained in these books and for the view that these books did not belong to the mother. There is, however, intrinsic evidence in the case justifying the conclusion that the account books produced in the case are of Sundaram Ayyar. In the letters exhibited as P-3 series, the second defendant was rendering accounts of all the eleven properties to Sundaram Ayyar. He was managing them on his behalf. No distinction was being maintained as regards these four properties from the other properties which both the lower Courts have found to belong to Sundaram Ayyar. The accounts annexed with these letters and sent to Sundaram Ayyar, were duly

entered in the account books. By way of illustration, it may be pointed out that Sundaram Ayyar withdrew Rs. 4,000 from the Co-operative Bank and lent it to various persons. Out of this, a sum of Rs. 2,000 was lent to N. Ramaswami Ayyar on a promissory note and other sums of Rs. 1,000 and Rs. 650 were lent to other persons. Rs. 350 remained as balance and this was accounted for in the accounts contained in Exhibit P-1. The whole of the sum of Rs. 4,000 which admittedly belonged to Sundaram Ayyar, finds mention in this book. It is clear therefore that Exhibit P-1 is an account book which contains entries regarding his money-lending transactions and also contains accounts of the properties held by him. All the eleven properties in dispute are dealt with in this book on the same footing and their income and expenses are accounted for. The consideration for Exhibits D-2 and D-3 is entered in the account book. A part of the consideration for Exhibit D-3 was a promissory note executed in Sundaram Ayyar's name. There can be no manner of doubt therefore that the High Court was right in holding that the defendants' case in respect of these properties was fully proved by the account book, Exhibit P-1 and that these were purchased out of moneys which belonged to Sundaram Ayyar.

The learned counsel for the defendants in the first instance argued that these books belonged to the mother. Later on he was forced to resile from that position and to urge that most likely these accounts were of moneys which belonged both to the son and mother. In our view, this contention cannot be sustained. The accounts started in the year 1929, nine or ten years after Sundaram Ayyar had been amassing wealth, while the lady apparently was doing no business and was not earning any money. Whatever little funds she might have had before 1919, there was no necessity for keeping any accounts in regard to those monies in the year 1929. The necessity for maintaining accounts arose because of the fact that Sundaram Ayyar had considerable money and acquired considerable property. It is quite possible that he was maintaining some account from 1919 to 1929, but as the whole material has not come before the Court it is difficult to say whether he did maintain such an account or not.

It seems to us, however, that the High Court was not quite right in the finding that Akilandammal had absolutely no funds with her and therefore it was not possible for her to acquire any properties. On the facts as stated in the earlier part of this judgment it does appear that she had some funds and some savings of her own because without any funds or savings she could not have educated and maintained her son till he started earning something. Moreover, the earnings of the boy in the early period of his career were not sufficient to maintain the whole family. There is no proof that Sundaram Ayyar was doing any work or was employed anywhere between 1916 to 1919. Presumably the money advanced on promissory notes taken during this period was out of the savings of the lady herself. With respect to the promissory note of the year 1915, however, the High Court was right in holding that this was taken with Sundaram Ayyar's money as it was so admitted by the defendants in the recitals in the mortgage deed taken in Sundaram Ayyar's name, but it has to be pointed out that this was not the first promissory note, the first being of the year 1912. Further, from this fact a decision could not be reached as regards the ownership of the moneys covered by three other promissory notes which relate to this period. It may therefore be that Akilandammal had some money of her son up to 1924 and was not a pauper, but that fact does not in any way affect the decision of the appeal because there is no evidence that after the year 1919 she did any business or earned any further money. She might have spent the money that she had, or she might have handed it over to her son; but there is no connection of these small sums which she had with the acquisition of properties in the year 1929.

It is also relevant to point out that the omission of the fourth defendant to give evidence is a circumstance that goes against the defendants' case. He knew all the facts about the purchase of these properties. Emphasis was laid by the learned

counsel for the appellants on Exhibit D-25, a letter written by Sundaram Ayyar to Natesa Ayyar on the 20th January, 1933. In the third paragraph of this letter Sundaram Ayyar wrote as follows :—

" Further, you have not written anything about the lands now purchased by *Athai* (aunt). What was the rate for them, *i,e.*, was it cheap or dear when compared with the prevailing price ? How much has Natesa Athan paid for them ? How much has yet to be paid ? Are the lands of a superior class ? Please write a detailed reply about all these matters."

The transaction mentioned in this letter is covered by Exhibits D-2 and D-3. It was urged that the above statement of Sundaram Ayyar amounts to an admission on his part that these properties had been purchased by his mother Akilandammal and that the High Court had failed to consider this admission or to give effect to it. There would have been considerable force in this contention had the Court been in full possession of all the materials and the letters of Sundaram Ayyar which admittedly were written by him and received by the second defendant concerning these transactions. From a statement contained in an isolated letter it is very difficult to appreciate the value or judge the true nature of this admission. It was pointed out by the learned counsel for the respondents that in various letters the second defendant wrote to Sundaram Ayyar saying that he remembered his *confidential* matters. Reference may be made to Exhibit P-3 (*g*) dated 2nd March, 1937. There is no material on the record disclosing the nature of these confidential matters. It was suggested by the learned counsel that as Sundaram Ayyar was employed in the Income-tax Department and was carrying on money-lending through the second defendant, this was a confidence reposed in him. To support the conclusion reached by the High Court reliance was also placed on letters exhibited as P-3 series. In some of these the second defendant had asked Sundaram Ayyar to send money for meals of mother and all of them indicate that Sundaram Ayyar was being treated as the owner of all the properties in suit.

It was contended that the mother and the son were living together and that the son might be managing the properties of the mother. The cumulative effect of the evidence on the record and the circumstances above narrated however do not warrant that conclusion. The correct conclusion seems to be that the son was making money and whatever little monies were with the mother were in the hands of the son, he was acquiring properties for himself and to please his mother and to save the eye of the officials he was putting the properties in the name of his mother, while he himself was paying the price for them, was negotiating for them and was receiving their benefit. He employed the second and the fourth defendants for managing these properties and for carrying on his business. They were his very near relations and he fully trusted them.

The High Court therefore correctly reached the decision that Akilandammal had not funds enough to embark on acquisition of the suit properties in the years 1929-37. This conclusion harmonizes with the fact that the only person who had the means to acquire these properties and who was interested in acquiring them was Sundaram. Akilandammal might have been in possession of some funds of her own in 1924, but that fact does not affect the decision of the case. Once the defendants' case about the sources of income of the mother and about her being in possession of over Rs. 15,000 by the year 1919 is negatived, then the only conclusion possible on the facts disclosed is the one arrived by the High Court and it is difficult to uphold the contention that the properties in suit were acquired by her. The onus that rested in the plaintiff stood discharged in the particular circumstances of the case and the trial Judge was not right in holding otherwise.

The result, therefore, is that this appeal fails and is dimissed with costs.

Fazl Ali, J.—I agree.

Patanjali Sastri, J.—I agree.

Mukherjea, J.—I agree.

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MACK.

Kandaswami Koundan .. *Petitioner**

v.

Sanni Krishnama Naidu .. *Respondent.*

Civil Procedure Code (*V of* 1908), *Order* 21, *rule* 89—*Application under and peposit by third party under direction of judgment-debtor—Maintainability—Allowing of application—Payment of costs to applicant—If justified.*

In execution of a decree a house belonging to the judgment-debtor was sold on 14th October, 1947. The judgment-debtor thereafter executed a usufructuary mortgage of some other property in favour of the petitioner herein and directed him specifically to deposit in Court as part of the consideration the decree amount and get the house released from attachment. In accordance with that specific direction, the usufructuary mortgagee filed an application under Order 21, rule 89, on 10th November, 1947, and made the necessary deposit in the execution Court. On the question whether the petitioner had a *locus standi* to file the application,

Held : (1) That in view of the specific direction and obligation imposed on petitioner in the registered mortgage deed, he could not be deemed a person not interested in the property brought to sale.

Hanumayya v. *Bapanayya,* (1945) 1 M.L.J. 66 : I.L.R. 1945 Mad. 566, referred to.

Krishnama Naicker v. *Sivasami Chetty,* (1943) 2 M.L.J. 281, distinguished.

(2) That the petitioner acted as an agent of the judgment-debtor by virtue of the authorisation contained in the mortgage bond and his claim to file the application should not be defeated on grounds of sheer technicality.

(3) That in the circumstances it would be inequitable not to direct the decree-holder (respondent) to pay the petitioner his costs throughout.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order in C.M.A. No. 14 of 1948, dated 29th June, 1948, District Court, Coimbatore (C.M.P. No. 157 of 1947 in O.S. No. 72 of 1947, District Munsif Court, Dharapuram).

K. V. Ramaseshan for Petitioner.

R. Desikan for Respondent.

The Court delivered the following

JUDGMENT.—Petitioner who was not a party to the decree filed an application under Order 21, rule 89, Civil Procedure Code, to set aside a Court sale in execution. The District Munsif and the District Judge in appeal concurred in finding that the petitioner had no *locus standi* to file such an application as he was neither the judgment-debtor nor a person deriving title from him nor any person holding an interest in the property and dismissed his application.

The facts are briefly these. The judgment-debtor is stated without contradiction by the other side to be an old man of about 80. The Court sale in execution of the decree against him was held on 14th October, 1947, at which a house belonging to him in Dharapuram was sold for Rs. 1010. On 27th October, 1947, the judgment-debtor executed a usufructuary mortgage of some other property, the mortgage specifically reciting as part of the consideration a sum of Rs. 1,500 which the mortgagee had to deposit in the executing Court. What is most important is a specific direction in this mortgage deed to the petitioner to pay this money into Court and to get this house released from attachment. In accordance with this direction, the petitioner filed an application under Order 21, rule 89, on the 10th November, 1947, making the full deposit required by that section. The point for consideration is whether his application was maintainable.

It is in the first place urged that the petitioner was an agent of the judgment-debtor and in this capacity made the deposit. Reliance is placed on *Hanumayya* v. *Bapanayya*[1] which held that it was sufficient if the deposit was made through an agent and the personal attendance of the judgment-debtor when depositing the

* C. R. P. No. 1003 of 1948. 4th March, 1949.

1. (1945) 1 M.L.J. 66: I.L.R. 1945 Mad. 566.

money is not necessary. Mr. Desikan for the respondent concedes this position, but urges that the application under Order 21, rule 89, by the petitioner is not maintainable and that in the circumstances it was only the judgment-debtor who could have filed it. He contends further that the petitioner can in no sense be considered a recognised agent within the meaning of Order 3, rule 2, Civil Procedure Code, as he is not the holder of a power of attorney. These technical positions can be met by counter technical positions, I think, to the advantage of the petitioner. The facts of this case are peculiar and not on all fours with those in *Krishnama Naicker* v. *Sivasami Chetti*[1], on which Mr. Desikan relies to refute the petitioner's possible position as a person who holds an interest in the property. The facts there were really quite different as the person who applied to set aside the sale had purchased some other property from the judgment-debtor or long prior to the Court sale and under his sale deed he merely had to deposit the price towards the decree. He made one or two deposits in driblets, then the property was brought to sale and afterwards he sought to come up with an application under Order 21, rule 89, Civil Procedure Code, to set aside the sale as one interested in the property. His application was ultimately dismissed and if I may say so with great respect to the Bench, quite rightly. There were some observations in that decision to the effect that the interest in the property contemplated by this rule is an interest in the very property the sale of which is sought to be set aside and that indirect interest is not sufficient. In view of the facts being different here, I am inclined to the view that in view of the specific direction and obligation imposed on petitioner in this registered mortgage, he cannot be held to be a person who does not have an interest in the property brought to sale. If he failed to make the deposit and get the attachment on it set aside, his usufructuary mortgage, would have failed for partial lack of consideration and from this point of view he was interested in getting the sale of this property set aside and its attachment raised.

From another standpoint, there can also be no doubt that the petitioner acted as the agent of the judgment-debtor. A power of attorney is widely defined in section 2 (21) of the Stamp Act as including an instrument empowering a specified person to act for and in the name of the person executing it. In this registered mortgage, there is a direction by the judgment-debtor to this petitioner to deposit this amount of Rs. 1,500 in Court to get this house released from attachment. A reasonable construction of that clause in this mortgage is that it gave the petitioner sufficient legal power to make the deposit and to file this application under Order 21, rule 89, Civil Procedure Code, on which alone in law the property could be released from attachment. It is contended that the petitioner could not possibly have been empowered by this mortgage deed to file for instance a suit on behalf of the judgment-debtor. I am in complete agreement, but the view I have no hesitation in taking on the recital of Ex. A is that it specifically authorised the petitioner both to make the deposit and to take the necessary steps to have the attachment raised. He was not authorised to appear for the judgment-debtor in any other Court proceeding. This is, I think, the only reasonable view of the action which petitioner took to implement the contract he had made under Ex. A. No doubt, it would have been better and more regular if the judgment-debtor had associated himself with this application and also this revision petition. He was, however, an old man of over 80 and had done his best within the limits of his legal knowledge to mortgage some of his other property and arrange to the best of his ability for the deposit of this money in Court in time through the agency of the petitioner. It would in my view be a travesty of law and justice if sheer technicality should prevail and the Court sale of this house not set aside in the circumstances and the auction-purchaser who incidentally happens to be the decree-holder himself should make his bargain good with the seal of Court approval on the ground of technicality alone.

The petition is allowed and the Court sale is set aside and the application under Order 21, rule 89, Civil Procedure Code, will be allowed with costs throughout. On the question of costs, Mr. Desikan contends that no equitable consideration.

1. (1943) 2 M.L.J. 281.

arise under Order 21, rule 89, in applications which make a concession to the judgment-debtor before confirmation of a Court sale. It is settled law that Order 21, rule 89, must be strictly complied with and that no deficiency, for instance, in the quantum of the deposit will be condoned under any circumstances. It is, as observed in *Karunakaran Menon* v. *Krishna Menon*[1], in the nature of an indulgence to judgment-debtors, and a jugement-debtor who wishes to take advantage of its provisions must strictly comply with the same. But "strict enforcement" must be interpreted in accordance with rural conditions, the knowledge of law prevailing in rural areas unconnected with Courts by any controlled channel of legal service and other factors, unless Order 21, rule 89, is to degenerate into mere ruthless machinery to which no equitable principle can, under any circumstances, be applied. I think in this case the decree-holder being himself the purchaser and the full deposit having been made by this agent of the judgment-debtor within the thirty days, the decree-holder should have contented himself with withdrawing the whole of the amount instead of pressing on grounds of mere technicality for the sale to himself being confirmed. It would be inequitable in the circumstances not to direct the decree-holder to pay the judgment-debtor his costs throughout.

K.C. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE RAJAGOPALAN.

In the matter of N.R. Sreenivasan a detenu in the Central Jail at Vellore .. *Petitioner**

Madras Maintenance of Public Order Act (I of 1947)—Order made with the object of preventing a person in judicial custody coming out on bail—Legality of detention.

Where the affidavit filed on behalf of the Counter-petitioner in an application for the issue of a writ of *habeas corpus* clearly showed that it was to prevent the release of the petitioner on bail while he was in judicial custody that the detention was considered necessary,

Held : (*i*) It is not one of the grounds of satisfaction contemplated by section 2 (1) of the Madras Maintenance of Public Order Act.

(*ii*) In considering the question whether the apparent satisfaction recorded by the District Magistrate was in good faith, in exercise of the statutory powers conferred upon him, it is certainly permissible to view the order of detention in relation to the apparent and avowed object with which the order of detention was passed, that is not to prevent a breach of the peace or a danger to public safety but to prevent the petitioner from coming out of jail if he could find the sureties he was required to do by the Sessions Judge. Such an exercise of power is *mala fide* ; and where a detention is traceable to such an exercise of power *mala fide*, the detention must be held to be illegal.

(*iii*) It cannot be said that the petitioner who was in judicial custody at the time was 'acting' in a manner prejudicial to public safety, and where the order uses the word 'acting' the Court will not import into that order that the District Magistrate meant to say that the petitioner was about to act in a manner prejudicial to public safety.

Petition under section 491 of the Code of Criminal Procedure, 1898, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue directions in the nature of *Habeas Corpus* for production before the High Court, Madras, the person of N.R. Sreenivasan, a detenu in the Central Jail at Vellore to be dealt with according to law and direct that he be set at liberty.

N. S. Mani for *Messrs. Row and Reddy* for Petitioner.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the Crown.

The Order of the Court was pronounced by

Rajagopalan, J.—The petitioner applies under section 491 of the Code of Criminal Procedure for his release from detention. The petitioner was arrested and taken into judicial custody on 25th October, 1947. He was charged in two cases with the commission of specific offences punishable under the Penal Code, namely, sections 147, 148, 323, 426 and 452 of the Indian Penal Code. He

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1. (1915) 28 M.L.J. 262 : I.L.R. 39 Mad. 429.

* Cr. M. P. No. 43 of 1949. 14th February, 1949.

continued in such judicial custody apparently till 21st March, 1948. Some time before 21st March, 1948, he applied for release on bail with reference to those specific charges levelled against him under the Penal Code. Bail appears to have been granted by the Sessions Judge, but on what date it was granted we have not been told. Meanwhile, on 5th March, 1948, an order was passed by the District Magistrate of Coimbatore under Section 2 (1) (*a*) of Madras Act I of 1947. The order ran :

"Whereas I * * * am satisfied that with respect of N. R. Sreenivasan * * * that he is acting in a manner prejudicial to the public safety and with a view to preventing him from so doing it is necessary to detain him * * I hereby direct that the said N. R. Sreenivasan shall be arrested by the police wherever found and removed to the Central Jail, Vellore."

That order was passed on 5th March, 1948. From the affidavit filed on behalf of the counter-petitioners it is found that it was only from 21st March, 1948, that the petitioner was treated as a person detained under the provisions of Madras Act I of 1947. Grounds for detention dated 29th March, 1948, were furnished to the petitioner on 27th April, 1948. Additional grounds were furnished on 31st July, 1948. It would appear that shortly before 28th January, 1949, the Government passed the requisite order under section 3 (5) of the Act confirming the original order passed under section 2 (1) (*a*) of the Act.

The main contention of the learned advocate for the petitioner is that the detention of the petitioner under the provisions of Madras Act I of 1947 is *mala fide*. In *Narayanaswami Naidu* v. *Inspector of Police, Mayavaram*[1], the learned Chief Justice laid down four categories in which classes of cases alone it will be open to the Court to intervene in an application filed under section 491 of the Code of Criminal Procedure with reference to orders passed under Act I of 1947, (*a*) when the order is not duly authenticated, (*b*) when the person detained in pursuance of the order is not the person intended to be detained, (*c*) when there is lack of *bona fides*, and (*d*) when it is established that the essential requirements of section 2, namely, satisfaction * * * is not present. We are concerned only with (*c*). In the affidavit filed on behalf of the counter-petitioners, sworn to by an Inspector of Police it was averred :

"While in remand he (the petitioner) applied for bail and the Sessions Judge, Coimbatore ordered his bail on condition that he should report at the police station every day. As such the detenu was at liberty to furnish the necessary securities and come out from the jail. Hence an order for his detention was considered necessary. He was treated as a detenu from 21st March, 1948."

No doubt the affidavit also disclosed the fact that the charges against the petitioner were withdrawn, but that in no way affects the legality of the order of detention. In our opinion, the only reasonable construction the averments in the affidavit are capable of is that it was to prevent the release of the petitioner on bail that his detention was considered necessary. That clearly is not one of the grounds of satisfaction, section 2 (1) of Madras Act I of 1947 contemplates. No doubt under clause (*c*) of the four classes postulated by the Chief Justice, the fact that the District Magistrate, the detaining authority, was satisfied under section 2 (1) of the Act is a fact that can be gathered from the order of detention itself, and further beyond that, it may not be permissible to go. But in considering the question, whether the apparent satisfaction recorded by the District Magistrate was in good faith in exercise of the statutory powers conferred upon him, it is certainly permissible to view the order of detention in relation to the apparent and avowed object with which that order of detention was passed, that is not to prevent a breach of the peace or a danger to public safety but to prevent the petitioner from coming out of jail if he could find the sureties he was required to do by the Sessions Judge. Such an exercise of power, we are convinced was *mala fide*; and where a detention is traceable only to such an exercise of power *mala fide*, the detention must be held to be illegal.

There is one other point to be mentioned. What the District Magistrate said was that the petitioner was *acting* in a manner prejudicial to the public safety

1. (1949) 1 M.L.J. 1 at 23 (F.B.).

and that with a view to prevent him from so doing, it was necessary to detain him. Now that order was passed on 5th March, 1948. The petitioner, it must be remembered, was in custody from 25th October, 1947. Under section 2 (1) (*a*) even a satisfaction that a person was *about to act* in a manner prejudicial to public safety would have been sufficient to justify an order of detention ; but when the Magistrate purports to have been satisfied that the petitioner was acting in a manner prejudicial to public safety, we cannot import into that order that the District Magistrate meant to say that the petitioner was about to act in a manner prejudicial to public safety. The use of the word " acting " in contradistinction with " about to act," which should apply to acts in future, could only be interpreted to mean to relate to something done in the recent past if not in the immediate present that is the recent past in relation to 5th March, 1948, the date of the order. Since the petitioner was in judicial custody from 25th October, 1947, that recent past was absent and could not have been considered by the District Magistrate. We are not concerned now whether that was a sufficient reason for the District Magistrate to be satisfied ; but we are only on the question whether such an exercise of power was in good faith or in bad faith. As we have already pointed out, the materials placed before us clearly indicate that it was not in the exercise of good faith that the order of detention was passed on 5th March, 1948.

We allow the petition and direct that the petitioner be set at liberty unless he is detained for a valid reason.

V. P. S. ——— *Petitioner directed to be set at liberty.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE VISWANATHA SASTRI.

K. Dasappa .. *Petitioner**

v.

The District Magistrate, South Kanara and another .. *Respondents.*

Madras Maintenance of Public Order Act (I of 1947) *and Code of Criminal Procedure (V of* 1898), *section* 151—*Arrest under section* 151 *of the Code—Subsequent detention under Madras Act I of* 1947—*Validity—Power to pass final order after application under section* 491, *Criminal Procedure Code—Power of Court to go into the question of the satisfaction of the detaining authority.*

It cannot be said that simply because a man has been arrested under section 151 of the Code of Criminal Procedure, the powers under Madras Act I of 1947 could not be exercised and the person so arrested could not be detained thereunder. Where the action under Madras Act I of 1947 was not actuated by any ulterior motive or improper purpose and the previous arrest under section 151 of the Code was made not with a view to attain that object, it cannot be said that the order of detention was made *mala fide.*

The Government has power to pass a final order in connection with the detention of an applicant even after an application had been made to the Court under section 491 of the Code.

The Court cannot investigate the sufficiency of the materials or the reasonableness of the grounds upon which the Government or the empowered authority or officer was satisfied that it was necessary in the interests of public safety and order to detain the petitioner.

Petition under section 491 of the Criminal Procedure Code praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue directions in the nature of *Habeas Corpus* directing the Superintendent, Central Jail, Vellore, to produce the body of the petitioner herein before the High Court for being dealt with according to law and setting him at liberty.

N. S. Mani for *Messrs. Row and Reddy* for Petitioner.

N. T. Raghunathan for the Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Judgment of the Court was delivered by

Viswanatha Sastri, J.—This is an application by a person detained under the Madras Maintenance of Public Order Act (I of 1947) to this Court for the issue

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* Cr. M. P. No. 2633 of 1948. 10th March, 1949.

of a direction in the nature of *Habeas Corpus* under section 491, Criminal Procedure Code. The applicant was arrested on the 25th April, 1948, under section 151, Criminal Procedure Code, by the Police authorities and an order for his detention was passed by the District Magistrate of South Kanara on the 29th April, 1948. On the 10th June, 1948, the applicant received a communication from the Provincial Government containing the grounds for the detention. He submitted his explanation in due course. The Advisory Committee considered the matter and we are informed that on the 17th February, 1949, the Government of Madras have passed final orders for the detention of the applicant.

Mr. N. S. Mani, the learned counsel for the applicant, raised four grounds in support of his application. The first contention was that the order for detention itself showed that the District Magistrate did not satisfy himself with respect to the applicant that he was acting or about to act in a manner prejudicial to public safety or the maintenance of public order and that it was necessary to detain him with a view to prevent him from so doing. Reliance is placed on the form of the order, the relevant portion of which runs in these terms :

"Whereas I, Setu Rao Kaiwar, District Magistrate of South Kanara, am satisfied with respect to Dasappa, Master of Balla Village, that he is acting or about to act in a manner prejudicial to the public safety and maintenance of public order and that with a view to preventing him from so doing, it is necessary to detain him."

The argument is that the order does not state whether the applicant is acting or is about to act in a manner prejudicial to public safety and that it is merely a reproduction of the language of section 2 of the Act. It is contended that the District Magistrate ought to have satisfied himself about one of two things, namely, that the applicant was acting or was about to act in a manner prejudicial to public safety and that since he had not done so, the requirement of section 2, sub-section (1) was not complied with. We consider this objection to the form of the order to be an unsubstantial one. We are supported in our opinion by the judgment of the Federal Court in *Emperor* v. *Sibnath Banerjee*[1]. The relevant passage in the judgment of the Chief Justice is as follows :—

"It has been suggested that (1) the form of the recital indicates by use of the word 'or' that no final consideration has been given to each case and that all that the investigating authority has done has been to form a rough conclusion that the case may come within one or other of the reasons quoted and that (2) the use of a cyclostyled form of order indicates a like lack of careful consideration, and that therefore the order is not good *ex facie*. I do not accept these arguments. In my judgment the form of recital is one which a layman might reasonably use when he was satisfied that the case must come within one or other of the specified categories without being prepared to pledge himself with legal exactitude to any particular one or more of the categories."

The objection therefore to the form of the order fails.

The next contention of the learned counsel for the petitioner is that as the applicant had been arrested under section 151, Criminal Procedure Code, on the 25th April, 1948, and the order of detention was passed on the 29th April, 1948, it could not be said that the District Magistrate was satisfied at the time the petitioner was arrested that he was likely to act in a manner prejudicial to public safety or the maintenance of public order. The arrest under section 151, Criminal Procedure Code, might have been in respect of a cognizable offence wholly unconnected with public safety or maintenance of public order. The definition under Madras Act I of 1947 is in the interests of public safety or maintenance of public order and the scope of section 151, Criminal Procedure Code and sections 2 to 4 of Madras Act I of 1947 are entirely different. We do not consider that simply because a man has been arrested under section 151, Criminal Procedure Code, the powers under Madras Act I of 1947 could not be exercised and the person so arrested could not be detained thereunder. There is also some authority for this view in the decision of the Allahabad High Court in *Mool Chand and others* v. *Rex*[2]. The head-note of the case of the Allahabad High Court is in these terms :

"The mere fact that certain persons were first arrested under some provisions of the ordinary law and were later ordered to be detained under the U. P. Maintenance of Order (Temporary)

1. (1945) 2 M.L.J. 325: 1945 F.L.J. 222 (P.C.). 2. (1948) All. L.J. 81.

Act is not, in itself, proof of *mala fides* and it is for the person arrested to adduce further circumstances or evidence to show that the executive authorities acted *mala fide*."

In the present case, there is no ground for holding that the action under Madras Act I of 1947 was actuated by any ulterior motive or improper purpose and that with a view to attain that object, the previous arrest under section 151, Criminal Procedure Code, was made. This contention of the petitioner is unsustainable.

The next contention raised on behalf of the applicant is that the Government had no power to pass a final order in connection with the detention of the applicant after an application had been made to this Court under section 491, Criminal Procedure Code. The applicant is unable to refer to any statutory provision or to any authority in support of his contention. In an application under section 491, Criminal Procedure Code, this Court is not empowered to stay a proceeding under Madras Act I of 1947 and it could not be said that the Provincial Government in fulfilling its statutory duties under section 3 (5) of Madras Act I of 1947, is in any way transgressing any law or any order of this Court. Indeed, it is their duty to deal expeditiously with cases of persons detained under Madras Act I of 1947, and pass final orders, in order that these persons may get the benefit of release after the expiry of six months from the date of the final order.

Lastly, it is contended that the decision of the Full Bench of this Court in *Narayanaswami Naidu* v. *Inspector of Police, Mayavaram*[1], does not fetter our powers to interfere under section 491, Criminal Procedure Code, and that the limitations laid down in the Full Bench decision are not now operative in view of the later events that have happened in this case. The later events referred to by the learned counsel for the petitioner are (1) the reference to the Advisory Committee ; (2) the subsequent explanation furnished to the Government by the applicant ; and (3) the report of the Advisory Committee. We consider that the power of this Court to interfere with an order of detention passed under Madras Act I of 1947, on an application under section 491, Criminal Procedure Code, is confined to the four grounds enumerated by the learned Chief Justice at page 23 of the Full Bench decision in *Narayanaswami Naidu* v. *Inspector of Police, Mayavaram*[1]. It is only when there is lack of *bona fides* in the order for detention that this Court can interfere, apart from the three other grounds enumerated in the judgment of the learned Chief Justice. It may be that, though the initial detention was *bona fide*, its continuance may become *mala fide* by reason of the subsequent events such as non-service of the grounds of detention on the detenu for an indefinite period. We are, however, not concerned with such a situation in the present case. All that has been urged is that there was lack of *bona fides* in the initial order of detention. We have examined the grounds of detention served on the petitioner and we are unable to hold that there are no grounds which would justify detention under section 2 of Madras Act I of 1947. It is clearly stated that the applicant is interfering with and impeading the work of the police in the matter of detecting crimes and bringing to trial offenders concerned in serious crimes, like dacoity in the locality. It is also stated that the organisation is indulging in violent and subversive activities. It is well-settled that this Court cannot investigate the sufficiency of the materials or the reasonableness of the grounds upon which the Government or the empowered authority or officer was satisfied that it was necessary in the interests of public safety and order to detain the petitioner.

For these reasons, we hold that the application fails and we direct that it be dismissed.

V.P.S. *Petition dismissed.*

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1. (1949) 1 M.L.J. 1 at p. 23 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Chilukuri Tripura Sundaramma .. *Appellant**

v.

Chilukuri Venkateswarlu *alias* Ramachandram and others .. *Respondents.*

Lease for agricultural purposes—Provision for period of grace for payment of rent and also provision for forfeiture for non-payment of rent—Power of Court to relieve against forfeiture for non-payment of rent.

Courts in India have power to relieve against forfeiture for non-payment of rent even in cases where a period of grace is allowed for payment by the lease deed and this rule applies equally to a lease for agricultural purposes.

Case-law discussed.

Appeals against the decrees of the Court of the Subordinate Judge, Tenali, in A. S. No. 23 of 1945, preferred against the decree of the Court of the District Munsiff, Tenali, in O. S. No. 209 of 1941, etc.

P. Somasundaram and *E. Subramaniam* for Appellant.

T. G. Krishnamurthi for Respondents.

The Court delivered the following

JUDGMENT.—These appeals arise out of the decision of the Subordinate Judge of Tenali wherein the question for consideration is whether the forfeiture clauses contained in the two lease deeds Exs. P-4 and P-5 executed by the respondents in each of these appeals to the appellant should be given effect to or not. Exs. P-4 and P-5 are both registered permanent leases relating to properties leased out to the respective respondents in each of the second appeals and in each of them the condition regarding the payment of rent is that the lessees were to remain in occupation of the property as permanent lessees on payment of a rent of ten bags of paddy per acre payable at the end of January each year. In default of payment of rent, the lessor is entitled to recover the same with a charge over the crop at an extra rate of four annas per bag over the prevailing rates. There was also a further clause that a period of grace from the end of January to the 16th of March every year is allowed for the payment of the rent at the rate mentioned above. In case of default of payment even by that date, it was provided that the permanent leases would stand forfeited and the lessees would be liable to be ejected. Both the lower Courts have found that the respondents are entitled to be relieved of the clause regarding forfeiture as it was a penal one, on condition that the arrears of rent were deposited in Court within the time allowed by the trial Court which gave an opportunity to the respondents to pay the rents claimed in the suit and the same has been complied with.

The argument of Mr. P. Somasundaram for the appellant is that when a permanent lease provides a stipulated period for the payment of rent after which some days of grace are allowed, and there is a further clause of forfeiture of the tenancy in case the rent is not paid even within the period of grace allowed, the Courts have no power to relieve against forfeiture, because the more allowance of days of grace amounts to something like a relief and therefore there cannot be further relief against forfeiture. Even though prior to 1912, there had been a line of cases laying down that the Court has no power to relieve against forfeiture in such cases, subsequently the tide has turned in the opposite direction and the learned counsel for the appellant has not been able to show to me any case after 1912 which took the same view that was in vogue previously.

In *Narayana Kamti* v. *Handu Shetty*[1], Shephard and Bhashyam Ayyangar, JJ., have held that where a lease contains a provision that rent should be paid on a certain day and that if default is made and continues until a certain further date, the lease is forfeited, the clause is not a penalty and there can be no relief against forfeiture. The learned Judges followed the maxim that he who seeks equity must

* S. A. Nos. 782 and 783 of 1946. 4th March, 1949.

1. (1901) 15 M.L.J. 210.

do equity and construed the clause as not being a penal one. This decision was followed in *Naraina Naicka* v. *Vasudeva Bhatta*[1], where Subramania Aiyar, O.C.J., and Bhashyam Ayyangar, J., laid down, in a case where the facts were similar, that the clause was not a penal one. In that case there was a lease of the year 1866 for building purposes with a provision that the lessee should pay to the lessor rent at the rate of Rs. 5 per annum by the 24th May of each year and if any arrears remained due, they should be paid within a further period of three months or by the 24th August, and if the payment was not made even then, the permanent lease should stand cancelled. Following the decision in *Narayana Kamti* v. *Handu Shetty*[2], the Court was of the view that the condition of forfeiture for non-payment was not penal as a period of grace was allowed and consequently no relief against forfeiture could be given. To the same effect is the judgment of Benson and Krishnaswami Ayyar, JJ., in *Adhiragi Chetti* v. *Billa Tyampu*[3] holding that Courts will not relieve against forfeiture for non-payment of rent where a period of grace is allowed in the lease deed. The two earlier decisions referred to *supra* were followed in this decision. In *Mahalakshmi Amma* v. *Lakshmi*[4], Abdur Rahim and Phillips, JJ., struck the same note when they held, following the cases mentioned above, that forfeiture for non-payment of rent when a period of grace is provided for in the lease cannot be ordinarily relieved against, especially when the tenant falsely pleads discharge. The last case of a similar nature is contained in *Tungamma* v. *Korathi*[5] where Sundara Aiyar and Sadasiva Aiyar, JJ., were of the view that where the lease allows a period of grace for payment of rent, the forfeiture incurred by non-payment within the period of grace will not be relieved against. But in *Ramakrishna* v. *Baburaya*[6], Arnold White, C.J. and Sankara Nair, J., were of the view that the question whether a tenant is entitled to relief against forfeiture for non-payment of rent must depend on the facts of each case and adverting to the decision in *Narayana Kamti* v. *Handu Shetty*[2] and *Mahalakshmi Amma* v. *Lakshmi*[4] held that they are distinguishable, especially the case in *Narayana Kamti* v. *Handu Shetty*[2] where a period of eight months was allowed as the period of grace.

As I have already stated, a different line of thought is discernible from the decision in *Appayya Shetty* v. *Mahammade Beari*[7]. In that case Seshagiri Aiyar and Napier, JJ., after an exhaustive consideration of the English and Indian cases and referring to the line of cases discussed by me above, came to the conclusion that Courts in India have power to relieve against forfeiture for non-payment of rent even in cases where a period of grace is allowed for payment by the lease deed and this rule applies equally to a lease for agricultural purposes. Seshagiri Aiyar, J., at page 838, observes as follows :

"In *Naraina Naicka* v. *Vasudeva Bhatta*[1] it was broadly laid down that if a contract provides for days of grace where rent is not paid in time, Courts should not relieve against forfeiture. *Narayana Kamti* v. *Handu Shetti*[2] is to the same effect. The learned Judges seem to suggest that the English decisions are distinguishable inasmuch as ordinarily days of grace are not provided in lease deeds executed in England. Our attention has been drawn by Mr. Sitarama Rao to the forms of lease deeds printed in Woodfall on Landlord and Tenant which give days of grace (see page 1069). Apart from this, I fail to see on what principle the insertion of such a clause should be held to disentitle the tenant from equitable relief. The observations of that great jurist, Story are particularly applicable to such carefully designed provisions. I think the true principle is that which *Ramakrishna* v. *Baburaya*[6], enunciates."

Napier, J., also comes to the same conclusion. In the opinion of Seshagiri Aiyar, J., a hard and fast rule that a contract providing for days of grace ought to be enforced strictly is not calculated to advance justice ; and the learned Judge instanced other cases where relief was given against forfeiture under similar circumstances. It was also observed that the earlier cases of this Court, *viz.*, *Kottal Uppi* v. *Edavalath Thathan Nambudiri*[8] and *Subbaraya* v. *Krishna*[9], took a view favourable to the tenant.

1. (1903) 15 M.L.J. 208: I.L.R. 28 Mad. 389.
2. (1901) 15 M.L.J. 210.
3. (1910) 20 M.L.J. 944.
4. (1911) 21 M.L.J. 960.
5. (1912) M.W.N. 1135.
6. (1912) 23 M.L.J. 715.
7. (1915) 29 M.L.J. 381: I.L.R. 39 Mad. 834.
8. (1871) 6 M.H.C.R. 258.
9. (1882) I.L.R. 6 Mad. 159.

In *Narayana* v. *Kashappayya*[1], Napier and K. Srinivasa Aiyangar, JJ., laid down that as between landlord and tenant, a Court has a discretionary jurisdiction to relieve against forfeiture of tenancy in all proper cases, whether days of grace are allowed or not in the lease deed. The learned Judges followed the decision in *Appayya Shetty* v. *Mahammade Beari*[2] and declined to be bound by the earlier decisions such as *Narayana Kamti* v. *Handu Shetty*[3], *Naraina Naicka* v. *Vasudeva Bhatta*[4] and *Adhiragi Chetti* v. *Billa Tyampu*[5]. Twelve years later, V. V. Srinivasa Aiyangar, J., in *Varanasi Ramabrahmam* v. *Rami Reddi*[6], took a similar view. In that case the lease deed provided for payment of rent on the 1st March, and in default for 12 per cent. interest till the 1st April, and on further default the document provided that the terms of the lease will be forfeited and the landlord was entitled to re-entry. The lower Court relieved against the forfeiture and Srinivasa Aiyangar, J., held that the decision of both the Courts was correct. Before the learned Judge the earlier cases such as *Narayana Kamti* v. *Handu Shetty*,[3] *Naraina Naicka* v. *Vasudeva Bhatta*[4] and others were cited. But he followed the decision in *Appayya Shetty* v. *Mahammade Beari*[2], for coming to the conclusion stated above. The other cases, *viz.*, *Elagan* v. *Nanjappa*[7] and *Ramakrishna* v. *Fernandez*[8], were also brought to my notice but in those cases there were no days of grace allowed for payment of rent.

In this state of the case-law, Mr. Somasundaram presses me to accept the earlier view and discard the later, and for such a procedure reliance is placed by him on the observations of the learned Chief Justice in *Seshamma* v. *Narasimha Rao*[9], where it has been held that a Division Bench in the High Court is the final Court of appeal and one Division Bench should regard itself bound by the decision of another Division Bench on a question of law; and if such a Division Bench does not accept as correct the decision on a question of law of an earlier Bench, the only right and proper course is to refer the matter to a Full Bench. Therefore the learned counsel argues that the Judges who decided *Appayya Shetty* v. *Mahammade Beari*[2] and *Narayana* v. *Kashappayya*[1], were bound by the earlier Bench decisions and should not have held a contrary view but should have referred the matter to a Full Bench. It may be that if the principles stated in *Seshamma* v. *Narasimha Rao*[9] had been considered to be of such compelling authority in 1915 when *Appayya Shetty* v. *Mahammade Beari*[2] was decided, the learned Judges might have adopted a course which Mr. Somasundaram states is the only proper method. But from the fact that those Judges did not think it necessary to refer the matter to a Full Bench, it does not follow that I should now adopt a course which, according to the appellant's counsel, these learned Judges should have adopted. The decision in *Appayya Shetty* v. *Mahammade Beari*[2], was followed by another Bench in *Narayana* v. *Kashappayya*[1] and again by a single Judge in *Varanasi Ramabrahmam* v. *Rami Reddi*[6]. I have been shown no case subsequent to *Tungamma* v. *Korathi*[10], where the earlier view has been maintained. It seems to me that the principle enunciated in *Appayya Shetty* v. *Mahammade Beari*[2] is the correct one with which I respectfully agree and since sitting as a single Judge I am bound by Bench decisions of more recent times, I have no other alternative but to follow them.

Both the lower Courts have relieved against forfeiture on the defendants depositing the arrears of rent as directed. There is no other point that arises for consideration in these second appeals which are accordingly dismissed with costs—Advocate's fee one set.

I do not think that a matter which has been set at rest by the decision in *Appayya Shetty* v. *Mahammade Beari*[2] should be re-opened now and therefore leave to appeal is refused.

V.P.S. ——— *Appeals dismissed.*

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1. (1915) 32 I.C. 526.
2. (1915) 29 M.L.J. 381 : I.L.R. 39 Mad. 834.
3. (1901) 15 M.L.J. 210.
4. (1903) 15 M.L.J. 208 : 28 Mad. 389.
5. (1910) 20 M.L.J. 944.
6. (1927) M.W.N. 305.
7. A.I.R. 1925 Mad. 919.
8. A.I.R. 1927 Mad. 239.
9. (1940) 1 M.L.J. 400 : I.L.R. 1940 Mad. 454.
10. (1912) M.W.N. 1135.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

Varry Mutyalamma *alias* Murtyalu and others .. *Petitioners**

v.

Dasary Narayanaswamy and others .. *Respondents.*

Amendment of plaint—plaint really within the jurisdiction of a higher Court—Court allowing amendment to bring it within its own jurisdiction—Propriety.

It is ordinarily not open to a Court, though there may be some exceptional circumstances which may justify the course, to allow an amendment of any plaint which may help to bring within its own pecuniary jurisdiction a doubtful plaint really within the jurisdiction of a higher Court. It is ordinarily its duty to decide its own jurisdiction to try the original plaint filed before it.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the judgment and order of the District Munsif, Rajahmundry, dated 6th October, 1947, in I.A. No. 778 of 1947, in O.S. No. 122 of 1947.

M. S. Ramachandra Rao for Petitioners.

B. V. Ramanarasu for Respondents.

The Court delivered the following

JUDGMENT.—Petitioners are the defendants in a suit filed against them by the plaintiffs. They seek to revise an order by the District Munsif allowing a belated amendment of the plaint after the issues were framed. They are persons in occupation of huts on an extent of land in Rajahmundry measuring about 800 sq. yards. Plaintiffs sued to evict them praying for a declaration of the right of the first and second plaintiffs to the suit site, for evicting defendants thereon and delivery of possession. They valued the plaint under section 7 (*v*) of the Court-Fees Act at Rs. 800 being the value of 800 square yards. Defendants in their written statement contested the position that they were in the position of licensees and also the financial jurisdiction of the District Munsif to try the suit on the ground that the value of the site and the huts standing thereon was in excess of Rs. 3,000. After issues, the plaintiffs sought to amend their plaint in a manner obviously designed to clothe the District Munsiff with financial jurisdiction and also to lessen the fiscal burden of Court-fee which may be cast upon them. The amendment sought in para. 8 of the plaint is as follows :

" Suit to declare the plaintiffs' right in the suit and to recover possession thereof after ejecting defendants who are licensees of plaintiffs 1 and 2. Hence value of the plaintiffs' right to eject the licensees is Rs. 800 under section 7, clause *v* of the Court-Fees Act."

The District Munsiff followed a Patna decision in *Mst. Barkatunnissa Begum* v. *Mst. Kaniza Fatma*[1], which took a view of section 7 (*v*) of the Court-Fees Act which is against the settled case-law of this presidency and with which I am unable to agree. Plaintiff in that case sued her own daughter and her son-in-law to eject them from a portion of her house in which she alleged she had permitted them to reside as licensees. The daughter, according to her plaint, set up title to the house as against her on the basis of an oral gift. It was held in revision by the learned Bench that the suit was one for ejectment and that Court-fee was payable under section 7 (*v*) of the Court-Fees Act according to the market value of the subject-matter of the suit which in this particular case was a right to eject the defendants, the value of the right being the value to the defendants of the right to remain in the house under the licence of the plaintiff. It was accordingly held that the valuation of this right, *viz.*, Rs. 400 given by the plaintiff was not unreasonable and that the suit was properly valued. The facts in that case were peculiar. It, however, is no authority for any general proposition that any plaintiff can under section 7 (*v*)

* C. R. P. No. 1845 of 1947. 4th March, 1949.

1. (1926) I.L.R. 5 Pat. 631.

of the Act put any valuation he pleases on the subject-matter which is land. This is not a suit for an injunction relating to land which is governed by wholly different principles. The suit is substantially one for the recovery of possession of land on which there are huts from several defendants, the first prayer in the original plaint being a declaration of the plaintiff's right or title to the suit land. It is true that the plaint alleges that the defendants are licensees. There is, however, no specific provision in the Court-Fees Act for a suit against a licensee. This is not a case between landlord and tenant which would be governed by section 7 (xi) (*cc*) on which *ad valorem* Court-fee on a year's rent would be payable. The amendment which the learned District Munsiff allowed on the basis that it was intended to clarify the plaint is in fact closely bound up with the question of Court-fee and jurisdiction.

I am unable to see anything wrong with the original plaint and even if the plaint had been filed in the amended form in the first instance, it would have exposed itself to legitimate criticism, that it was substantially a suit under section 7 (*v*), namely, one for declaration of title and for recovery of possession of land from persons in adverse possession. The amendment is an ingenious way of importing into section 7 (*v*) a right never contemplated thereof valuing relief in suits for recovery of possession of land in any manner the plaintiff pleases. My attention has been drawn to *Maroof Sahib* v. *Ayyakannu Naicker*[1], where an Inamdar whose right to the melwaram was admitted sued a tenant for a declaration that he was the owner of the kudivaram and for the recovery of the holding. It was held that the suit was governed by section 7 (*v*) and not by section 7 (*iv*) (*c*) and that the correct Court-fee leviable was on the market value of the kudiwaram right which alone was the subject-matter of the suit. That decision emphasises the fact that suits for possession of land are in terms governed by section 7 (*v*) which contemplates an ascertainable value for the land which is the subject-matter in the suit, which cannot be made to depend upon the will or caprice of the plaintiff.

The learned advocate for the respondents urges that the plaint allegations should only be considered for purposes of Court-fee and jurisdiction, that they are substantially to the effect that the defendants are mere licensees and that what they are asking in the suit is for a right to eject them as licensees being declared. If this argument is to be accepted, it would mean that even plaintiff in a suit for title and recovery of possession could couch his plaint treating the defendant as a " licensee " and claim the right of arbitrary valuation on the plaint even within the scope of section 7 (*v*) of the Act. In the circumstances the learned District Munsiff should not have allowed this amendment. Although the point of Court-fee was not specifically decided, the learned District Munsiff seemed to think that proper Court-fee was paid on the plaint. The value of the suit property must first be ascertained in accordance with the provisions of section 7 (*v*) of the Court-Fees Act, and if this is found to be in excess of the District Munsiff's jurisdiction, he should at once return the plaint for presentation to the proper Court. It is ordinarily not open to a District Munsiff, though there may be some exceptional circumstances which may justify this course, to allow an amendment of any plaint which may help to bring a doubtful plaint really within the jurisdiction of a higher Court within his own jurisdiction. It is ordinarily his duty to decide his own jurisdiction to try the original plaint filed before him.

The revision is allowed with costs and the amendment sought for is rejected. The District Munsiff will dispose of the suit on the basis of the original plaint which, so far as I can see, is free from any ambiguity and to be in need of no clarification.

V.P.S. *Petition allowed.*

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1. (1934) 68 M.L.J. 755 : I.L.R. 58 Mad. 1051.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

Sadanala Narayana Rao and another .. *Petitioners**

v.

The Official Receiver, Rajahmundry and another .. *Respondents.*

Provincial Insolvency Act (V of 1920), sections 53 and 67—Order setting aside an alienation by the debtor—Appeal—Compromise—Alienee depositing enough money to pay off the creditors and expenses—Balance left after payment to creditors—Preferential right of alienee to such balance.

Where pending an appeal against an order under section 53 of the Provincial Insolvency Act setting aside an alienation by the debtor, the alienee enters into a compromise agreeing to deposit enough money to pay off all the debts and makes the deposit, then the alienee, rather than the debtor, has a more equitable right to the balance remaining out of such deposit after payment of all the debts. The balance left after such payment cannot be considered as surplus remaining after the administration and the payment of all the creditors in full to which the insolvent is entitled under section 67 of the Act.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the District Court, East Godavari, at Rajahmundry, dated 13th August, 1947, in C.M.P. No. 144 of 1947 in C.M.A. No. 39 of 1945.

T. R. Srinivasan and *S. Gopalaratnam* for Petitioners.

V. Viyyanna for Respondents.

The Court delivered the following

JUDGMENT :—This revision petition filed under section 115, Civil Procedure Code, should, as the following facts will show, have been more properly filed as an appeal under section 75 (2) of the Insolvency Act. I do not, however, propose to attach any importance to this technicality in disposing of it on its merits.

The short facts are these. The petitioners are minors by their mother as guardian who took a conveyance of about 11 acres of land from an insolvent in 1940 prior, of course, to his adjudication. It is common ground that the Official Receiver got this alienation set aside under section 53 of the Insolvency Act. The petitioners filed an appeal in the District Court, East Godavari, the first Court of insolvency being the Subordinate Judge of Amalapuram. In the District Court, the Official Receiver entered into a compromise with the petitioners by which they undertook to deposit Rs. 1,000 in Court in one month to " meet the claims of the creditors and the necessary expenses in the insolvency." They also agreed to deposit any further sum required for this purpose within a month of the Official Receiver giving them notice ; and that their appeal would stand dismissed with costs if this deposit of Rs. 1,000 was not made within one month. Another term of the compromise was that the Official Receiver should at once address the Subordinate Judge of Amalapuram for sanctioning the proposed settlement. It is common ground that this sanction was obtained, that the Rs. 1,000 was deposited in the District Court, East Godavari, that the Official Receiver paid all the creditors in full and that after incurring all expenses in the administration a balance of Rs. 879 remained to the credit of the administration. As the deposit of Rs. 1,000 was made in the District Court, they filed an application there under section 151, Civil Procedure Code, whereas section 4, Insolvency Act, would have been far more appropriate, for payment to them of this balance as something deposited by them over and above what was necessary to pay all the creditors in full and the expenses of the administration. The insolvent made a counter claim for this balance as surplus payable to him under section 67 of the Insolvency Act. The learned District Judge upheld the claim of the insolvent and dismissed the petition of these alienees.

* C. R. P. No. 1422 of 1947. 21st March, 1949.

An interesting point of conflicting equities arises for determination in the case of these parties to a transaction which the insolvency Court has found to be one neither entered into in good faith nor for valuable consideration and on these grounds voidable as against the Official Receiver.

My attention has been drawn to a decision by Horwill, J., in *Thimmappa* v. *Balayya*[1], which appears to be the nearest decision applicable to the present facts. In that case an alienation by an insolvent was set aside at the instance of the Official Receiver. Subsequently, the alienees deposited into Court sufficient money to pay off all the creditors. Later, the insolvent deposited sufficient money not only to pay all the creditors but also the alienees themselves in full. It was held applying the decision in *Dharma Samarajayya* v. *Sankamma*[2] by King, J., that as the object of setting aside an alienation is to satisfy the debts of the creditors, the property must be restored to the alienee from whom they were taken, and not to the insolvent, on the object being achieved otherwise than by sale of the property. The alienees were not permitted to withdraw their deposits. They retained the property and the insolvent was directed to take back the amount he had deposited. The decision of King, J., on which reliance was placed did not concern itself with any deposit made in Court. The facts there were these. An insolvent executed a gift in favour of his wife and the alienation was set aside in the insolvency. There was, however, no necessity to sell this property in the administration and subsequent to the adjudication being annulled the insolvent executed a will disregarding the gift. It was held that the rights under the gift deed had become automatically restored by the annulment of the adjudication, following a dictum of Wright, J., in the English decision In re *Parry*: Ex parte *Salaman*[3], that the setting aside of an alienation operated only so far as may be necessary to pay the creditors in the bankruptcy.

In view of these authorities which were not placed before the learned District Judge, the alienee has a more equitable claim to this balance which cannot be considered as surplus remaining after the administration and the payment of all creditors in full to which the insolvent is entitled under section 67 of the Act.

Quite apart from the case-law on the subject, I would make the same inference from the terms of the compromise itself also, as an agreement entered into by the Official Assignee representing both the insolvent and the creditors on the one hand and the alienees on the other. By the compromise, the alienees undertook broadly to deposit into Court a sum necessary to pay all the creditors in full and also to defray the expenses of the administration. The sum of Rs. 1,000 they deposited was a tentative amount. There is no clause in the compromise under which the insolvent becomes entitled to any balance. Therefore, reading the compromise as it stands, the alienees appear to be entitled to the return of any balance out of the deposit they made after paying the creditors in full and defraying the administration expenses. Section 67 of the Act does not, therefore, from any standpoint, apply to the present facts.

The petition is allowed; but, in this case of conflicting equities, I direct the parties to bear their own costs throughout.

V.P.S. *Petition allowed.*

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1. (1948) 2 M.L.J. 590.
2. (1943) 1 M.L.J. 166.
3. (1904) 1 K.B. 129.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL, MR. JUSTICE VISWANATHA SASTRI AND MR. JUSTICE BALAKRISHNA AIYAR.

Kanamathareddi Seethamma .. *Appellant**

v.

Kanamathareddi Kotareddi and another .. *Respondents.*

Civil Procedure Code (V of 1908), *section* 11, *Explanation IV and Order* 21, *rule* 63—*Suit by money decree-holders for declaration that charge decree for maintenance in favour of the judgment-debtor's mother was collusive and not binding filed before claim application by the mother was made and pending when adverse order on claim application was passed—Sale in execution and claimant filing no separate suit under Order* 21, *rule* 63, *within one year of adverse order—Effect—Creditors not setting up in their suit and appeal thereon the finality of the order on claim application and claimant succeeding in the suit—Claimant seeking to execute her maintenance decree and enforce the charge—Auction purchasers in the sale in execution of the money decree if barred from questioning the binding nature of the maintenance decree by a fresh suit for declaration to that effect*—Res judicata *if applies.*

X a money decree-holder attached in execution of his decree six items of property and when the properties were posted for sale on 13th July, 1936, *Y*, the mother of the judgment-debtor intervened and claimed in her application that she had been given a maintenance charge over those six items and other items of property by a decree in her favour. Four days before the claim application was filed *X* and another decree-holder *K* filed a suit representing the general body of creditors for a declaration that the charge decree obtained by *Y* was collusive and not binding on the creditors. When the claim application came on for hearing on 13th July, 1936, *X* informed the Court that he had filed a suit on 9th July, 1936, for a declaration that the charge was not binding. The Court thereupon passed the order. " Notify the suit presented and the charge claimed by the petitioner." The property was brought to sale and five items were purchased by *K* (one of the plaintiffs in the creditors' suit) and one item was purchased by a stranger. The suit by the creditors was dismissed on 15th December, 1939. An appeal was allowed, the Subordinate Jude holding that the maintenance decree obtained by *Y* was vitiated by fraud and collusion. In second appeal however the decree of the trial Court was restored upholding the charge over the six items in favour of *Y*. When *Y* filed an execution application to enforce her maintenance decree the application was resisted and *K* and *S* the purchasers in the prior execution filed a suit for a declaration that since *Y* had not filed a suit under Order 21, rule 63, Civil Procedure Code, within one year of the adverse claim order, *K* and *S* had obtained as auction-purchasers an absolute right to the properties. On a question whether *K* and *S* were barred by *res judicata* from questioning *Y*'s right to execute her decree,

Held : The provisions of Order 21, rule 63, Civil Procedure Code, are mandatory and the decision in a claim petition is final unless the party aggrieved takes the course indicated in the rule by instituting a suit to supersede it within a year. The specific provisions of Order 21, rule 63, override the more general principle enunciated in section 11, Civil Procedure Code.

In any event as the auction-purchasers obtained an indefeasible right to the properties upon the expiry of one year from the adverse claim order which was after the suit had been filed, the creditors were not bound to rely on that new right in the pending suit. Accordingly the second suit by the auction-purchasers is maintainable and not barred by *res judicata.*

Case-law reviewed.

Appeal against the decree of the Court of the Subordinate Judge of Eluru in A. S. No. 299 of 1944 (A. S. No. 184 of 1944, District Court, West Godavari) preferred against the decree of the Court of the District Munsiff, Eluru, in O. S. No. 91 of 1943.

C. A. Vaidyalingam and *T. Venkatadri* for Appellant.

D. Suryaprakasa Rao for Respondents.

The Court (*Patanjali Sastri* and *Bell, JJ.*) made the following Order of Reference to a Full Bench, (dated 30th October, 1947). Order of the Court was delivered by

Patanjali Sastri, J.—This is a second appeal from a decree of the Subordinate Judge's Court of Ellore which affirmed a decree of the District Munsiff, Ellore, declaring that the appellant (defendant) had no right to bring the properties in the possession of the respondents (plaintiffs) to sale in execution of the decree in O. S. No. 349 of 1932 of the same Court whereby those and other properties had been charged with her maintenance. The appeal was heard in the first instance by Chandrasekhara Aiyar, J., who considered that the case should be decided by a Division Bench " as the question is not free from difficulty and there is no direct authority on the point."

One Guruva Reddi obtained a decree for money in O. S. No. 527 of 1930 in the Court of the District Munsiff, Ellore, against the appellant's son Sura Reddi and in execution attached 21 items of immoveable property. Some of these items, eight in number, were sold in 1934 but the sale having

* S. A. No. 1971 of 1945. 8th February, 1949.

proved insufficient to satisfy the decree in full he proceeded to bring the remaining properties to sale. The appellant then intervened with an application (E. A. No. 1250 of 1936), dated 13th July, 1936, claiming that the properties sought to be sold had been charged with her right to maintenance under the decree in O. S. No. 349 of 1932, dated 13th August, 1935, and passed against Sura Reddi, and praying that " they should be sold subject to the charge or the sale should be stayed." On that application the Court passed the following order on the same day : " Notify the suit presented and the charge claimed by the petitioner." The suit referred to was O. S. No. 231 of 1936 on the file of the same Court brought by Guruva Reddi and Kota Reddi, the first respondent herein, on behalf of all the creditors of Sura Reddi, against the latter and his mother, the present appellant, for a declaration that the decree in O. S. No. 349 of 1932 was obtained collusively to defraud those creditors and that the maintenance charged created thereby could not affect the properties already purchased by Guruva Reddi in execution of his decree in O. S. No. 527 of 1930 or his right to bring to sale in further execution the remaining thirteen items of property already attached free of the maintenance charge. While that suit (O. S. No. 231) was pending, Gurava Reddi proceeded with the execution of his decree (in O. S. No. 527 of 1930) for the balance due thereunder and some more properties were brought to sale on the 17th July, 1936, of which 5 items (which are shown as items 1 to 5 in the plaint schedule) were purchased by the first respondent and one item (item 6 of that schedule) by the second respondent.

The appellant took no steps to establish the validity of the charge claimed by her presumably because the same issue had been raised in O. S. No. 231 of 1936 already instituted as aforesaid and pending the decision of that suit it was thought, naturally enough, to be unnecessary to start fresh proceedings for the same purpose. But what may appear to be natural and sensible conduct in such circumstances led her, as a result of certain decisions of this Court hereinafter referred to, into difficulties from which she seeks in the present appeal to extricate herself.

O. S. No. 231 of 1936 was carried to this Court in S. A. No. 1276 of 1941 and it was therein decided that (*i*) the decree in O. S. No. 349 of 1932 was not vitiated by any fraud or collusion between the present appellant and her son, (*ii*) the suit was not maintainable under section 53 of the Transfer of Property Act as the maintenance charge was created by the decree and not by the debtor Sura Reddi, (*iii*) the charge was operative only from the date of that decree, *viz.*, 13th August, 1935, (*iv*) the properties sold before that date in execution of Gurava Reddi's decree (in O. S. No. 527 of 1930) were not affected by the charge and that a declaration to that effect should be made, but (*v*) items sold after that date (which included the properties now in question) " will be subject to the charge created in favour of the third defendant (*i.e.*, the present appellant) and in regard to these items of property the plaintiff's suit must necessarily fail." A decree was passed accordingly on the 29th January, 1943.

When, however, the appellant sought to enforce her charge by executing the decree for maintenance the respondents initiated the present proceedings seeking a declaration that " she has no right to bring the plaint schedule properties to sale in execution of her maintenance decree in O. S. No. 349 of 1932 on the file of this Honourable Court," and also a permanent injunction restraining her from doing so. That is to say, they raised the same issue which the appellant fought to a successful conclusion in S. A. No. 1276 of 1941 as aforesaid. The ground of claim was however no longer that the appellant's decree was obtained by collusion with her son but that " the defendant did not institute any suit till now to establish the charge claimed by her on the plaint scheduled properties. Consequently the order of the Honourable Court dated 13th July, 1936, passed against her on her objection petition E. A. No. 1250 of 1936 is conclusive against her and she has therefore no longer any right to enforce the charge claimed by her against the said properties in the hands of the plaintiffs." Both the lower Courts relying upon certain decisions of this Court overruled the appellant's plea of *res judicata* and decreed the suit. Chandrasekhara Aiyar, J., was inclined to think that the bar of *res judicata* operated against the respondents under the circumstances. He apparently doubted the correctness of some of the decisions relied on by the Courts below but considered that they did not directly cover the case.

In the Courts below as well as before Chandrasekhara Aiyar, J., no distinction appears to have been made between the first and second respondents in regard to the plea of *res judicata*. But, clearly, they do not stand on the same footing inasmuch as the second respondent was not a party to O. S. No. 231 of 1936. It is true that the suit, as already stated, was brought by the plaintiffs therein (Guruva Reddi and the present first respondent) on behalf of all the creditors of Sura Reddi, but that could have reference only to the prayer for a declaration that the maintenance decree obtained by the appellant herein was void as against those creditors. As regards the declaration sought in respect of the purchase by the plaintiffs of certain items of property the action could hardly be regarded as representative. Nor is there any evidence to show that the second respondent was one of the creditors of Sura Reddi. No doubt Gurava Reddi was a party to O. S. No. 231 of 1936 but the second respondent cannot be said to claim under him and so does not come within section 11 of the Civil Procedure Code, though, as the purchaser in the execution proceeding in which the appellant unsuccessfully preferred her claiming he is entitled to take advantage of the conclusive effect of the order made against her which she did not sue within one year to displace. (See *Velu Padayachi* v. *Arumugam Pillai*[1] and *Narasimhachariar* v. *Raghava Padayachi*[2]. Mr. Subba Rao on behalf of the appellant conceded that, in view of the Full Bench decision in *Cannanore Bank, Ltd.* v. *Madhavi*[3], which has placed

1. (1919) 38 M.L.J. 397.
2. (1945) 2 M.L.J. 89 : I.L.R. 1946 Mad. 79 (F.B.).
3. (1941) 2 M.L.J. 956 : I.L.R. 1942 Mad. 336 (F.B.).

a very wide interpretation on the words " the party against whom an order is made " in Order 21, rule 63, he could not successfully maintain that the aforesaid order was not one made " against " the appellant within the meaning of that rule.

The position, however, as regards the first respondent who is the purchaser of items 1 to 5 is different. He was a co-plaintiff with Gurava Reddi in O. S. No. 231 of 1936 in which the appellant's right to enforce the charge against these and other items was directly and substantially in issue and was heard and finally decided by this Court in favour of the appellant so far as the said items were concerned. In the present suit again the same right is challenged, though on a different ground, *viz.*, the conclusive effect of the order on the appellant's claim petition, which, it is now alleged, precludes her from enforcing the charge against the same properties since purchased by the first respondent. This ground of attack was available to the plaintiffs in the former suit but was not put forward.

It was argued that inasmuch as O. S. No. 231 of 1936 was a representative action in which the appellant's charge was impeached as having been collusively obtained in fraud of Sura Reddi's creditors the ground of attack now urged by the first respondent as the auction-purchaser of items 1 to 5 could not have been properly put forward in that suit, and stress was laid on the fact that the order in E. A. No. 1250 of 1936 was passed and the first respondent's purchase was made after the institution of that suit. The argument has no force. As we have already observed, the pleadings and the judgments in O. S. No. 231 of 1936 show that the action was not entirely representative in character as reliefs relating to specific properties purchased by the plaintiffs therein were included within the scope of the suit. Although the present ground of attack based on the order as well as the first respondent's right as auction purchaser to put it forward to protect his purchase arose a few days after O. S. No. 231 of 1936 was instituted, the subsequent proceedings, particularly the judgment of this Court in the second appeal, show that both Gurava Reddi and the first respondent herein were contending that their respective purchases prevailed over the maintenance charge of the appellant on various grounds, and the Court held that while the purchase of Gurava Reddi, having been made before the charge came into existence, was not affected by it, " subsequent purchasers " (of whom the first respondent was one) " must be found to be holding the property purchased by them after the 13th August, 1935 " (date of the appellant's decree) " subject to the charge created in favour of the third defendant " (that is the present appellant). This decision was given while holding that the suit, in so far as it was framed as a representative one under section 53 of the Transfer of Property Act, must fail both because the charge was created *bona fide* and not in fraud of creditors and because it was effected not by the debtor but by a decree of Court. It is thus clear that the first respondent's claim to hold items 1 to 5 purchased by him free of the appellant's maintenance charge was brought within the scope of the former suit however it might originally have been framed, and was one of the matters in controversy therein at any rate in its later stages. In respect of that matter, the conclusive effect of the order on the appellant's claim petition was very relevant and might and ought to have been put forward by the first respondent. Not having been put forward it " shall be deemed to have been a matter directly and substantially in issue " within the meaning of Explanation IV to section 11 of the Civil Procedure Code and to have been decided against him, as his claim to hold items 1 to 5 free of the appellant's charge was held to be unsustainable . *Prima facie* therefore, the Court is precluded under section 11 from trying the same issues again in the present suit.

It is urged, however, that this view is inconsistent with the decision of this Court in *Akkammal* v. *Komaraswami*[1], where it was held that in view of the mandatory provisions of rule 63, a later judgment *inter partes* could not operate as *res judicata* to supersede an earlier order on a claim petition which had become conclusive under that rule. The appellant in that case purchased the property in question in execution of a decree obtained by him against one of two brothers after a claim preferred by the respondent as the purchaser from the Receiver in the insolvency of the other brother was rejected. Subsequently, however, it was decided in a partition suit in the family of the brothers that the property belonged to the respondent's predecessor. Both the appellant and the respondent were parties to the suit and though they were both ranged as defendants all the conditions necessary to constitute the decision *res judicata* as between co-defendants were present. The respondent then brought the suit out of which the appeal to this Court arose to recover the property from the appellant who had in the meantime taken possession in pursuance of his auction purchase, and the question arose whether the later decision in the partition suit which upheld the respondent's title did not effectively supersede the earlier conclusive order which was not put forward in that suit. Leach, C.J., who delivered the judgment of the Court observed :

" In view of the mandatory provision of rule 63 there is no room for the application of the principle on which Patanjali Sastri, J., based his decision. Rule 63 says that the order passed on the claim petition shall be conclusive unless the petitioner files a suit within one year to establish the right which he claims. The fact that the decree-holder may file another suit within twelve months to establish a right which he claims does not relieve the objector from the necessity of complying with rule 63. The wording of the section itself is clear on this question, but we have in addition the three decisions of this Court to which reference has just been made."

The three decisions referred to are: *B. Krishna Rao* v. *Lakshmana Shanbhogue*[2], *Peela Yarakayya* v. *Venkata Krishnamaraju*[3], *Kumaran Unni Achan* v. *Kunhi Krishnan Nair*[4]. It was held in those cases that an order under Order 21, rule 63 or rule 101 not set aside by the aggrieved party by instituting an independent

1. (1942) 2 M.L.J. 315 : I.L.R. 1943 Mad. 40.
2. (1881) I.L.R. 4 Mad. 302.
3. (1917) 6 L.W. 281.
4. (1923) 19 L.W. 394.

suit for the purpose becomes conclusive against him and cannot be re-opened in a suit brought by the other party in regard to the same property, though such suit was pending on the date of the order or was brought within one year from that date. It is worthy of note that in each of those cases the order on the claim proceeding which had been allowed to become conclusive was put forward in the subsequent suit to bar an adjudication on the merits of the unsuccessful claimants' title and there was accordingly no such adjudication. In none of the cases did the Court have to consider the position that would arise if the conclusive effect of the earlier order was *not* put forward in the later suit, and the Court upheld the title of the person against whom that order had been made. Thus no question arose as to whether in such a case it was the later adjudication or the earlier order that should prevail when a dispute regarding the same property arose between the same parties on a subsequent occasion. That question no doubt arose in *Akkammal* v. *Komarasami*[1], as it arises here, and the decision certainly supports the first respondent's contention that in the present suit the final adjudication in S. A. No. 1276 of 1941 does not operate as *res judicata* and that it is open to him to rely on the conclusive effect of the order in E. A. No. 1250 of 1936 to get a declaration in his favour contrary to that adjudication. We are, however, of opinion that the point requires re-consideration. As we have already pointed out, the decisions relied on in *Akkammal* v. *Komarasami*[1], are distinguishable, and do not seem to warrant the proposition that the principle of *res judicata* ceases to operate when once an order on a claim proceeding was made and has not been set aside in the manner contemplated in Order 21, rule 63. The learned Chief Justice referred to the mandatory character of that provision, but that can hardly, we think, be regarded as intended to override or exclude the operation of the general principle of *res judicata*. The terms of section 11, Civil Procedure Code, which is a statutory application of the principle in this country, are no less mandatory and it is difficult to see why this rule should not operate where a previous order however conclusive was not put forward in the proceedings which resulted in the later adjudication.

We are therefore of opinion that the decision in *Akkammal* v. *Komarasami*[1], requires re-consideration and we accordingly refer the following question to a Full Bench :

"Was *Akkammal* v. *Komarasami*[1], correctly decided ?"

The further hearing of this appeal will await the decision of the Full Bench.

In pursuance of the above order of reference to the Full Bench the above appeal coming on for hearing before the Full Bench

The Judgment of the Court was delivered by

Horwill, J.—On 19th August, 1935, the decree-holder in O. S. No. 527 of 1930 attached the six items of property with which we are now concerned and a few other items in E. P. No. 383 of 1935. When the property was posted for sale on 13th July, 1936, the mother of the judgment-debtor intervened and claimed in her application, E. A. No. 1250 of 1936 (Ex. P-3), that she had been given a maintenance charge over these six items in a suit brought by her for that purpose (O.S. No. 349 of 1932) on the file of the District Munsiff's Court of Ellore). Four days before E. A. No. 1250 of 1936 was filed, the decree-holder and another filed a suit representing the general body of creditors for a declaration that the charge decree obtained by the mother of the judgment-debtor was collusive and not binding on the creditors and that the property already purchased in execution of the decree in O. S. No. 527 of 1930, as well as the items under attachment, were not therefore liable for her maintenance. On 13th July, 1936, when E. A. No. 1250 of 1936 came on for hearing, the decree-holder informed the Court that he had filed O. S. No. 231 of 1936 on 9th July, 1936. The Court thereupon passed the order,

"Notify the suit presented and the charge claimed by the petitioner."

The property was thereupon brought to sale and items 1 to 5 were purchased by the first plaintiff in the suit out of which this second appeal arises and item 6 by the second plaintiff. O. S. No. 231 of 1936 was dismissed on 15th December, 1939. The appeal of the plaintiffs was allowed, the Subordinate Judge holding that the decree obtained by the mother of the judgment-debtor was vitiated by fraud and collusion. In second appeal to this Court, however, the decree of the District Munsiff was restored as far as it related to items 1 to 6, the rights to which are now in question. When the mother of the judgment-debtor, who is the appellant in this second appeal, filed E. P. No. 146 of 1943, to enforce her maintenance decree, the application was resisted; and the purchasers of the properties filed the present suit, O. S. No. 91 of 1943, for a declaration that since the appellant had not filed

1. (1942) 2 M.L.J. 315 : I.L.R. 1943 Mad. 40.

a suit under Order 21, rule 63, Civil Procedure Code, within a year of the adverse claim order, they had obtained, as auction purchasers, an absolute right to the property. They also prayed for an injunction restraining her from executing her decree in O. S. No. 349 of 1932. The appellant's defence to that suit was that her right to execute the decree was raised in O. S. No. 231 of 1936, which had ended in her favour and that it was no longer open to the respondents to contend afresh that she was not entitled to execute her decree. The Courts below held that the respondents were not barred by *res judicata* from putting forward their claim again. In second appeal to this Court Patanjali Sastri and Bell, JJ., were of opinion that section 11, Explanation IV of the Code of Civil Procedure did bar the respondents from again questioning the mother's right to execute her decree, notwithstanding the fact that she had not filed a suit to set aside the adverse claim order. As however the learned Judges were confronted with the decision in *Akkammal* v. *Komarasami*[1] a case almost identical with the present case, in which it was held that the only way of getting rid of an adverse claim order was to file a suit under Order 21, rule 63, Civil Procedure Code, the principle of *res judicata* would not apply, the learned Judges referred the question, "Was *Akkammal* v. *Komarasami*[1] correctly decided ?" to a Full Bench. As neither of the learned Judges is now sitting in this Court, the appeal as well as the question referred by the learned Judges have been posted before us for decision and disposal.

It has first been argued for the respondents that even apart from the mandatory provision of Order 21, rule 63, Civil Procedure Code, the matter would not be *res judicata* as a result of the decision in O. S. No. 231 of 1936 ; because the parties were litigating under different titles in the two suits. O. S. No. 231 of 1936 was filed as a representative suit by the creditors; whereas the present suit was filed by auction-purchasers who did not claim as creditors or through a creditor but through the judgment-debtor, whose interest, they had purchased. The fact that one of them was also a decree-holder was immaterial. It was held in S. A. No. 1276 of 1941 by Abdur Rahman, J., that the suit was not maintainable as a representative suit ; but he treated it as one by the two respondents with regard to their own rights. It is true that in that suit they figured as creditors and here as representatives of the judgment-debtor ; but in both the suits there was a triangular fight between the decree-holder, the judgment-debtor, and the appellant. The appellant was contending on the one hand that she was entitled to this charge and was claiming that charge against the interests of both the judgment-debtor and the decree-holder. There was therefore a conflict between the judgment-debtor and the appellant in the former suit, and in the latter between the appellant and the respondents, who claimed through the judgment-debtor. In *Akkammal* v. *Komarasami*[1], under similar circumstances, it was held the bar of *res judicata* would undoubtedly have applied had it not been for the mandatory requirements of Order 21, rule 63, Civil Procedure Code. We respectfully agree.

The learned referring Judges were of opinion that the provisions of section 11, Civil Procedure Code, were as mandatory as the provisions of Order 21, rule 63, Civil Procedure Code ; and it has therefore been argued before us that even though the adverse order in the claim petition became final as a result of the appellant's failure to institute a suit under Order 21, rule 63, Civil Procedure Code, the finality of those proceedings could and should have been put forward by the respondents in their suit and that since they had not done so, the decision in O. S. No. 231 of 1936 was final and must be regarded as having, by implication, decided against the plea of the respondents based on the finality of the claim proceedings. It has however to be borne in mind in this connection that O.S. No. 231 of 1936 was filed before the order on the claim petition had been passed, and it remained pending during the whole period of one year from the date of the adverse order, *i.e.*, 13th July, 1936. The plea that the adverse claim order had become final could not therefore have been put forward in the plaint in O. S. No. 231 of 1936,

1. (1942) 2 M.L.J. 315 : I.L.R. 1943 Mad. 40.

though there can be no doubt that the plaintiffs could have put it forward at a later stage. The question is whether they were bound to do so, under penalty of being barred in any subsequent suit from raising that point. Upon the expiry of the period of one year from the adverse claim order, the respondents obtained an indefeasible right to the property. They had purchased it subject to the result of any suit that the appellant might have brought within the period of one year; but subject to the result of that suit, their title to the property could not be questioned by the appellant. Upon the expiry of that term, therefore, they had acquired a right in that property in much the same way as a person would acquire a title to immoveable property if he remained in adverse possession for a period of twelve years. They had therefore obtained a fresh cause of action.

From *Arichendrana Deo Garu* v. *Ramanna Chandiri*[1] onwards, it has been a well-recognised principle of law that a plaintiff who acquires a fresh claim during the pendency of his suit or afterwards can bring another suit on the fresh cause of action. In that case, the plaintiff claimed a right to resume a certain jeroiti land which had been temporarily alienated. He eventually failed on that cause of action; but during the pendency of the suit the Government had transferred to him the rights in that village. He thereupon filed a fresh suit in which he claimed that the mokhasa which was the subject of the litigation in the earlier suit had lapsed to the Government and had been transferred to him by the Government. It was held that he was entitled to put forward that plea and that the decision in the earlier suit did not operate as *res judicata.*

The principal cases relied on by the appellant in support of her contention that the respondents were bound to put forward the finality of the claim order in the earlier suit are *Vinayak* v. *Dattatraya*[2] and *Manikbhai* v. *Virchand*[3]. The former related to a suit for redemption in which it was found by the trial Court that Rs. 8,200 were due by the plaintiffs. Upon that amount being paid, possession was given to the plaintiffs. In appeal by the defendant, it was found that the sum really due was Rs. 9,809-9-9. The difference was paid by the plaintiffs. In a fresh suit, the mortgagee claimed that since the amount due to him had not been fully paid until long after possession had been given to the mortgagors as a result of the decree of the trial Court, he was entitled to mesne profits for the period from the date on which the mortgagors had obtained possession to the date on which they had fully paid to him the amount found to be due to him by the appellate Court. It was held that he was bound to have put forward that claim in the suit for redemption and could not raise it in a separate suit. The learned Judges however specially emphasised the peculiar nature of redemption suits. The learned Chief Justice remarked:

> " But the decree in a suit for redemption must be such as to enable the Court to do complete justice . . . . and, 'as far as it is possible the Court endeavours to make a complete decree that shall embrace the whole subject and determine upon the rights of all the parties interested in the estate' . . . . . So in this case the claim on which we are now asked to adjudicate is one that could and ought to have been advanced in the former suit. Without a determination on it (the question of mesne profits) there was not a complete adjustment of the right of the parties."

The learned Chief Justice, after referring to a remark of Blackburn, J., that the dectrine of *res judicata* applies to all matters which existed at the time of giving of the judgment, went on to say:

> " Beyond doubt must this be so in a redemption suit, which has for its purpose the complete adjustment of the rights of the parties, and the decree in which, when properly framed, provides for matters even up to the time when it is ultimately carried into effect.
>
> The comprehensive character of suits, relating to mortgages and the obligation incumbent on litigants to see that the decree in them covers all their rights has been repeatedly recognised by the Courts . . . ."

This is the only case placed before us in which it has been suggested that where a right accrues during the pendency of a suit, it must be put forward by the party acquiring the right on pain of being, in a subsequent suit, barred from putting it

1. (1866) 3 M.H.C.R. 207.
2. (1902) I.L.R. 26 Bom. 661.
3. (1907) 9 Bom.L.R. 1020.

forward by the principle of *res judicata*. In *Manikbhai* v. *Virchand*[1], the plaintiff brought a suit as the heir of her father for accounts in a partnership of which her father was a partner. It was held that the claim was barred by time. She thereupon filed another suit for accounts, in which she pleaded that upon the death of her father, her mother became a partner, and that as the heir of her mother she was entitled to bring the suit. It was held that her claim in the second suit would be barred by *res judicata*, only if it were shown that she was aware of her right as the heir of her mother during the earlier suit. This case does not, however, help the appellant, because both pleas were there available to the plaintiff when the first suit was filed.

In *Fakir Chandra* v. *Ekkari Sarkar*[2], the plaintiff filed two suits claiming the same property; but it was held that the plaintiff was not hit by the principle of *res judicata*, because he was not aware when he filed his earlier suit that he had an alternative cause of action. There, as in *Jatindra Nath Chowdry* v. *Azizur Rahman Shana*[3] and several other cases quoted to us, it was pointed out that whether a particular point of attack should be pressed in a particular suit depends on the facts of each case. In *Jatindra Nath Chowdry* v. *Azizur Rahman Shana*[3], it was held that the new point of attack should have been put forward and was available on the date when the earlier suit was filed. In *Kanhaya Lal* v. *Banke Behari*[4] and *Rajani Kumar Mitra* v. *Ajmaddin Bhuiya*[5], it was held that the finality of an order on a claim petition is a point, that should be relied on in a suit filed subsequent to the date of the order. If it is not, the right resulting from the finality is deemed to be waived and cannot be raised in a subsequent suit. In *Srimut Rajah Moottoo Vijaya Raganadha Bodha Gooroo Sawmy Periya Odaya Tever* v. *Katama Natchiar, Zamindar of Sivaganga*[6] where the plaintiff pleaded that the property she claimed, was undivided, she could however have also pleaded that even though the property had been divided, she was entitled to certain items of the suit property by virtue of a will in her favour; but to the end she disclaimed the will and said that the instrument was not testamentary. Clearly in such a case a suit would not subsequently lie on the will. The above cases do not suggest that where a right accrues after the institution of the suit, as in *Arichandrana Deo Garu* v. *D. Ramanna Chandiri*[7], the plaintiff is bound to put forward that right as soon as it accrues to her. Admittedly, an amendment of the plaint would be necessitated if he did so, and the Court might or might not allow that application. Ordinarily, such an application would be rejected on the ground that it was raising a fresh cause of action which was foreign to the suit as originally instituted, though no doubt it would be within the competence of the Court to permit an amendment of the plaint and thereby extend the scope of the suit. In *Muyyarikandi Kunhi Pakki* v. *Muthuvana Cheeru*[8], the Madras Agriculturists Debt Relief Act (Act IV of 1938), had become law during the pendency of an appeal and clearly had retrospective effect, and it was held that the debtor was bound to put forward his rights under the Act, the reason being that the Court had to administer the law as it stood on the date of its decision; and if it decided the case wrongly in ignorance of the law prevailing at the time, the decision was none the less binding and conclusive. In such a case, a separate suit based on the debtor's right under the Madras Agriculturists Debt Relief Act would clearly not be maintainable.

It remains to consider briefly the decision in *Akkammal* v. *Komarasami*[9] which the learned referring Judges considered needed re-consideration. The parties to the suit were the respondent, claiming through the Official Receiver, who had had an alienation set aside on the ground that it was a sham transaction, and the appellant, who had brought the property to sale in execution of a decree obtained against one Krishna Aiyar, who had earlier sold the property to the insolvent.

1. (1907) 9 Bom.L.R. 1020.
2. (1938) 42 C.W.N. 560.
3. (1922) I.L.R. 50 Cal. 79.
4. A.I.R. 1938 All. 542.
5. (1928) 48 C.L.J. 577.
6. (1866) 11 M.I.A. 50.
7. (1866) 3 M.H.C.R. 207.
8. (1945) 1 M.L.J. 157.
9. (1942) 2 M.L.J. 315: I.L.R. 1943 Mad. 40.

In a suit filed by the sons of Krishna Aiyar for partition, it was declared that the sale to the insolvent was not binding on the sons. The appellant and the respondent were both parties to this suit; and the learned Judges held that if one had regard to the principles of section 11 of the Civil Procedure Code alone, then undoubtedly the decision in the earlier suit could not be questioned in the second suit. They however held, following *Krishna Rau* v. *Lakshmana Shanbhogue*[1], *Peela Yarakayya* v. *Kanumuri Venkata Krishnamraju*[2] and *Kumaran Uni Achan* v. *Kunhi Krishnan Nair*[3], that the provisions of Order 21, rule 63, Civil Procedure Code, were mandatory, and that the decision in a claim application is final, unless the party aggrieved takes the course indicated in the rule by instituting a suit to supersede it. The learned Judges did not discuss the point made by the learned referring Judges that even when a matter has been concluded, if its conclusiveness is not put forward in a suit, where the conclusiveness would be a good point of attack or defence, the party not doing so is barred by the principle of *res judicata* from relying on it in another independent proceeding; but there can be no doubt that the learned Judges in *Akkammal* v. *Komarasami*[4] regarded the pescific provisions of Order 21, rule 63, Civil Procedure Code, as overriding the more general principle enunciated in section 11, Civil Procedure Code. It is however unnecessary for us to go so far; for the right accrued to the respondents here after their suit had been filed and they were not bound to rely on that new right in the pending suit.

The learned referring Judges distinguished the cases of the first and second respondents; but it has been argued on behalf of the appellant that no such distinction can be made. In view of our decision that the later suit by the respondents is maintainable, it is unnecessary for us to consider this point.

The appeal is dismissed with costs. (Advocate's fee Rs. 100).

K.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMASUNDARAM.

I. V. Subba Rao .. *Petitioner*.*

Prevention of Corruption Act (II of 1947)—Sanction to prosecute Railway station-master for accepting illegal gratification—Full facts not placed before sanctioning authority—No valid sanction and no jurisdiction to take cognizance of case.

Sanction to prosecute a station-master under section 161 of Indian Penal Code is a matter of importance which constitutes a condition precedent to the institution of the prosecution and the Government have absolute discretion to grant or withhold the sanction.

Where the sanction in a case against the station-master for having accepted illegal gratification on its face did not contain the facts constituting the offence charged nor was there any evidence given that those facts were placed before the sanctioning authority.

Held: That under Act II of 1947 there was no valid sanction and the lower Court had no jurisdiction to take cognizance of the offence.

Gokulchand Dwarkadas v. *The King*, (1948) 1 M.L.J. 243 : L.R. 75 I.A. 30 (P.C.) followed.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of Session of East Godavari division in C.A. No. 27 of 1948 preferred against the judgment of the Court of the Additional First Class Magistrate, Kakinada, in C.C. No. 451 of 1947.

C. A. Vaidyalingam and *K. Ramachandra Rao* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

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1. (1881) I.L.R. 4 Mad. 302.
2. (1917) 6 L.W. 281.
3. (1923) 19 L.W. 394.
4. (1942) 2 M.L.J. 315 : I.L.R. 1943 Mad. 40.

* Crl.R.C. No. 546 of 1948. (Crl.R.P. No. 514 of 1948).

16th March, 1949.

The Court made the following

ORDER.—In this case the petitioner has been convicted under section 161, Indian Penal Code and sentenced to one and a half month's rigorous imprisonment by the Additional First Class Magistrate, Kakinada, and it was confirmed on appeal by the Sessions Judge of East Godavari.

The petitioner who was a station-master at Dwarapudi was charge-sheeted by the Special Police Establishment for having accepted an illegal gratification of Rs. 10 on 23rd April, 1947, from P.W. 2 for booking two iron machinery parts to Bezwada. It is unnecessary to go into the details of the case as the main point on which the revision was argued is one of sanction. The sanction which is required for prosecuting the petitioner under Act II of 1947 is contained in Ex. P-4 which is as follows :

No. P. 426. Madras,
22nd July, 1947.

To

The Deputy Superintendent of Police,
Special Police Establishment, Vepery, Madras.

Dear Sir,

Ref : I.V. Subba Rao—Station-master, Dwarapudi.

With reference to your letter C. No. 437 SPE/M/47 of the 4th instant, sanction is afforded to prosecute the abovenamed.

Yours faithfully,
(Signed) . . . .
Chief Commercial Manager.

The letter referred to in that sanction has not been filed in Court, nor the facts on which the sanction was obtained spoken to by the Inspector in this case. No evidence has been let in to show what facts were placed before the sanctioning authorities for the purpose of obtaining sanction. In *Gokulchand Dwarkadas* v. *The King*[1], their Lordships of the Privy Council have held that it must be proved that the sanction was given in respect of the facts constituting the offence charged and it is plainly desirable that the facts should be referred to on the face of the sanction ; but if it is not so shown, the prosecution must prove by extraneous evidence that those facts were placed before the sanctioning authority. Sanction to prosecute is a matter of importance which constitutes a condition precedent to the institution of the prosecution and the Government have absolute discretion to grant or withhold the sanction and they held in that particular case that the sanction which was in terms similar to the one given here was not a valid one. In this case, as already stated, the sanction on the face of it does not contain the facts constituting the offence charged nor was there any evidence given that those facts were placed, before the sanctioning authority. I called for a report from the lower Court whether the letter referred to in the sanction letter was filed in evidence in Court. The report is that the letter does not seem to have been filed or produced in Court. The Public Prosecutor applied to let in evidence of that letter in this Court but I do no think that in a matter in which there had been such serious lacuna in the prosecution it is advisable to allow it to fill in the lacuna in the revisional Court by letting in evidence here.. The sanction in this case is on all fours with the sanction in the Privy Council case. Following the ruling of the Privy Council, I hold that in this case there has been no valid sanction and the lower Court has therefore no jurisdiction to take cognizance of the offence. The conviction and sentence of the petitioner are set aside and he is acquitted.

Conviction set aside.

K.C.

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1. (1948) 1 M.L.J. 243 : L.R. 75 I.A. 30 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VISWANATHA SASTRI.

Bodi Venkataswami and others .. *Appellants**

v.

Adada Mahalakshmi and another .. *Respondents.*

Madras Court of Wards Act (I of 1902), section 49—Statutory notice required by the section—Waiver by Court of Wards—Competency—Effect of such waiver.

It is quite competent for the Court of Wards to waive the notice required by section 49 of the Madras Court of Wards Act, even assuming that the meaning and scope of that section is the same as that of section 80 of the Civil Procedure Code.

Case-law discussed.

Waiver is an abandonment of a right and may be express or implied from conduct and to be effectual must be by a person who has full knowledge of the facts. A person who has taken a plea based on the want of notice to which he is entitled, may waive it and allow the action to proceed as though the required notice had been given to him and this can be done so long as the action is pending and has not been finally determined. It cannot be said that there cannot be a waiver after objection as to want of notice had been raised in the written statement filed by the Court of Wards.

The plea as regards the want of notice is only available to the Court of Wards which is entitled to such notice and not to the other defendants after the Court of Wards itself waived the objection. Such waiver on the part of the person principally concerned affects the other parties as well.

Appeal against the decree of the District Court, Vizagapatam in A.S. No. 19 of 1945 preferred against the decree of the Court of the District Munsif, Chodavaram, in O.S. No. 75 of 1941.

E. Venkatesam for Appellants.

P. Somasundaram and *S. Venkatesa Aiyangar* for Respondents.

The Court delivered the following

JUDGMENT.—Defendants 1 to 4 have preferred this second appeal from the appellate decree of the District Judge of Vizagapatam declaring the title of the plaintiff and granting her an injunction in respect of a plot of land of the extent of about 12 cents and a palmyra hedge situate therein in the village of Jannavaram in the Vizianagaram zamindari. The litigation which concerns property of a trifling value has had a long and sinuous course coming, as it does, for the fifth time for adjudication by a judicial tribunal. The melwaram in the land vests in the Zamindar of Vizianagaram within the limits of whose estate the property is situate. The Court of Wards had been in management of the Vizianagaram Zamindari during the period with which we are concerned in this case. The District Munsif who first tried the suit dismissed it on 26th October, 1943, on the ground that the plaintiff had not proved her title to the plot in question or her possession of it within 12 years of suit. The plaintiff appealed to the Subordinate Judge of Vizagapatam who, instead of deciding the question of disputed title between the plaintiff and defendants 1 to 4 each of whom claimed only a kudiwaram interest in the land, held quite unnecessarily, that the presence of the Court of Wards in charge of the Vizianagaram zamindari before the Court was necessary in order to enable it effectually and completely to adjudicate upon and settle all the questions involved in the suit and remanded the suit to the District Munsif for disposal after making the Court of Wards a party. The judgment of the Subordinate Judge was delivered on 2nd August, 1944 and the unfortunate plaintiff was obliged to apply and did apply to make the Court of Wards a party defendant to the suit. The application was ordered on 18th September, 1944 and the Court of Wards was impleaded as the fifth defendant. Then started fresh trouble for the plaintiff. The Court of Wards promptly filed a written statement that it was not a necessary party to the suit and that the suit itself was

* Second Appeal No. 670 of 1946. 24th February, 1949.

not maintainable in law as the statutory notice of two months had not been given to it as required by section 49 (1) of the Madras Court of Wards Act (I of 1902). At the fresh hearing after remand certain documents including the Survey and Settlement Register of the village of Jannavaram were filed and a fresh issue was framed as to the maintainability of the suit without the notice required by section 49 of Madras Act I of 1902. The District Munsiff found in favour of the plaintiff's title and granted the declaration and injunction sought by her. Defendants 1 to 4 preferred an appeal to the District Court of Vizagapatam which affirmed the decision of the District Munsiff. Hence this second appeal.

Two questions were argued by Mr. E. Venkatesam, the learned counsel for the appellants. First he contended that the suit should have been dismissed for want of the notice required by section 49 of the Madras Court of Wards Act. He contended that two months' previous notice was a condition precedent to the maintainability of the suit and the Court had no jurisdiction to entertain or decide the suit without such notice. He contended that the plaintiff in the present case should have given the Court of Wards two months' notice, waited for the expiry of the two months and then applied to the trial Court for impleading the Court of Wards as a party. The same contention was urged beford the learned District Judge who held that, though the Court of Wards through its advocate waived all objections on the ground of want of notice, there could be no waiver of the statutory notice of two months which was a peremptory and fundamental pre-requisite of every suit against the Court of Wards. He relied on the decisions of this Court interpreting the analogous provisions of section 80, Civil Procedure Code, namely, *Tne Government of the Province of Madras* v. *Vellayan Chettiar*,[1] and *Chidambaram Chettiar* v. *Municipal Council, Karaikudi and the Province of Madras*[2]. In the former case it was held by Leach, C.J. and Shahabuddin, J., that section 80, Civil Procedure Code, was express, explicit and mandatory and admitted of no exceptions. If the notice required by that section was not given, the Court had no jurisdiction to try the suit. In the latter case it was held by Leach, C.J. and Lakshmana Rao, J., following the decision in *Madhav Rao Anand Rao* v. *The Collector of Kolaba*,[3] that the giving of notice under section 80, Civil Procedure Code, was necessary even when the Provincial Government was added as a party to a suit already instituted pursuant to an order of Court directing the addition of the Government as a party. The District Judge, though he purported to follow the above decisions, nevertheless held that the prior order of the Subordinate Judge directing the Court of Wards to be added as a party to the suit operated as *res judicata* and the objection to the maintainability of the suit for want of the statutory notice was no longer available to the defendants after the order of remand. I confess my inability to understand this reasoning of the District Judge. I consider, however, that the learned District Judge went wrong on the question of waiver and that the decisions of this Court relied upon by him have been superseded by a recent pronouncement of the Judicial Committee.

No doubt the Privy Council held in *Bhagchand Dagadusa* v. *Secretary of State for India*[4], that section 80 of the Civil Procedure Code was express, explicit and mandatory and admitted of no implications or exceptions. In spite of this emphatic statement of the effect of this section, it is permissible to look at its object and purpose. It is to give to the Government or the Public Officer concerned, an opportunity to re-consider his position and to make amends or settle the claim, if so advised, without litigation and waste of public money, see *Secretary of State for India in Council* v. *Perumal Pillai*[5], and *Secretary of State for India* v. *Gulam Rasul*[6]. This being the object of the statutory requirement as to two months' notice, it was held by the Courts in this country that the notice under section 80 might be waived by the defendant concerned, *Bholanath Roy* v. *Secretary of State for India*[7], *Gangadas Sil* v. *Secretary of State for India in Council*,[8]

1. (1944) 2 M.L.J. 65.
2. A. S No. 126 of 1941 (unreported).
3. (1890) 6 Bom. Printed Judgments, p. 386.
4. (1927) 53 M.L.J 81 : I.L.R. 51 Bom. 725 (P.C.).
5. (1900) 11 M.L.J. 117 : I.L.R. 24 Mad. 279.
6. (1916) I.L.R. 40 Bom. 392.
7. (1912) I.L.R. 40 Cal. 503.
8. (1916) 20 C.W.N. 636.

and that the defendant might be estopped from pleading want of notice if in any particular case the facts were sufficient to sustain a plea of estoppel, *Manindra Chandra Nandi* v. *Secretary of State*[1]. After the decision in *Bhagchand Dagadusa* v. *Secretary of State for India*[2], a very strict view began to be taken by this Court of the provisions of section 80, Civil Procedure Code, see *Apparao* v. *Secretary of State for India in Council*[3]. It was held in *Marina Ammayi* v. *Secretary of State for India in Council*[4], that it was not open to the Collector to waive the plea of want of notice under section 80, Civil Procedure Code and reliance was placed for this conclusion on *Bhagchand Dagadusa* v. *Secretary of State for India*[2], and *Gaekwar of Baroda State Railway* v. *Hafiz Habib U Haq*[5]. This view was again affirmed by this Court in *The Government of the Province of Madras* v. *Vellayan Chettiar*[6]. In the case last cited the Subordinate Judge of Devakottai held (*a*) that the notice issued by the plaintiff was substantially in compliance with the requirements of section 80, Civil Procedure Code; (*b*) that even if that were not the case, the Provincial Government had waived the right to question the notice; and (*c*) that in any event the Government was estopped by its conduct from pleading that the notice was defective. This Court (Leach, C.J. and Shahabuddin, J.) reversed the judgment of the Subordinate Judge on all the three points and held *inter alia* that there could be no question of waiver or estoppel as it was a matter affecting the jurisdiction of the Court to try the action. Reliance was placed on the decision of Venkataramana Rao, J., in *Marina Ammayi* v. *Secretary of State for India in Council*[4] and two decisions of the Judicial Committee already referred to. The other High Courts, however, held notwithstanding the two decisions of the Judicial Committee aforesaid, that it was open to the Government or a public officer to waive the notice required by section 80, Civil Procedure Code, and that in a proper case there could be an estoppel by conduct against pleading the want of notice as a bar to the suit. See *Hirachand Himatlal* v. *Kasinath Thakurji*[7], *Erashshaw Hormasji* v. *Secretary of State*[8], *Purnachandra Sarkar* v. *Radharani Dasya*[9], *Ramanarain* v. *Ramkishan*[10] and *Charuchandra* v. *Snigdhendu Prosad*[11]. But the learned Judges of this Court who decided the case in *Government of the Province of Madras* v. *Vellayan Chettiar*[6], dissented from the decisions of the other High Courts on the ground that the learned Judges who decided those cases had paid no sufficient regard to the wording of section 80, Civil Procedure Code and to its interpretation by the Judicial Committee in *Bhagchand Dagadusa* v. *Secretary of State for India*[2].

The appeal to the Privy Council was from the decision of this Court in *Government of the Province of Madras* v. *Vellayan Chettiar*[6], and the case squarely raised the question whether the view of this High Court or the contrary view of the other High Courts on the points of waiver and estoppel was correct. The report of the argument before the Judicial Committee shows that all the relevant cases on the topic were cited before the Board. Lord Simonds who delivered the judgment of the Board distinguished the prior decision of the Board delivered by Lord Sumner in *Bhagchand Dagadusa* v. *Secretary of State for India*[2] in this way:

> "In the case *Bhagchand Dagadusa* v. *Secretary of State for India*[2], to which reference has already been made, no question of waiver arose. The observations of Lord Sumner in delivering the opinion of the Board were directed solely to the construction of the section and cannot, in their Lordships' opinion, be regarded as deciding that it is not competent for the authority for whose benefit the right to notice is provided, to waive that right. There is no inconsistency between the propositions that the provisions of the section are mandatory and must be enforced by the Court, and that they may be waived by the authority for whose benefit they are provided." (*Vellayan Chettiar* v. *Government of the Province of Madras*[12].)

Later in the course of the judgment, their Lordships dealt with the question of estoppel and found that there can be no basis for that plea on the facts of the particular case.

1. (1907) I.L.R. 34 Cal. 257.
2. (1927) 53 M.L.J. 81 : I.L.R. 51 Bom. 725 (P.C.).
3. (1930) 59 M.L.J. 923 : I.L.R. 54 Mad. 416.
4. (1941) 1 M.L.J. 328.
5. (1938) 2 M.L.J. 11 : L.R. 65 I.A. 182 : L.R. 1938 All. 601 (P.C.).
6. (1944) 2 M.L.J. 65.
7. (1942) 44 Bom. L.R. 727.
8. I.L.R. 1943 Bom. 186.
9. A.I.R. 1931 Cal. 175.
10. A.I.R. 1934 Pat. 354.
11. A.I.R. 1948 Cal. 150.
12. (1947) 2 M.L.J. 208 : L.R. 74 I.A. 223 : I.L.R. 1948 Mad. 214 (P.C.).

It may now be taken as established that a plea of the want of notice required by section 80, Civil Procedure Code, or a plea that the notice issued under section 80 does not conform to the requirements of that section, may be waived by the Government or public officer entitled to such notice.

The contrary view taken by the Madras High Court is no longer law. I have discussed the matter at some length as it was argued by the learned counsel for the appellants that a decision on these points was unnecessary in the view the Judicial Committee took of the form and contents of the notice issued under section 80, Civil Procedure Code. I consider that their Lordships of the Judicial Committee deliberately corrected what they felt was an erroneous view taken by this Court differing from the other High Courts and even if their pronouncement was *obiter* it is far too clear and explicit to be ignored by this Court.

I therefore consider that it was quite competent to the Court of Wards to waive the notice required to be given by section 49 of the Madras Court of Wards Act, even assuming that the meaning and scope of the section is the same as that of section 80, Civil Procedure Code. There is no substance in the contention of the appellants that there cannot be a waiver after objection as to the want of notice had been raised in the written statement filed by the Court of Wards. This argument entirely overlooks the nature of a plea of waiver. Waiver is an abandonment of a right and may be express or implied from conduct and to be effectual must be by a person who has full knowledge of the facts. A person who has taken a plea based on the want of notice to which he is entitled, may waive it and allow the action to proceed as though the required notice had been given to him and this can be done so long as the action is pending and has not been finally determined.

I may, however, observe that the language of section 80, Civil Procedure Code and the language of section 49 of the Madras Court of Wards Act are by no means similar though, under both provisions, two months' notice is required to be given. The present suit is not one relating to the person or property of the ward. The melwaram right of the ward is not in question and will not be affected by the result of the decision in this suit. The contest is between two rival claimants to the kudiwaram interest and the Court of Wards is really a mere spectator of this litigation. Further, I hold that the plea as regards the want of statutory notice is only available to the Court of Wards which is entitled to such notice and not to the other defendants after the Court of Wards itself waived the objection. Such waiver on the part of the person principally concerned affects the other parties as well.

Lastly Mr. Venkatasam argued that the Courts below have come to an incorrect conclusion on the question of title to the property. The evidence in support of the plaintiff's title and possession within 12 years is both oral and documentary and has been accepted and relied upon by the Courts below. The documentary evidence consists of Ex. P-8, the survey and settlement register, Ex. P-1, a receipt for payment of tree tax in respect of the palmyra trees on the land, Ex. P-2, the challan for payment of Nazarana to the Zamin estate and Ex. P-3, the patta. I am unable to hold that the finding of the lower Courts based as it is on relevant evidence is contrary to law or vitiated by any serious misapprehension of the effect of the documentary evidence.

The result is that the second appeal is dismissed with costs of the first respondent only. No leave.

V.P.S. ——— *Second appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

A. N. G. Sundararajulu Chetty .. *Petitioner.**

War Risks (Goods) Insurance Ordinance (IX of 1940), section 7 (2)—Repeal of by War Risks (Goods) Insurance Termination Ordinance (XXXIV of 1945)—Effect on the right of Crown to initiate prosecutions.

*Cr.R.C. No. 1372 of 1947. 26th November, 1948.
(Crl.R.P. No. 1347 of 1947).

The right which the Crown has to initiate prosecutions for an offence committed when section 7 of the War Risks (Goods) Insurance Ordinance was in force is not taken away by the repeal of section 7 by the War Risks (Goods) Insurance Termination Ordinance of 1945.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of Session, West Tanjore in C. A. No. 62 of 1947 (C.C. No. 154 of 1946, Additional first Class Magistrate, Kumbakonam).

R. Gopalaswami Aiyangar for Petitioner.

N. T. Raghunathan for the Public Prosecutor (*V.L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The point arising in this revision petition has already been the subject of a pronouncement by me in the decisions reported in the *Public Prosecutor* v. *Ramalingaswamy*[1], but Mr. R. Gopalaswami Aiyangar for the petitioner in his interesting and able argument has sought to question the correctness of that decision and out of deference to his learned arguments I shall state briefly the reasons why I adhere to the view already propounded by me in the case mentioned above.

The petitioner was convicted by the Additional First Class Magistrate of Kumbakonam of an offence under section 7 (2) of the War Risks (Goods) Insurance Ordinance (IX of 1940) and sentenced to a fine of Rs. 500. On appeal, the learned Sessions Judge of West Tanjore confirmed the conviction and sentence and this revision petition is a further attempt by the petitioner to canvass the correctness of his conviction and sentence. There is no dispute regarding the circumstances which led to the prosecution and as regards the fact, that the petitioner did not take out an insurance policy as contemplated by section 7 (1) of the Ordinance. Various points were raised in the lower appellate Court of which, in addition to the question regarding the sustainability of the prosecution, the only other point that was argued was about the necessity of taking out an insurance policy for the entire goods belonging to the petitioner stored in various districts throughout India.

The prosecution in this case was instituted on 21st November, 1946, as a result of a sanction obtained on 7th November, 1946. Ordinance IX of 1940 continued to be in force till the duration of the war and six months thereafter, *i.e.*, till the 30th September, 1946, but portions of the same had been repealed by Ordinance XXXIV of 1945, dated 14th September, 1945. The subsequent Ordinance repealed with effect, at and after the midnight between the 30th September and the 1st October, 1945, sections 5, 5-A, 7, 8 and 15 of the War Risks (Goods) Insurance Ordinance of 1940. Such being the case, from the date of the promulgation of the later Ordinance, section 7 of the earlier Ordinance ceased to have any operation and was wholly effaced with the result that from that date the prohibition against carrying on any business in British India as seller of goods which were insurable under the Ordinance and without taking out an insurance policy, was thereby revoked; but the offence in this case was committed prior to that date and if the prosecution had been started prior to the 1st October, 1945, there could have been no question whatever about the maintainability of it.

The argument is now put forward that since the Ordinance of 1940 itself was a temporary piece of legislation which would automatically have expired at the end of the period contemplated by section 72 of the Government of India Act, 1935, with all its later amendments, it cannot be said that the provisions of section 6 of the General Clauses Act corresponding to section 38 (2) of the English Interpretation Act can have any application here. By section 30 of the General Clauses Act, an Ordinance is equated to a Central Act and therefore for the interpretation of the provisions of an Ordinance, the principles enunciated in the General Clauses Act will have to be applied. Mr. Gopalaswami Ayyangar invited my attention to the passage in Halsbury's Laws of England, Second Edition, Volume 31, pages 511 to 513. At pages 511 and 512, occur the following passage :—

1. (1948) 2 M.L.J. 351.

"Statutes, moreover, may be intended to be temporary as well as perpetual, and express words are not necessary to show whether Parliament intended a particular statute to be one or the other."

Again,

"After the expiration of the statute, in the absence of provision to the contrary, no proceedings can be taken on it, and proceedings already commenced *ipso facto* determine............A statute which is repealed differs from a temporary statute in that the former, except in so far as it relates to transactions already completed under it, becomes as if it had never existed, while with respect to the latter the extent of the restrictions imposed and the duration of the provisions are matters of construction."

In *Lemm* v. *Mitchell*[1], their Lordships of the Judicial Committee quote from the decision of Tindal, C.J., in *Kay* v. *Goodwin*[2], as follows :

"I take the effect of repealing a statute to be to obliterate it as completely from the records of the Parliament as if it had never been passed ; and it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded whilst it was an existing law."

In *Bansgopal* v. *Emperor*[3], Sulaiman, C.J., delivering the judgment of the Full Bench has laid down that as a general rule, unless there is some special provision to the contrary after a temporary Act has expired no proceedings can be taken upon it and it ceases to have any further effect. An offence, therefore, committed against a temporary Act must be prosecuted and punished before the Act expires and as soon as the Act expires any proceedings which are being taken against a person will *ipso facto* terminate. It is further observed that even though the General Clauses Act would ordinarily apply to Ordinances under the Government of India Act, section 6 of the Act is applicable only to a case where a previous Ordinance has been repealed by a subsequent Ordinance or a subsequent Act and would not necessarily apply to a case where a temporary Ordinance automatically expires after the period during which it is in operation and therefore even though section 30 makes the Act applicable to the Ordinances, section 6 has no application to such temporary Ordinances. This decision has been followed by a single Judge of the Lahore High Court in *F. C. Aubrey* v. *K. M. Aubrey*[4].

On the other hand, Mr. N. T. Raghunathan appearing for the Public Prosecutor contends that if section 6 is not intended to apply to a temporary piece of legislation like an Ordinance, there was no necessity to insert section 30 in the General Clauses Act at all. He further contends that the statement of the law contended for by Mr. Gopalaswami Ayyangar has not been accepted as one of absolute universal application because we find that in a very recent decision of the House of Lords reported in *Wicks* v. *Director of Public Prosecutions*[5], the unanimous opinion of the House of Lords was that under the Emergency Powers (Defence) Act, 1939, which by section 11, clause (3) provided that :

'the expiry of the Act shall not affect the operation thereof as respects things previously done or omitted to be done"

and that although Regulation 2-A of the Defence (General) Regulations, 1939, made pursuant to the Act expired on the 24th February, 1946, the trial of a person for an offence committed when the regulation was in force was proper and since section 11, sub-section (3) did not expire with the rest of the Act, being designed to preserve the right to prosecute after the date of expiry, there was nothing wrong in proceeding with the prosecution after the expiry of the regulation. *Bennett* v. *Tatton*[6] was a case of a similar kind where, after the repeal of a certain temporary Regulation, offences committed against that Regulation were tried. It is also mentioned there that for the interpretation of such Regulations, section 38 (2) of the Interpretation Act is applicable. To the same effect is the view taken by this Court in *Chockalingam*, In re[7]. It is noteworthy that such a point was not raised or discussed in similar cases arising out of temporary Acts and Ordinances for it is seen that the offences committed in the case reported in *Gas Plant Manufacturing Co., Ltd.* v. *Emperor*[8], decided by the Federal Court were also against the provisions

1. (1912) A.C. 400 (406).
2. (1830) 6 Bing. 576 : 130 ER. 1403.
3. (1933) I.L.R. 55 All. 961.
4. A.I.R. 1947 Lah. 414.
5. (1947) A.C. 362.
6. (1918) 118 L.T. 788.
7. (1945) 2 M.L.J. 295.
8. (1947) 2 M.L.J. 402 : 1947 F.L.J. 71 (F.C.).

of such temporary Acts or Ordinances which functioned only for a definite period of time. It is unnecessary for me to discuss the other aspects at great length because I have already stated in my judgment in *The Public Prosecutor* v. *Ramalingaswamy*[2], that the repeal of section 7 would not prevent the initiation and trial of offences against it while it was in force. But Mr. Gopalaswami Aiyangar contends that the retention of section 12 of the Ordinances was necessitated not by the circumstance that future prosecutions were permissible, but by the fact that section 10 had been allowed to continue and with the existence of section 10, there is a necessity to continue section 12. I am not inclined to accept the contention, for, section 10, clauses (*a*) and (*b*) are necessary even after the repeal of section 7 for the purpose of investigation of offences which were committed while section 7 was in force.

It is next urged that since the Ordinance worked itself out by the 30th September, 1946, there was no authority competent to grant the sanction on 7th November, 1946, to initiate the prosecution on 21st November, 1946, and therefore the whole proceedings are without jurisdiction. For this purpose reliance is placed on the decision in *Manmohan Goswami* v. *Emperor*[1]. The answer to this contention is found in the fact that even if, after the expiry of the Act, a prosecution can be launched by the application of clauses (*d*) and (*e*) of section 6 of the General Clauses Act, then the necessary pre-requisite for such a prosecution must also be deemed to exist after the expiry of the Act. That there was an authority competent to grant sanction under section 12 of the Ordinance before its expiry is not disputed and it is the same authority that has now granted the sanction. I am therefore of opinion that this contention should also be overruled.

Lastly, Mr. Gopalaswamy Aiyangar contended that since the value of the insurable goods exceeded Rs. 20,000 only in one district the criterion adopted by the lower Courts in fixing the premium is wrong, and therefore the fine of Rs. 500 is excessive. I am inclined to hold that the prosecution initiated more than a year after the repeal of section 7 does not require the imposition of a fine of Rs. 500. It is reduced to Rs. 100 which, if collected, will be credited to the War Risks (Goods) Insurance Fund. With this modification the revision petition is dismissed.

V.P.S. ——— *Petition dismissed. Fine Reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MACK.

The Kshatriya Sandarare Nadar Uravinmurai at Usilampatti, represented by its present managers and representatives Manikkam *alias* Sivasubramanya Nadar and another .. *Petitioners**

v.

Malayappa Nadar and another .. *Respondents.*

Court-Fees Act (VII of 1870), section 7, clause (v) (*b*) *and* (*e*)*—Applicability—Suit by a Hindu reversioner to recover land—Plaint returned for presentation to proper Court—Non-compliance—But fresh plaint for the same relief filed in the same Court—Admission—Propriety.*

The petitioner, 1st defendant, was sued by the plaintiff who claimed as reversioner to the estate of one *M* on the death of his daughter. *M* had sold a half share in the suit property. Subsequent to his death, the defendant, a trust institution, purchased the other half share from the daughter. It is this half share that plaintiff claimed. A prior plaint by this same plaintiff for precisely the same relief as reversioner was returned by the District Munsif as beyond his own jurisdiction to entertain. The valuation of land was much higher therein and plaint was returned for being presented to the proper Court. But the plaintiff filed a fresh plaint under section 7, clause (v) (*b*) of the Court-Fees Act and the plaint was admitted. On the question as to the court-fee payable,

Held: That the correct court-fee payable on the plaint in this suit is on half the market value of the entire site under section 7, clause (v) (*e*). The Court should not have entertained the fresh plaint, after having returned the former one for the same relief by the same party. Plaintiff should not twist the language of his plaint for the purpose of evading court-fee.

1. (1948) 2 M.L.J. 351. 2. (1947) 48 Cr.L.J. 770.

* C.R.P. No. 421 of 1948. 7th March, 1949.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the finding recorded by the Court of the District Munsiff, Thirumangalam, dated 23rd February, 1948, in O. S. No. 91 of 1947.

U. S. Ramaswami Aiyar for Petitioners.

T. S. Vaidyanatha Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The petitioner is the first defendant. He was sued by the plaintiff who claimed to be a reversioner to the estate of one Malayappa Nadar on the death of his daughter Thillaiammal who died in 1943. Malayappa in his lifetime sold a half share in the suit property which is a plot of land 2·66 acres in extent in the village of Usilampatti in Mathurai district. Subsequent to his death, the first defendant, which incidentally is a Nadar trust institution, purchased the other half share from Thillaiammal in 1919. It is this half share which the plaintiff as a distant reversioner seeks to recover. The District Munsiff held that he was entitled to file this suit on a court-fee of Rs. 2-3-0 paying ten times the assessment of Rs. 4 per acre as on land governed by section 7, clause v (*b*).

The history of the case is rather extraordinary, as the same learned Distric Munsiff returned a prior plaint filed in O. S. No. 335 of 1945 by this very same plaintiff for precisely the same relief as reversioner for presentation to the Subordinate Judge's Court holding the suit to be beyond his financial jurisdiction. In that previous plaint the plaintiff who is the present respondent valued this same site at Rs. 300 describing it as "natham" or house site. A member of the Bar was appointed Commissioner who valued this land at Rs. 50 per cent. He also found no less than 38 buildings of various descriptions on this site which he valued separately at about a lakh of rupees. The prior plaint was returned on 10th August, 1946, and then without any attempt to represent the plaint in the Sub-Court, in 1947 the plaintiff filed a fresh plaint in the District Munsiff's Court under a fresh inspiration treating it under section 7, clause v (*b*) and taking it into an absurd extreme in the payment of court-fee. The learned District Munsiff, however, admitted the plaint which was, in due course, rightly objected to by the court-fee examiner on the ground that court-fee should be paid on half the market value of the site, including the buildings thereon. The learned District Munsiff in a long finding overruled the court-fee examiner's objections and held, despite the fact that the plaintiff had previously described this same site as house site or natham poromboke, that he was within his rights in treating it as ordinary land in a village and valuing it under clause v (*b*). He failed to realise the existence of all these buildings on this site. Mr. Vaidhyanatha Iyer for the respondent urges that the plaintiff only seeks a half share in this site which may at the time of partition exclude any building on the site at all. This argument is untenable as if an undivided half share in the land is sought in the suit; the land as a whole has to be valued for purposes of both court-fee and jurisdiction.

I have no hesitation in setting aside the finding of the learned District Munsiff as untenable and quite incorrect. The court-fee examiner's objection must be sustained. The correct court-fee payable on this suit is on half the market value of the entire site under section 7, clause v (*e*). The learned District Munsiff should not have so lightly admitted a second plaint on his file, seeking precisely the same relief on the same land after having returned the first plaint for presentation to a higher Court. A plaintiff should not be permitted to twist the language of his plaint in this manner for the purposes of evading court-fee.

The petition is allowed and this plaint is also directed to be returned for presentation to the higher Court having jurisdiction.

The petition is, in the result, allowed with costs in this Court only.

K.C. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Akkirayu Sanyasi .. *Petitioner*.*

Penal Code (XLV of 1860), section 498—Ingredients of offence.

In order that a person should be made liable for an offence under section 498 of the Code it is not necessary that there should be any enticement. All that is necessary is that if any person "takes away" another man's wife with the intention that she may have illicit intercourse with him, then the offence is completed. Taking away implies that there must be some influence operating on the woman, or co-operating with her inclination at the time the final step was taken which caused a severance of the woman from her husband, for the purpose of causing such step to be taken.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Sub-Divisional Magistrate of Vizagapatam, dated 11th September, 1947, in C. A. No. 45 of 1947, preferred against the judgment of the Court of the Stationary Sub-Magistrate, Anakapalle, dated 12th July, 1947, in C. C. No. 336 of 1947.

E. Venkatesam for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) and *S. Ramamoorthy* for Complainant.

The Court delivered the following

JUDGMENT.—The petitioner was convicted by the Stationary Sub-Magistrate of Anakapalle of an offence under section 498, Indian Penal Code and sentenced to rigorous imprisonment for three months. The conviction was upheld in appeal by the Sub-Divisional Magistrate of Vizagapatam, who reduced the sentence to a fine of Rs. 200 out of which a sum of Rs. 100 was ordered to be paid to the complainant as compensation.

Mr. Venkatesam appearing for the petitioner has raised two points in support of his application. The first of them is that from the evidence it can be discerned that the wife of the complainant who, it is alleged, had been taken away or enticed by the petitioner, had already been discarded by the complainant sometime ago, and therefore if she had gone and lived with the petitioner as his wife either as a result of inducement or request made by the petitioner or of her own free-will and volition which were aided by the petitioner, it cannot be said that an offence under section 498 has been committed. In support of this contention reference was made to the evidence of P. W. 6 who in cross-examination says that the complainant abandoned his wife and went away to another village for two years. From this statement it is sought to be argued that at the time of the alleged enticement or taking away the woman was not under the protection of the complainant at all and that therefore the element necessary to constitute an offence under section 498 is absent. From the evidence of P. Ws. 1, 2 and 3 and others it is clear that the alleged enticement or taking away took place only three months before the complaint, but according to the evidence of P. W. 6, the abandonment and going away were two years ago. P. Ws. 1 to 3 as well as other witnesses including P. Ws. 8 and 9 say that at the time the petitioner and the woman went from their villages, the woman was under the protection of the husband. There is some evidence also that she was living with her father. This portion of the evidence has been accepted by the lower Court, and I can find no justification for holding that at the time the woman left her village she was not under the protection of the complainant. It seems to me that the findings of fact on this aspect of the case have to be accepted, especially since nothing can be said against the evidence of those witnesses. I therefore find it difficult to accept the contention raised by the learned counsel that the woman had been abandoned by the complainant.

The other question which has been rather elaborately argued at the Bar is whether the elements constituting an offence under section 498 can be held to be present in the present case. It is conceded however by the Public Prosecutor

*Crl.R.C. No. 1325 of 1947. 28th October, 1948.
(Crl.R.P. No. 1204 of 1947).

and by the learned counsel appearing for the complainant that from the evidence it cannot be said that there was any case of enticement in the strict sense of the terms. The word " enticement " necessarily connotes that some kind of persuasion or allurement was held out by the person who imposed either his will or power upon a woman. There is no evidence whatever that the petitioner was seen offering any inducement ; nor is it suggested that the petitioner placed before the woman any false impressions of his status or what he would do to benefit her. In these circumstances, if the matter had stood there it would be very difficult to confirm the conviction of the petitioner.

But then, the wording of the section makes it clear that in order that a person should be made liable for an offence under that section it is not necessary that there should be any enticement. All that is required is that if any person " takes away " another man's wife with the intent that she may have illicit intercourse with him, then the offence is completed. What then is the meaning of the word " takes." The fact that the word " takes " is put in juxtaposition with " enticing away " shows that the Legislature intended that the circumstances attending the two are quite different. In *Hossain Mothor* v. *Emperor*[1], Henderson and Biswas, JJ., had to consider the meaning of this term. Biswas, J., was of the view that there must be some influence operating on the woman, or co-operating with her inclination at the time the final step was taken which caused a severance of the woman from her husband, for the purpose of causing such step to be taken. On the facts of that particular case it was held that there was no taking away. This decision was followed in *Mahadeo Rama* v. *Emperor*[2], by Beaumont, C.J., sitting with Sen, J. The learned Chief Justice agreed with the view taken by Biswas, J. and came to the same conclusion.

Having carefully read both these cases it seems to me that the facts in those cases are very different from what are contained in the present case. I do not think that from the evidence of the witnesses it is possible to infer that the woman went with the petitioner out of her own will and not as a result of any act done by the petitioner. There is a clear finding of fact by the lower Courts accepting the evidence of the various witnesses, that the woman went away from a place where she had gone to gather firewood after the petitioner had gone there and spoken to her. In the very nature of things it is not possible to say what exactly were the words which the petitioner used towards the woman ; but from the attendant circumstances and the previous attitude taken by the petitioner as well as his subsequent conduct the lower Courts were perfectly justified in inferring that the petitioner took away the woman with him. This circumstance is made clearer by the fact that though the parties belonged to a village in Vizagapatam district the petitioner and the woman were seen, three months later, in a village in the West Godavari district, and, as the lower Courts find, she was with him living in a distant place even at the time when this petition was filed. From these facts the only inference to my mind that can be drawn is that it was as a result of some action taken by the petitioner that the woman went with him.

My attention was invited by Mr. Venkatesam to a decision in *Ram Narayan* v. *Emperor*[3]. Having carefully perused that decision I do not find that the principles enunciated there can be applicable to this case in any way. Moreover in that case Broomfield, J., was of the view that the complaint itself was not a proper one. There were other matters on which the Bombay High Court came to the conclusion that the petitioner there neither took away the woman nor enticed her. I do not think that that decision is any authority for holding that in circumstances like the present case no offence is committed.

Before leaving this case I must take exception to a passage in the judgment of the lower appellate Court in the following terms :—

" The ties of matrimonial alliance in some of the lower status of the community to which the parties belong are not very strictly observed................ "

1. A.I.R. 1937 Cal. 460.
2. A.I.R. 1943 Bom. 179.
3. I.L.R. (1937) Bom. 244.

I am constrained to observe that this sentence is absolutely unwarranted. The ties of matrimonial alliance are strictly observed as much in the lower stratus of society as in highplaced and fashionable society. The learned Magistrate was certainly not justified in making such a wide observation.

In the circumstances of the case and considering the fact that the complainant himself was to some extent responsible for the way in which the woman behaved I do not think that a fine of Rs. 200 is called for. I reduce the fine to Rs. 50 and cancel the amount of compensation ordered to be paid to the complainant.

V.P.S. ——— *Petition dismissed. Fine reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

Mahalingam Asari .. *Petitioner**

v.

Lakshmana Reddiar .. *Respondent.*

Practice—Plaintiff coming to Court with extremely exaggerated and substantially false case based on a substratum of truth—Proper course for Courts to adopt when defence also is exaggerated or false.

The only way in which plaintiffs can be stopped from coming to Court with extremely exaggerated and substantially false cases based on a substratum of truth is by dismissing such suits *in toto* if the Court has good reason to believe that they have not disclosed the truth in their plaints and evidence. It is impossible to expect a Court to ferret out the exact truth between two extreme positions in all cases.

A plaintiff filed a small cause suit in the Subordinate Judge's Court against a goldsmith claiming the return of gold given for making jewels and the goldsmith filed a separate suit in the Village Panchayat Court claiming making charges alleging that the jewels had been made and delivered. On the evidence the Subordinate Judge decreed the suit and the Panchayat Court also subsequently decreed the suit filed by the goldsmith. The Panchayat Court decree was set aside by the Munsiff on the ground that it was vitiated by bias and the case was withdrawn by the Munsif to his own file. On revision petitions in both cases, both the suits were directed to be dismissed without costs as it was found that both the versions were exaggerated.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge, Tirunelveli, dated 7th October, 1946, and passed in S. C. S. No. 92 of 1946.

S. V. Rama Aiyangar for Petitioner.

S. T. Srinivasagopalachari for Respondent.

The Court delivered the following

JUDGMENT.—The petitioner in both these revision petitions is a goldsmith of Thirukkarangudi village in Tirunelveli District. They raise for resolution an interesting conflict of decision between the Subordinate Judge of Tirunelveli in S. C. S. No. 92 of 1946, and the Village Panchayat Court of Kalakkad in a suit before them. On what appears precisely the same evidence they came to different findings of fact in the following curious circumstances.

Lakshmana Reddiar, the respondent, it is common ground, gave this goldsmith a lump of gold weighing 15⅝ kalanjis on 12th June, 1945, to make a pair of bangles for his daughter. This is also evidenced by a receipt admittedly signed by the goldsmith and produced from Lakshmana Reddiar's custody. Lakshmana Reddiar's case set out in a notice Ex. P-2, dated 20th June, 1946, was a demand on the goldsmith to make and deliver the bangles or to return the gold. This was countered by a reply, Ex. D-1, dated 28th June, 1946, by the goldsmith to the effect that he had made the bangles and delivered them to Lakshmana Reddiar on 4th August 1945, and he claimed Rs. 52-8-0 for making charges and some gold which he supplied. Lakshmana Reddiar filed a Small Cause suit in the Sub-Court on 20th July, 1946, to recover Rs. 585 as value of the gold he had given to the goldsmith. The goldsmith filed a suit in the Thirukkarangudi Panchayat Court for Rs. 50 as making charges of the bangles alleging that he had in fact delivered them to Lakshmana Reddiar.

* C.R.P. Nos. 265 and 392 of 1947. 22nd February, 1949.

On the application of Lakshmana Reddiar the District Munsiff of Ambasamudram transferred the suit to the Panchayat Court of Kalakkad village about six miles away.

The learned Subordinate Judge decreed Lakshmana Reddiar's suit in full on 7th October, 1946, finding that though gold had been handed over to the goldsmith according to the chit, Ex. P-1 signed by him and produced from the possession of Lakshmana Reddiar, the goldsmith had delivered no bangles at all, his defence being rejected in toto. Lakshmana Reddiar was the only witness examined, while the defendant examined himself and three other witnesses. One was Piraviperumal Pillai, D. W. 2, who was no other than the President of the Thirukkarangudi Panchayat Court, who actually swore that he personally saw the goldsmith hand over the bangles to Lakshmana Reddiar. He further said that in the Panchayat Court itself on 18th July, 1946, when Lakshmana Reddiar appeared before them and asked for further time he told him that he had himself seen the goldsmith hand over the jewels to him. The next witness, one Muhammad Ali, D. W. 3, said he was in the Panchayat Court when this case was called up when Lakshmana Reddiar said he would go home and bring the bangles. One Sudalaikuluva Naicker (D.W. 4) also swore that he actually saw the goldsmith giving the bangles to Lakshmana Reddiar. Rejecting this evidence and acting mainly on the receipt for the lump of gold, Ex. P-1, which the goldsmith has not taken back from Lakshmana Reddiar, the learned Subordinate Judge decreed the suit on the basis of the plaint claim that the lump of gold was of sovereign quality.

The Kalakkad Panchayat Court took the other suit up for hearing after the Subordinate Judge had disposed of the Small Cause suit. Under section 17 of the Village Courts Act, no Village Court shall try any suit which has been heard and determined by a Court of competent jurisdiction in a *former suit* between the same parties. The Panchayat Court was aware of this section and gave it a curious interpretation. They took the view that the suit filed in the Panchayat Court was earlier in point of time and the decision of the Subordinate Judge did not therefore preclude them from trying the suit. They heard exactly the same witnesses and came to a totally different finding to the effect that the goldsmith had actually made these bangles and delivered them to Lakshmana Reddiar. They accordingly decreed the suit after an elaborate judgment written in Tamil and signed by seven members of the Court. Lakshmana Reddiar applied to the District Munsiff in revision, who found himself in a position of obvious difficulty. Holding that the Panchayat Court should not have taken upon itself to decide a suit which had already been decided by the Subordinate Judge, and moreover, on no real ground, that the Panchayat Court were biassed in favour of the goldsmith he set aside their decree and withdrew the suit to his own file for disposal pending disposal of the revision petition, C. R. P. No. 265 of 1947, filed by the goldsmith in this Court. Subsequently the goldsmith filed the other revision petition, No. 1392 of 1947, to revise the District Munsiff's order.

It is obvious that the two decrees based on entirely conflicting findings of fact cannot stand. Mr. Srinivasagopalachari urges that there are no legal grounds for any interference in revision with the judgment of the Subordinate Judge on fact, and that this is a case in which his judgment should be upheld, the Village Court having no jurisdiction to try the suit before it, the main issue in which had already been decided by a higher Court. In fairness to the parties, the learned Subordinate Judge and the District Munsiff and also the Panchayat Court, it appears to me that this conflict of finding requires close scrutiny and a disposal on its merits. I have carefully perused the evidence on record and also the elaborate judgment written in this case by the President of the Panchayat Court. I am quite satisfied that the Panchayat Court judgment has not been in any way the result of any bias or prejudice or that the Court was animated by any disrespect or disregard of the Subordinate Judge's findings. I am convinced that in this case there has been a perfectly *bona fide* finding of fact given on the same evidence both by the learned Subordinate Judge and also by the Village Panchayat Court. The Subordinate Judge being dissatisfied with some of the oral evidence, based his decision on the chit or receipt for the jewel signed by the goldsmith which Lakshmana Reddiar

was able to produce. Ordinarily one would have expected the goldsmith to have asked for this chit back at the time he delivered the bangles. But if that delivery had been made in the presence of others, this is not a very serious omission. I am quite satisfied that this conflict of a decision on fact by two Courts on the same evidence is due to the simple fact that neither Lakshmana Reddiar nor the goldsmith has placed the truth before the Court, both taking extreme positions, the truth lying between their cases. The Village Panchayat Court in their judgment, were quite convinced that the goldsmith's case that he made and handed over the bangles to Lakshmana Reddiar was true, and with the President of the Thirukkarangudi Panchayat Court himself deposing that he witnessed this delivery personally, supported as he was by two other village witnesses, it certainly cannot be said that their finding is not in accordance with the weight of evidence. It has also to be remembered that the Panchayat Court had a considerable advantage in some ways over the Subordinate Judge before whom witnesses were deposing a long way from their village. Lakshmana Reddiar deposing in his own rural environment may not have been able to impress the Panchayat Court in the same way that with expert legal assistance he impressed the learned Subordinate Judge.

A decree of Court should represent the truth so far as it lies in the power of the Court to ascertain it. It however does happen that the truth is often concealed between two extreme cases, and under the doctrine of either accepting the plaintiff's case in toto or accepting the defendant's case in toto many Court decrees expose themselves to criticism that they are not in accordance with strict truth. It appears to be established by the evidence that the goldsmith did hand over these bangles to Lakshmana Reddiar, but what transpired subsequently, it is difficult to say. It is probable that Lakshmana Reddiar, after he got these bangles tested, found the quality of the gold very inferior to that of the gold which he handed over and that a subsequent dispute between the parties resulted in their coming to two different Courts with two extreme cases, Lakshmana Reddiar putting the goldsmith in the position of a person who had misappropriated all the gold and had not made him any bangles at all. Had this been the case, it is reasonable to expect Lakshmana Reddiar to have rushed in the first instance to a criminal Court. The goldsmith countered with a claim for making charges, etc., on the basis that he had utilised all the gold which Lakshmana Reddiar had given him for the making of bangles which were actually delivered. In cases of this kind, when a plaintiff conceals the truth and does not place the full facts before the Court, the only course possible is to dismiss his suit in toto. The bangles which I believe were made by the goldsmith have not been produced. It is unnecessary to speculate as regards this, there being more than one possibility. It may be that the bangles were handed over to Lakshmana Reddiar who sometime later handed them back to the goldsmith. The only just inference to be drawn from these two suits on which two different Courts have come to conflicting findings of fact is that the plaintiff in the small cause suit before the Subordinate Judge and also the plaintiff before the Village Panchayat Court have not come to Court with clean hands. The only way in which plaintiffs can be stopped from coming to Court with extremely exaggerated and substantially false cases based on a substratum of truth is by dismissing the suits in toto if the Court has good reason to believe that they have not disclosed the truth in their plaints and evidence. It is impossible to expect a Court to ferret out the exact truth between two extreme positions in all cases. This, I think, is the simple explanation for this very interesting conflict between the Subordinate Judge hearing the suit in a town and a Panchayat Court in a village, and coming to diametrically opposed findings.

The only just and equitable disposal these two suits should receive is, in the view I have taken, dismissal without any order as to costs. The decree of the Subordinate Judge is set aside, the small cause suit before him being dismissed without costs, and the suit in the Village Panchayat Court which is now before the District Munsiff is similarly dismissed without any order as to costs. On these revision petitions the parties will bear their own costs.

K.S. — *Ordered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

Chandana Satyanarayana and another .. *Petitioners**

v.

Sri Venkatachalaswami Temple of Gudur, represented by the trustee Sri Unnava Ramayya Chowdry, Advocate, Masulipatam .. *Respondent.*

Court-Fees Act (VII of 1870), *sections* 7 (iv) (c) *Proviso and* 7 (iv) (a)—*Suit for declaration that earlier decree obtained against the plaintiffs and their deceased elder brother was a nullity and for injunction restraining the defendant from executing that decree and recovering possession of the lands from plaintiffs—Proper court-fee.*

The plaintiffs sued for a declaration that the decree in O.S. No. 456 of 1938, in which they and their deceased elder brother were parties, was a nullity and not binding on them and for an injunction restraining the defendant (the plaintiff in that suit which was a temple) from executing that decree against them. That suit was one to recover possession of some lands of which it was averred the present plaintiffs were still in possession.

The plaintiffs paid *ad valorem* court-fee on half the value of the immoveable property under the proviso to section 7 (iv) (*c*) of the Court-Fees Act. The suit was dismissed and an appeal was filed paying the same court-fee. The District Judge held, that the correct court-fee payable on the plaint as well as the appeal memorandum was under section 7 (iv) (*a*) on the full value as one for cancellation of the decree. The plaintiffs though they were minors at the time of the decree in O.S. No. 456 of 1938 were impleaded as majors in the appeal and second appeal. In the present plaint it was alleged that the elder brother was negligent in not filing documents showing the plaintiffs' occupancy rights in the land.

Held : This is a case rather on the border line and midway between that on which court-fee of only Rs. 100 is payable under Article 17-A of Schedule II, namely, one for a pure declaration without consequential relief, and a suit for cancellation of a decree which should be governed by section 7 (iv) (*a*). The *via media* adopted in the present case for court-fee valuation namely section 7 (iv) (*c*) cannot be said, in the circumstances, to be incorrect or inappropriate.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Court, Krishna at Masulipatam, dated 4th December, 1948, in unregistered appeal, S. R. No. 2807 of 1948 (O. S. No. 56 of 1946, Sub-Court, Masulipatam).

D. Manavala Chowdry for Petitioners.

The Government Pleader (*K. Kuttikrishna Menon*) for the Government.

The Court made the following

ORDER.—This revision petition raises an interesting question of court-fee. The plaintiffs sued for a declaration that the decree in O. S. No. 456 of 1938, in which they and their deceased elder brother were parties, was a nullity, and not binding on them, and for an injunction, restraining the plaintiff in that suit, which was a temple, from executing that decree against them. That suit was one to recover possession of about 24 acres of land, of which, it is averred in the plaint and it is also common ground before me, the plaintiffs are still in possession. On the plaint, the plaintiffs paid *ad valorem* court-fee on half the value of the immoveable property under the proviso to section 7 (iv) (*c*). Their suit was dismissed ; and they filed an appeal, paying the same court-fee under this provision. The learned District Judge held that the correct court-fee payable by them on the plaint and the appeal memorandum was under section 7 (iv) (*a*) on the full value of the subject-matter of the suit as one for cancellation of a decree.

His decision was based on the Full Bench decision in *Ramaswami* v. *Rangachari*[1]. That was a case of a Hindu minor plaintiff who sued with his mother as next friend really to set aside alienations made by his father including decrees passed against him but seeking to ignore them as not binding on him. It was held *inter alia* that in respect of decrees passed against the plaintiff in suits in which he had been *eo nomine* impleaded as a party, he must pay the court-fee prescribed by section 7 (iv) (*a*). In the present plaint, the plaintiffs' main contention is that they were, in fact, minors both at the time of the institution of O.S. No. 456 of

* C.R.P. No. 8 of 1949. 24th February, 1949.

1. (1940) 1 M.L.J. 32 : I.L.R. 1940 Mad. 259 (F.B.).

1938 and also at the time of the decree passed against them. The learned Government Pleader concedes that if the matter ended there, then their present suit would be one for a declaration that the previous decree was a nullity and not binding on them and would not come within the mischief of section 7 (iv) (*a*). He urges, however, that, as found by the learned District Judge, the plaintiffs, even after attaining majority on their own showing on the date they had given in their plaint, were impleaded as majors in an appeal to the District Court, and also in a second appeal to the High Court. It is urged on their behalf that the appeals were filed by their deceased elder brother who was negligent in the conduct of that litigation and failed to file documents which would show that the plaintiffs had permanent occupancy rights in this land as against the temple landholder. Court-fee is usually determined on the plaint averments. If at the time of the decree in O. S. No. 456 of 1938, the present plaintiffs were, in fact, minors, though impleaded in that litigation as majors, the decree would be a nullity so far as they were concerned, and they would be entitled to ask for a declaration without an obligation to cancel the decree and to pay court-fee under section 7 (iv) (*a*). This is a case rather on the border line and midway between that on which a court-fee of only Rs. 100 is payable under Article 17-A of Schedule II, namely, one for a pure declaration without consequential relief such as that considered in *Abdulla* v. *Subramania Pattar*[1], and a suit for cancellation of a decree which should be governed by section 7 (iv) (*a*). A *via media* has been adopted for court-fee valuation, namely, section 7 (iv) (*c*) which cannot be said in the circumstances to be incorrect or inappropriate. I hold that the plaint and the appeal have been correctly valued for purposes of court-fee and allow the revision petition without any order as to costs.

K.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

C. Tadulinga Mudaliar .. *Petitioner** (*1st Respondent*)

v.

M. R. Sakuntala Bai and others .. *Respondents.*

Elections—Petition challenging validity of election —Order for inspection of ballot papers—If can be made without notice to the successful candidates.

In a petition challenging the validity of the election of the successful candidates for a division of the Madras Corporation, the Chief Judge of the Court of Small Causes on the petitioner's application for production and deposit of the ballot papers, electoral rolls and other papers and for leave to inspect them, gave notice only to the Commissioner of the Corporation of Madras and ordered inspection to be given at the Corporation Office. No notice of the application was given to the successful candidates who were the other respondents. On a revision petition by one of the successful candidates,

Held : In a case of this kind the maxim *audi alteram partem* has to be applied. No order should have been passed without hearing the opposite side. Further, in such a case the Court before ordering inspection must be satisfied by evidence on oath that it is reasonably and *bona fide* necessary to have such inspection. The power of ordering inspection of the ballot papers should be exercised by the election Court with the greatest circumspection.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of Small Causes at Madras dated 22nd December, 1948, and made in M. P. No. 9782 of 1948 in Election Petition No. 5 of 1948.

S. G. Rangaramanujam for Petitioner.

M. R. Vijayarangam, H. Neelakantan for *Messrs. Short Bewes and Co.* and *K. C. Subramaniam* for *Messrs. John and Row* for Respondents.

The Court delivered the following

JUDGMENT.—Election Petition No. 5 of 1948 on the file of the Court of Small Causes, Madras, was filed by Mrs. Sakuntala Bai, the first respondent to this

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1. (1936) 71 M.L.J. 383.

* C.R.P. No. 12 of 1949. 3rd March, 1949.

petition against three persons two of whom had been declared as the successful candidates in the election to the Corporation of Madras from the 40th Division (Chepauk) held on 30th September, 1948. The third respondent to her petition is the Commissioner, Corporation of Madras. In her petition for setting aside the election, the first respondent herein alleged several instances of irregularities in the conduct of the election as well as false personations and misrepresentations practised by the candidates. It was alleged that there was false personation of voters on a large scale and quite a large number of false votes were recorded in favour of the successful candidates. It was further alleged that many dead persons were " resuscitated " and voters who had left the division long before were impersonated and their votes recorded. The successful candidates filed written statements denying these allegations and the enquiry is now pending before the Chief Judge of the Court of Small Causes, Madras. M. P. No. 9782 of 1948 in Election Petition No. 5 of 1948 was filed on the 20th December, 1948, praying that the Commissioner of the Corporation of Madras may be directed to produce and deposit the documents mentioned therein in the Court and the first respondent herein may be granted leave to inspect the documents. The documents mentioned in the petition are ten in number beginning with " the marked copy of electoral rolls used by the Polling Officers at the four booths in the 40th Devision, Chepauk, on the day of election " and ending with " the statement of votes secured with particulars of invalid and duplicate votes polled for each candidate prepared at the counting of votes by the Commissioner of the Corporation of Madras." Among these are to be found : counted ballot papers ; tendered ballot papers ; unused ballot papers ; spoilt ballot papers ; counterfoils of ballot papers, etc.

On this application the learned Chief Judge of the Court of Small Causes gave notice only to the Commissioner of the Corporation of Madras and passed the order which is now sought to be revised by the petitioner, one of the successful candidates.

It is common ground that no notice of M. P. No. 9782 of 1948 was given to the two contesting respondents before the lower Court but the only party that was represented before the learned Chief Judge was the Commissioner of the Corporation of Madras. The learned Judge ordered that the inspection of the documents mentioned in the application should be given at the Corporation office by some responsible officer of the Corporation by breaking open the seals after previous notice to the parties and in their presence and after the inspection is over the packets should be re-sealed in the presence of the parties. It was further directed that if the inspection lasted for more than a day, the packets should be re-sealed at the close of each day and be broken open on the next day in the presence of the parties and the inspection conducted as aforesaid. The re-sealing was to be done by the Officer who opens the packets. It is noteworthy that the first respondent's prayer was that the documents mentioned in her application should be produced and deposited in the lower Court and that she might be granted leave to inspect the same thereafter ; but the learned Judge, so I am informed, found it inconvenient to keep the custody of the ballot papers and other documents and therefore after getting the consent of the counsel for the Commissioner of the Corporation directed the inspection in the office of the Commissioner itself. It is this order giving an opportunity to the defeated candidate to have what Mr. Rangaramanujam for the petitioner characterises as " a roving enquiry in order to fish out information " that is now sought to be set aside on the ground of irregularity in the exercise of jurisdiction by the lower Court.

Among the rules prescribed for the adjudication by the Court of Small Causes of disputes arising out of elections of Councillors or Aldermen of the Corporation of Madras, Rule No. 6 is to the effect that every election petition shall be enquired into by the Court (Small Cause Court) as nearly as may be, in accordance with the procedure applicable to the trial of suits in the Presidency Court of Small Causes, Madras (*see* page 136 of the Madras Corporation Code, Volume I). Order XI, rules 1 and 2 of the Small Cause Court Rules provide for inspection of documents, just as Order XI provides for inspection of documents under the Code of Civil Pro-

cedure. Ordinarily, in the trial of a suit if a party seeks inspection of documents in the possession or custody of the other party, in an application to the Court filed for that purpose, whether supported by an affidavit or otherwise, notice has to be issued to the opposite party before such inspection is ordered. In this case there is no dispute whatever that no such notice was ordered. How far the order of the learned Chief Judge passed in the absence of notice to the contesting respondents, though they are not in possession of the documents of which inspection is sought, is, in the exercise of jurisdiction, is a question that has got to be considered.

Secrecy of ballot is one of the chief features connected with an election in any democratic country and if democracy is to function properly it is of the very essence that the choice made by a voter regarding a particular candidate should not be made known to the public generally. That is the reason why elaborate precautions are taken and rules promulgated enjoining secrecy of ballot for the election of councillors for the Corporation of Madras as well. Rule 21 of the Rules for election of divisional councillors of Corporation of Madras and of the councillors to fill seats specially reserved for labour, provides the procedure to be followed when an elector wants to vote. Rules 36 and 37 of the said rules provide for the safe custody of the sealed packets containing tendered ballot papers and marked copy of the electoral roll of the counterfoils of the ballot papers. Rule 37 dealing with disposal of ballot papers lays down that the Commissioner, after declaring the results, shall retain in his custody the packets of ballot papers, whether counted, rejected or tendered, and of the counterfoils thereof. These packets shall not be opened and their contents shall not be inspected or produced except under the orders of an election or other competent Court. These safeguards show that the ballot papers and other records relating to the election should be kept in safe custody and should not be made available to the candidate or the public even after the election is over and the successful candidates declared.

In *Ramakrishna Reddi* v. *Nooney Panakalu*[1], Jackson, J., held that the power of ordering inspection of the ballot papers should be exercised by the Election Court, with the greatest circumspection; and if it is necessary to find out the ballot papers the search must be conducted by the Judge himself or by the Subordinate in whose impartiality he has complete confidence. The parties themselves should never have access to the general contents of the ballot box. As I have already stated, it is of the very essence of any proper election in a democratically governed country that the mode in which a particular elector has voted shall not be discovered until he has been proved to have voted and his vote has been declared by a competent Court to be invalid. The examination of the ballot papers must follow the proof and not precede it.

In Rogers on Elections, Volume II, 20th Edition, which is one of the leading authorities regarding elections in Great Britain, we find at page 110 the following passage :—

> "After the documents have been deposited with the clerk of the Crown, no person is to be allowed to inspect any rejected ballot papers except under the order of the House of Commons, or a superior Court or a Judge at Chambers, *which is to be granted by such Court or Judge on being satisfied by evidence on oath* that inspection or production is required for the purpose of a prosecution or *petition*."

Therefore what is necessary before the inspection of ballot papers is ordered, is the satisfaction of the Court by evidence on oath, that such inspection or production is required for the petition. A strong case is required to justify an order for the production of ballot papers or counterfoils ordinarily. It is also stated at page 111 of the same book that with the exception of the rejected ballot papers, the counted ballot papers and the counterfoils, all the documents forwarded by the returning officer to the Clerk of the Crown are to be open for public inspection, and copies of them or extracts therefrom may be taken. In the City of Madras, in respect of Corporation elections, the functionary who resembles the clerk of the Crown in parliamentary elections is the Commissioner of the Corporation and it is his

1. A.I.R. 1929 Mad. 1129.

duty to seal up and keep the papers relating to the elections in safe custody and as I have already remarked, rule 37 lays down his duties. It also states when and under what conditions the sealed packets shall be opened.

Though at the hearing of this petition, no English case laying down the principles to be observed before inspection of documents relating to an election has to be ordered was brought to my notice, I find from the authorities cited in Rogers on Elections, the decision in *Stowe* v. *Jolliffe*[1], which affords a useful and safe guidance. In that case Brett, J., laid down that the practice of granting inspection of documents under the English Ballot Act should be regulated by the same rules which guide the Courts in granting inspection in ordinary cases, proper precautions being taken not to violate the secrecy of voting which was the object of the Act to ensure. At page 456, Grove, J., observes as follows :—

> " Rule 40 gives power to the Court or to a Judge at Chambers to allow the inspection of the rejected ballot papers, ' *on being satisfied by evidence on oath that the inspection or production of such ballot papers is required for the purpose*,' amongst other things, ' of a petition questioning an election or return.' That rule, therefore, seems to contemplate a power to the Court or a Judge at Chambers which the election Judge does not possess. It seems to me that that power may fairly be contended to extend to any document, public or private. I therefore think the order for production and inspection of the marked register may go, though not without some doubt. But as to the rejected ballot papers and the counterfoils, I think no case is made out for an order for their production. The application is not confined to any particular ballot papers but inspection of all the rejected ballot papers is asked for. Is this Court, in every case, to grant inspection as a matter of course upon the mere production of an affidavit of the agent that in his judgment and belief such inspection is necessary to enable him to prepare the petitioner's case ? If that had been the intention of the Legislature, it might have been expressed in a few lines : I do not think these long provisions would have been necessary ; particularly as there is a provision elsewhere showing how these may be seen and copies obtained."

Further on, the learned Judge observed :—

> " The whole scope of those provisions is that no person, not even the Clerk of the Crown, shall see the contents of these sealed packets without the order of the House or of the Court."

Again at page 458 we find the following passage :—

> " That shows the elaborate care taken to prevent an undue exposure of the way in which any voter has voted : and all this would have been unnecessary *if inspection could be had for the more asking.*"

Later on he observes :—

> " I do not say that the Court has not power under any circumstances to allow inspection of the rejected ballot papes and the conterfoils of ballot papers ; but I think, before such inspection is allowed, a very strong *prima facie* case should be made out."

At page 459, Denman, J., observes :—

> " It is not enough that inspection is asked for ; the Court must be satisfied by evidence on oat h that it is reasonably and *bona fide* required for that purpose."

In view of the above observations, which in my opinion should be followed by Courts hearing election petitions in this country as well, the question whether the learned Chief Judge of the Court of Small Causes was justified in ordering inspection without notice to the other respondents who were the successful candidates and before giving a finding that a *prima facie* case has been made out for such inspection, has to be decided. I am of opinion that in a case of this kind the maxim *audi alteram partem* has to be applied. No order should have been passed without hearing the opposite side.

I do not wish to say anything on the merits of the application to the lower Court in view of the course I am taking of remanding the application to the learned Chief Judge of the Court of Small Causes for fresh disposal after giving notice to the other two respondents and hearing the objections, if any, of the successful candidates who were respondents 1 and 2 before him. The Civil Revision Petition is therefore allowed. The order of the learned Chief Judge is set aside and he is directed to restore M. P. No. 9782 of 1948 to his file and dispose it of according to law in the light of the observations contained in this judgment. There will be no order as to costs in this Civil Revision Petition.

K.S. ——— *Petition hllowed.*

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1. L.R. 9 C. P. 446 : 30 L.T. 299.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN.

S. A. Narayanaswamy Aiyar .. *Appellant**

v.

S. R. Muthurethnam Ayyar and others .. *Respondents.*

Transfer of Property Act (*IV of* 1882), *sections* 119, 120 *and* 55 (2) *before amendment of* 1929—*Deed of exchange—Representatives of original contracting parties—Whether entitled to claim recovery of possession.*

Section 119, Transfer of Property Act before the amendment of 1929 which conferred a special right, no doubt carried with it a liability which could be imposed on the other side. But the liability which was implied was not co-extensive with the right created by section 119.

Section 120 cannot be construed to confer on an assignee of the "party" within the meaning of section 119 of the Transfer of Property Act, rights which section 119 conferred on that party.

Where two persons in possession of the properties which were the subject-matter of an exchange under a deed of the year 1901 happened to be not exactly the original persons who signed the contract but only alienees of the title to the same, on the question whether section 120 of the Act read with section 55 (2) would entitle the plaintiff as the representative in interest of one of the original parties to the contract of exchange to recover the possession of property by reason of the provision contained in section 119 of the Act,

Held : The language of section 119 as it stood before its amendment in 1929 was clear and was a specific bar to plaintiff's claim since the plaintiff himelf was not a party to the deed of exchange effected in 1901 and the statutory right of buyer and seller created by section 55 (2) of the Transfer of Property Act was outside the scope of section 119 of the same Act.

Chidambara Thevar v. *Swaminatha Rao*, (1940) 1 M.L.J. 248 and *Srinivasa Aiyangar* v. *Johnsa Rowther*, (1919) I.L.R. 42 Mad. 690, distinguished.

Held further, in the circumstances that the rights and privileges in the deed of exchange imported into it nothing more than the ordinary statutory rights of a buyer and seller and to say that they could amount in result to a contract to the contrary within the meaning of section 119 of the Act would be wrong.

Srinivasa Aiyangar v. *Johnsa Rowther*, (1919) I.L.R. 42 Mad. 690, distinguished.

Appeal against the decree of the Court of the Subordinate Judge, Tiruchirapalli, in A. S. No. 40 of 1945, preferred against the decree of the Court of the District Munsiff, Kulitalai, in O. S. No. 337 of 1947.

N. R. Govindachari and *N. K. Karpagavinayagam* for Appellant.

K. G. Srinivasa Ayyar for Respondents.

The Court delivered the following

JUDGMENT.—The facts are not in dispute. Sitaram Dikshitar, the father of the third defendant, owned S. No. 199/1. Sami Aiyar, the grandfather of defendants 1 and 2, owned S. No. 227/3 and 227/2. Sitarama Dikshitar and Sami Aiyar effected an exchange of their properties under Ex. P-2 in 1901. Subsequently, the father of defendants 1 and 2 sold S. No. 199/1 to the plaintiff. The plaintiff was dispossessed of S. No. 199/1 under the decree in O. S. No. 53 of 1932 in 1940 by a person who claimed superior title. The plaintiff then laid this suit to recover possession of S. No. 227/3 and 227/2 from the 3rd defendant and his alienee, the fourth defendant. The learned District Munsif dismissed the plaintiff's suit on the ground that section 119 of the Transfer of Property Act, as it stood at the time of exchange, evidenced by Ex. P-2 of 1901, did not entitle the plaintiff, who was himself not a party to the contract of exchange, to recover the property exchanged. The learned Subordinate Judge on appeal reversed the decree of the trial Court and decreed the plaintiff's claim on the ground, that S. 120 of the Transfer of Property Act read with section 55 (2) of the Transfer of Property Act enabled the plaintiff as the representative in interest of Swami Aiyar to recover possession of the property. Hence this second appeal.

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* S.A. No. 836 of 1946. 7th March, 1949.

Section 119 of the Transfer of Property Act before it was amended in 1929 ran :

" In the absence of a contract to the contrary, the party deprived of the thing or part thereof he has received in exchange, by reason of any defect in the title of the other party is entitled, at his option, to compensation, or to the return of the thing transferred by him."

The learned advocate for the appellant was right in his contention, that section 120 of the Transfer of Property Act, on which the learned Judge relied, cannot be construed to confer on an assignee of the " party " within the meaning of section 119, rights which section 119 conferred on that party, because section 120 itself runs :

" Save as otherwise provided in this Chapter, each party has the rights, and is subject to the liabilities, of a seller as to that which he gives, and has the rights, and is subject to the liabilities of a buyer as to that which he takes."

Section 119 is a provision " otherwise " within the meaning of section 120 of the Act. What section 119 conferred was a statutory right on a party to a contract to claim recovery of the very property he had parted with. In *Chidambara Thevar* v. *Swaminatha Rao*[1], the liability to return the property was enforced against an assignee of one of the parties to the original exchange, but the plaintiff who claimed the return of the property was himself a party to that exchange. I am unable to see any justification to extend the scope of *Chidambara Thevar* v. *Swaminatha Rao*[1], to a claimant who is himself not a party to the exchange but only a representative in interest of that party. The specific right conferred by section 119 of the Transfer of Property Act as it stood before 1929 no doubt carried with it a liability which could be imposed on the other side ; but I am unable to hold that the liability which was implied was co-extensive with the right created by section 119. That the liability could be transferred and be enforced against an assignee from a party to a contract of exchange does not necessarily imply that the assignee from a party who seeks to enforce the right to recover the property can, despite the plain wording of section 119, claim such a right.

To repeat, the plaintiff in the case decided in *Chidambara Thevar* v. *Swaminatha Rao*[1] was himself a party to the contract and was, therefore, a person specifically within the scope of section 119 of the Transfer of Property Act with a specific right to ask for the return of the property he had given in exchange.

In *Srinivasa Aiyangar* v. *Johnsa Rowther*[2], neither of the parties to the suit was a party to the original contract ; but what the learned Judge held in that case was " the covenant in this case is in the nature of a condition subsequent and the action is based on a breach of that condition." The covenant itself was :

" Should there arise any dispute in the matter of enjoyment of the properties specified in the deed of exchange, each shall enjoy as before their respective lands."

Section 119, it should be remembered, confers a right on the party to the contract to recover the property exchanged only in the absence of a contract to the contrary. There was such a contract to the contrary and the right and liability enforced in that suit were those that flowed from the contract and not the statutory right conferred on the parties to the contract by section 119 of the Transfer of Property Act.

In my opinion the language of section 119 as it stood before its amendment in 1929 is clear and is a specific bar to the plaintiff's claim since the plaintiff himself was not a party to the deed of exchange, Ex. P-2.

The next question is, is there anything in Ex. P-2 which can be construed to be a contract to the contrary within the meaning of section 119 of the Transfer of Property Act ? The learned advocate for the respondent pointed out that what Sitarama and Sami Ayyar purported to exchange were lands, " with all the rights and privileges therein." In the latter portion of Ex. P-2, the provision was :

" . . . . each of the aforesaid persons shall respectively hold and enjoy, according to the recitals of exchange aforesaid, the lands allotted to them, with all rights and privileges, so long as the sun and

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1. (1940) 1 M.L.J. 248. 2. (1919) I.L.R. 42 Mad. 690.

the moon last, from son to grandson and so on in succession, and with the powers of alienation, such as gift, exchange, sale, etc. . . . "

I am unable to hold that this provision in that contract, Ex. P-2, is in any way analogous to the contract which the learned Judges had to consider in *Srinivasa Aiyangar* v. *Johnsa Rowther*[1], or that the provision in Ex. P-2 is a contract to the contrary within the meaning of section 119 of the Transfer of Property Act. We are here concerned with the right of a party to invoke a specific statutory right created by section 119; that this right can be independent of rights that flow from a contract to which the rights and liabilities of seller and buyer might be traceable is obvious and seems to be specifically provided in section 119 itself, which refers to " a contract to the contrary." I am unable to hold that the reference to rights and privileges in Ex. P-2 import into that document anything more than the ordinary statutory right of a buyer and seller, or that it amounts to a contract to the contrary within the meaning of section 119 of the Transfer of Property Act.

Thus, the position is, the plaintiff cannot claim the statutory right under section 119 because he was not himself a party to the contract; he cannot claim any contractual right because there was no specific provision in the contract; and the statutory right of buyer and seller created by section 55 (2) of the Transfer of Property Act is outside the scope of section 119 of the Transfer of Property Act.

The appeal is allowed, the decree of the lower appellate Court is set aside and the decree of the trial Court is restored with costs of the appellant here and in the lower appellate Court. (Leave is refused.)

K.C. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

Kalakkathankandi Chathan .. *Petitioner**

v.

Valia Parambath Cheeru and others .. *Respondents.*

Partition Act (IV of 1893), sections 2 and 6—Partition resulting in inconvenience and uneconomic segments—Partition Act, sections 2 and 6 to be applied in such circumstances by Court.

Where in a partition of a house and garden between the claimants under the title of the original owners, two brothers of a joint family, it was found, after the exercise of actual partition by commissioners appointed for the specific purpose, that it was impracticable, impossible and uneconomic,

Held, that in the circumstances, the only course to be followed would be to order a sale of the house and garden in Court auction under section 2 read with section 6 of the Partition Act. The sharers can no doubt bid, if they so desire.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Additional District Munsiff of Tellicherry, dated 10th October, 1947, in R. I. A. No. 1470 of 1947 in O. S. No. 520 of 1946.

A. Achuthan Nambiar for Petitioner.

V. P. Gopalan Nambiar for Respondent.

The Court delivered the following

JUDGMENT.—The petitioner is the plaintiff in a partition suit in which a decree was passed for the division of a small house situated in a paramba or garden about ten cents in extent, into two shares, the plaintiff being entitled to one half, and defendants 2 to 6 who are strangers but who took an assignment of the other half share from the first defendant, who is plaintiff's brother, being entitled to the other half. Complications ensued in effecting a partition of this small house and garden, as may well be expected. Two commissioners appear to have been appointed—for what reason neither of the learned advocates can say—who appear-

1. (1919) I.L.R. 42 Mad. 690.

* C.R.P. No. 1679 of 1947. 22nd March, 1949.

to have divided the garden itself into two portions one of which they proposed to be allotted to the plaintiff and the other to defendants 2 to 6. They valued the house itself at Rs. 1,495-4-2 and proposed its allotment to the defendants... It would appear that defendant No. 1 and defendants 2 to 6 are all residing in this house. The Commissioners proposed equalisation on the defendants paying the plaintiff half the value of the house. The learned advocate for the respondents say that they are poor and are unable to pay the half share of the valuation of the Commissioner, quite apart from its being very excessive. The plaintiff filed a previous application, I. A. No. 1021 of 1947 for the sale of the entire house and garden and a division of the sale proceeds into two. This however appears to have been dismissed by the learned District Munsiff on the insistence of the defendants to a half share in the land itself to which they contended they were entitled under the preliminary decree. The next stage was the application under revision filed under section 151 of the Civil Procedure Code by the defendants 2 to 6 for a Court direction to the commissioner to auction the house as between the two sharers ; and to re-allot the garden plots among them in modification of the commissioner's proposals. The learned District Munsiff allowed this petition in substance on grounds which I am not able to appreciate.

Even on the showing of the learned advocate for the respondents, even if they purchased the house put up for auction as between the sharers, they are too poor to pay a half share of the purchase money to the plaintiff. The simple fact of the matter and one which explains all these unnecessary complications in the partition of this small house is that it is really incapable of any equitable or practicable partition into two shares in the circumstances. It is eminently a case to which section 2 of the Partition Act should be applied in which a division of this house cannot reasonably or conveniently be made and in which on the request of the plaintiff who reiterates it again here, the Court should direct a sale of the entire property and a distribution of the sale proceeds amongst the sharers. It is regrettable that section 2 of the Partition Act is so frequently ignored by executing Courts in seeking to give effect to family partition decrees and in trying to fragment land and houses into impracticable impossible and uneconomic segments. I am wholly unable to see how any partition of this small house on ten cents of land can by any stretch of language be reasonably or conveniently made in these circumstances. The only course and one which the learned District Munsiff should have given effect to in the previous application was an order for the sale of the house and the entire garden in Court auction under section 2 of the Partition Act read with section 6. This course will now be adopted. It will be open of course, to the sharers to bid, but provided they are in a position to deposit immediately half the purchase money for payment to the other sharer if successful. The lower Court will, after hearing the parties, fix a suitable upset price as required by section 6 of the Partition Act. I direct the parties on this petition to bear their own costs.

K.C. *Ordered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, AND MR. JUSTICE YAHYA ALI.

Burugu Nagayya and another .. *Petitioner**

v.

Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 42 (3)—Cases to which the relief afforded by section 42 (3) applies.

The relief afforded by section 42 (3) of the Income-tax Act, applies only to a case in which the profits and gains are deemed under section 42 to accrue or arise in British India, and not to a case in which they actually so accrue or arise or are received in British India.

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* Case Referred No. 35 of 1947. 16th August, 1948.

Case stated to the High Court by the Commissioner of Income-tax, Appellate Tribunal, Bombay, under section 92 of the Income-tax (Amendment) Act, (VII of 1939) in R. A. A. No. 108 (Madras) of 1943-44 (R. A. No. 350 of 1946-47) on its file.

M. Subbaraya Aiyar for Petitioner.

S. Krishnamachariar for Respondent.

The Judgment of the Court was delivered by

Yahya Ali, J.—This is a reference made by the Income-tax Appellate Tribunal under section 66 (1) of the Indian Income-tax Act at the instance of the assessee and the question referred is :

> " Whether in the circumstances of the case, the provisions of section 42 (3) are applicable to the profits on the sale of gold effected in British India by the assessee, a non-resident Hindu undivided family, in such manner as to override the provisions of section 4 (1) (c) and render only such portion of such profits assessable as are attributable to operations carried out in British India."

We may say at the outset that the frame of the question struck us at first sight as being not quite happy in view of the reference therein to section 42 (3) overriding the provisions of section 4 (1) (*c*). But after having heard the arguments we feel convinced that the question, for the reasons we shall state later, has been rightly framed.

The applicant is a non-resident and he has been carrying on business in gold and silver in Secunderabad outside British India. He used to purchase gold at Secunderabad and to sell the major portion of it at Bombay through brokers in that line. The rest of it used to be sold in Hyderabad itself, a small portion of it being sold locally at Secunderabad. The Bombay brokers with whom the assessee was in touch would telegraphically intimate to the assessee the current prices of gold in Bombay and thereupon advices would be sent from Secunderabad notifying to them the quantity of gold that would be available for sale at those rates. Soon thereafter gold would be sent to Bombay through a representative of the assessee who would get it assayed in the mint and give the same to the broker who after selling it paid the sale proceeds to the assessee's agent. Upon these facts the contention raised on behalf of the assessee was that the source of the business was in Hyderabad and that the purchases and other activities were also in Hyderabad. What was done in British India consisted only in the delivery of the gold and the receipt of the price. The assessment relates to the year 1941-1942 and during the accounting period the total turnover of gold was Rs. 11,20,119 and out of this the sales at Bombay to British Indian buyers were for Rs. 6,68,666 yielding a profit of Rs. 7,346. The Income-tax Officer assessed the said profits to tax on the basis of the same having accrued or arisen in British India, since the profits accrued from the sale of gold in Bombay. On appeal before the Appellate Assistant Commissioner, it was contended that the sales took place in Secunderabad where orders were placed and the prices were fixed at that place under the contract. Upon those premises it was argued that the profits from these sales did not accrue or arise in British India. An alternative suggestion was also made before the Appellate Assistant Commissioner that the appellant being a non-resident was only trading with British India and not in British India and that consequently profits attributable to transactions in British India fell to be taxed under section 42 (3) on the basis of allocation of operations. These contentions were rejected by the Appellate Assistant Commissioner and an appeal was brought against this order before the Income-tax Appellate Tribunal. There also the same two contentions were raised, but the assessee gave up before the Tribunal the first contention, namely, that the profit from the Bombay sales of Rs. 7,346 did not accrue or arise in British India. He confined himself to the second contention relating to the applicability of section 42 (3). The Tribunal did not accept this contention and dismissed the appeal. An application was made before the Tribunal under section 66 and in that application the two questions that were sought to be referred were the following :—

(*i*) Whether on the facts of the case, the sales effected to the Bombay commission merchants took place in British India or at Secunderabad and whether the income was income earned in British India and governed by section 4 (1) of the Act, or

(*ii*) Whether the profits derived from the sales made from Secunderabad to commission agents in British India are profits or gains deemed to have accrued or arisen in British India within the meaning of section 42 (1) and assessable under sub-section (3) of section 42.

In spite of his having given up the first contention before the Tribunal and the Appellate Assistant Commissioner he repeated it in his application under section 66. In answer to this application the Commissioner filed a reply and in that reply he pointed out that the first question did not arise from the order of the Bench under section 33 (4) and the assessee did not raise any objection before the Tribunal to the finding of the Appellate Assistant Commissioner that the sales of gold were effected in British India and that the income of Rs. 7,346 accrued or arose in British India. In paragraph 2 of the reply the Commissioner further pointed out that the argument relating to the second contention before the Bench, namely, as to the applicability of section 42 (3) proceeded on the accepted basis that the sales of gold actually took place in British India and that consequently the income from those sales accrued or arose in British India. In the statement of the case after setting out all that had happened before the Appellate Assistant Commissioner and before the Tribunal at the earlier stages, it is specifically mentioned that the contention relating to the income arising in British India was definitely given up before the Tribunal. It is only in consequence thereof that the reference was made only as to the applicability of the provisions of section 42 (3) and the question was framed in the specific manner in which it has been cast to emphatically bring out the position taken up by the assessee that the enactment of section 42 (3) has the effect of overriding the provisions contained in the earlier part of section 4 (1) (*c*) and renders only such portion of the profits assessable as are attributable to operations carried out in British India.

Having regard to the history set out above, we have no difficulty in holding that the assessee is precluded from putting forward the contention at this stage before us that the profits in question did not accrue or arise in British India. The argument throughout and up to the present stage had been on the footing that the profits did accrue or arise in British India, but, none the less section 42 (1) was attracted and it was necessary for the Income-tax authorities to determine that portion of the profit which is attributable to the operations carries out in British India.

To meet this singular contention it will be necessary to set out section 4 (1) (*c*) and sections 42 (1) and 42 (3). Section 4 (1) (*c*) reads :—

"Subject to the provisions of this Act, the total income of any previous year of any person includes all income, profits and gains from whatever source derived which . . . . if such person is not resident in British India during such year, accrue or arise or are deemed to accrue or arise to him in British India during such year."

Section 2 (1) runs thus :—

"All income, profits or gains accruing or arising, whether directly or indirectly, through or from any business connection in British India, or through or from any property in British India, or through or from any asset or source of income in British India, or through or from any money lent at interest and brought into British India in cash or in kind, or through or from the sale, exchange or transfer of a capital asset in British India, shall be deemed to be income accruing or arising within British India, and where the person entitled to the income, profits or gains is not resident in British India, shall be chargeable to income-tax either in his name or in the name of his agent, and in the latter case such agent shall be deemed to be, for all the purposes of this Act, the assessee in respect of such income-tax."

Section 42 (3) is in these terms :—

"In the case of a business of which all the operations are not carried out in British India, the profits and gains of the business deemed under this section to accrue or arise in British India shall be only such profits and gains as are reasonably attributable to that part of the operations carried out in British India."

It will be seen that section 4 (1) (*c*) deals with two classes of cases. The first category consists of profits accruing or arising in British India to non-residents. The second category consists of profits which are deemed to accrue or arise to non-residents in British India. It was not necessary for the Legislature to make any provision in the statute to explain the first part of the provision dealing with profits accruing or arising to non-residents, but it was necessary to indicate what kind of profits should be deemed to accrue or arise for the purposes of sub-section (*c*) of section 4 (1) and those provisions are found *inter alia* in Explanations 2 and 3 to section 4, section 2 (6-C) and section 42. It is hardly necessary to point out in this connection that "when a person is deemed to be something, the only meaning possible is that whereas he is not in reality that something, the Act of Parliament requires him to be treated as if it were"—see *Commissioner of Income-tax, Bombay* v. *Hongkong Trust Corporation, Ltd.*[1]. Likewise when certain profits are deemed to be profits for the purpose of a fiscal provision, they are not in reality profits, but they have to be deemed so for the specific purposes of the statute. Section 42 (1) comprises a number of sources or connections through or from which the profits may accrue or arise; they are deemed to be income accruing or arising within British India and will be chargeable to income-tax, if the person entitled to the income is a non-resident, either in his name or in the name of his agent. With regard to cases to which section 42 (1) applies, sub-section (3) of that section provides that if the business consists of a number of operations carried out in British India, the profits and gains of the business deemed under section 42 (1) to accrue or arise shall be only such profits and gains as are reasonably attributable to that part of the operations carried out in British India.

Mr. Subbaraya Aiyar had an insurmountable difficulty to face, having regard to the contentions raised at the earlier stages, in contending that the profits did not accrue or arise in British India. It was not possible for him to exclude the applicability of the first part of section 4 (1) (*c*) and when that part applied, there was no further need to invoke the applicability of the second part dealing with profits which are deemed to accrue or arise in British India. It is to meet the situation that he put forward the startling proposition that the effect of the enactment of section 42 was to merge all cases of income directly accruing or arising in British India into the latter category mentioned in section 4 (1) (*c*). In other words, his contention is that by creating the category of profits mentioned in section 42, virtually the first part of section 4 (1) (*c*) was abrogated, since, according to him, even profits which directly accrued or arose in British India fell to be treated under section 42 as profits deemed to have accrued or arisen in British India. The proposition has only to be put in that form to be rejected *brevi manu* as utterly unsustainable, and being opposed to the entire scheme of the Act. With regard to profits which have accrued and arisen, a distinction is made in the Act between residents and non-residents. It is provided in the case of residents that all income which accrues or arises *whether within or without British India* is taxable. In the case of non-residents, income which accrues or arises or is deemed to accrue or raise in *British India alone* is taxable (apart from cases covered by section 4 (1) (*a*) which apply to residents and non-residents alike) and it is only to define in what cases income, profits and gains are deemed to accrue or arise that provision is made in section 42 and in other sections. We may here refer to the observations of Sir Iqbal Ahmad, C.J., in *Hira Mills, Ltd.* v. *Income-tax Officer, Cawnpore*[2]:

> "We think on construction alone that it is quite clear that the relief afforded by section 42, sub-section (3), applies only to a case in which the profits and gains are deemed under section 42 to accrue or arise in British India, and not to a case in which they actually so accrue or arise or are received in British India."

The question is therefore answered accordingly. The applicant will pay to the Commissioner the costs of this reference Rs. 250.

V. S. ——— *Reference answered.*

1. (1930) 4 I.T.C. 312.
2. (1946) 14 I.T.R. 414.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Kalachitti Bhimavva .. *Appellant**

v.

Gurikara Nagappa and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 21, *rules* 63 *and* 103—*Facts to be proved in suits under—Distinction.*

In a suit under Order 21, rule 63, Civil Procedure Code, the onus is very heavy on the defeated claimant to prove affirmatively his case. There is one distinction between what has to be proved in a suit under Order 21, rule 63 and that in a suit under Order 21, rule 103, Civil Procedure Code. So far as the class of suits contemplated by the latter provisions is concerned, the Code lays down affirmatively that the plaintiff should prove his title. So far as suits under Order 21, rule 63 are concerned all that the Code requires is that the plaintiff should prove the right to possession. The question of title is not intended to be so elaborately gone into as in a case under Order 21, rule 103, Civil Procedure Code.

Appeal against the decree of the District Court, Bellary, in A.S. No. 16 of 1945 preferred against the decree of the Court of the District Munsiff, Hospet, in O.S. No. 575 of 1942.

P. Chenchiah for *V.S. Narasimhachari* for Appellant.

C. Vasudevan for Respondents.

The Court delivered the following

JUDGMENT.—In a small cause suit, S.C. No. 219 of 1939 on the file of the District Munsif's Court, Hospet, the present appellant obtained a decree for a sum of money against one Obavva, the third defendant in this suit and another Bhimappa, the second defendant in this suit. On his attaching survey No. 601 in Kadligi village as belonging to Obavva, certain persons claimed those properties. One Muddabappa a cousin of Obavva claimed by E.A. No. 842 of 1941 his right to possession of a part of the property and that claim was allowed by the District Munsiff. No further proceedings have been taken to get that order set aside under Order 21, rule 63, Civil Procedure Code and it has hence become final. The three uncles of Obavva, being her father's step-brothers filed a claim petition stating that they are entitled to the rest of the property. This claim was enquired into by the District Munsiff who rejected it and thereupon the claimants as plaintiffs filed O.S. No. 575 of 1942 out of which this second appeal has arisen.

Both the lower Courts have upheld the plaintiffs' claim and decreed the suit as prayed for. The District Munsif in a fairly elaborate and considered judgment discusses the oral and documentary evidence on the side of the plaintiffs and the defendants. In paragraph 5 he mentions the various salient facts spoken to by P.Ws. 2, 3, and 4. In paragraph 6 of his judgment he contrasts the evidence on the side of the defendants with that of the plaintiffs and finally at the end of that paragraph comes to the conclusion that the oral testimony as regards possession and enjoyment is both in quality and quantity in favour of the plaintiffs' case. Thereafter the learned District Munsiff adverts to the documentary evidence in the case and devotes some space to the recitals contained in Ex. P-2 which is a patta in the joint names of the three plaintiffs and Obavva. According to the trial Court, in the absence of other evidence to show how Obavva's name came to be included in the patta it was impossible to accept that document at its face value as establishing the right of Obavva. Then the learned District Munsif went into the probative value of Exs. P-3 and P-4 and came to the conclusion that these documens also helped the plaintiffs' case. It is not as if he did not discuss the defendants' documentary evidence though the same was rather meagre and scanty as it consisted only of two documents. The sum and substance of the learned District Munsif's discussion was the finding that the plaintiffs had established their case.

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* S. A. No. 897 of 1946. 17th March, 1949.

The learned District Judge Mr. Mack, as he then was, devoted paragraph No. 2 in his judgment to a discussion of the evidence The learned Judge came to the conclusion that the learned District Munsif was right. He did not specifically or distinctly discuss or give a finding as regards the credibility of the oral evidence on either side but a perusal of paragraph 2 of his judgment shows that he was in entire agreement with the reasons given by the learned District Munsiff as well as the substance of his final conclusions. The learned Judge was of opinion that Ex. P-2 to some extent established the case of the plaintiffs. The same, according to him, should be the result of the consideration for Exs. P-3 and P 5. In the end he confirmed the judgment and decree of the learned District Munsif and dismissed the appeal.

Mr. Chenchiah, the learned advocate for the appellant, strenuously attacks this finding of fact basing his argument on the well-known proposition of law that in a suit under Order 21, rule 63, Civil Procedure Code, the onus is very heavy on the defeated claimant to prove affirmatively his case. There is one distinction between what has to be proved in a suit under Order 21, rule 63 and that in a suit under Order 21, rule 103, Civil Procedure Code. So far as the class of suits contemplated by the latter provision is concerned, the Code lays down affirmatively that the plaintiff should prove his title. So far as suits under Order 21, rule 63 are concerned all that the Code requires is that the plaintiff should prove the right to possession. This distinction is not often kept in view by the Courts. In the present case we have the evidence of the plaintiffs' witnesses especially of the karnam of the village, P.W. 4 that the plaintiffs have been in possession of these properties for nearly 15 years. That would establish their right to possession. The question of title is not intended to be so elaborately gone into as in a case under Order 21, rule 103, Civil Procedure Code. Mr. Chenchiah relies upon the fact that in Ex. P-2 in addition to the names of the three plaintiffs being mentioned as pattadars the name of Obavva is also given as the joint fourth pattadar. According to him that would indicate that Obavva also had a right to the suit property. I am inclined to agree with the learned District Munsiff that in the absence of any explanatory oral evidence as to how this Obavva's name came to be included in this document it is very difficult to hold that she had any positive right to the property. It would have been much better if the learned District Judge had discussed the oral evidence in the case before he dismissed the appeal after concurring with the judgment of the learned District Munsif; but all the same I am not satisfied that the learned District Judge has erred in law in coming to the conclusion he did on the facts of the case. I am, therefore, of opinion, that the decision of both the Courts below is correct and that this second appeal should be dismissed but in the circumstances without costs. The second appeal is accordingly dismissed without costs. No leave.

V. S. *Appeal dismissed*

[THE FEDERAL COURT OF INDIA.]

PRESENT :—H. J. KANIA, *Chief Justice*, S. FAZL ALI, M. PATANJALI SASTRI, MEHRCHAND MAHAJAN AND B. K. MUKHERJEA, JJ.

[Appeal under the Federal Court (Enlargement of Jurisdiction) Act, 1947 from the High Court of Judicature at Fort William in Bengal.]

Jiban Krishna Das .. *Appellant**

v.

Jitendra Nath Das and others .. *Respondents.*

Partition suit—No specific prayer for administration but all material facts mentioned in plaint—Dismissa on ground that administration was not completed—Propriety—Will—Construction—" Sons of my said two son X and Y shall get all the properties "—Grandsons, if take per stirpes *or* per capita.

* Civil Appeal No. V of 1948. 16th December, 1948.

Though ascertainment of residue after completion of administration is certainly a pre-requisite to a claim for partition, where the material facts have all been set out in the plaint and there being nothing in law, which stands in the way of combining prayers for administration and partition in one and the same suit, to throw out a suit for partition on the technical ground that there is no specific prayer for administration in the plaint would not serve the ends of justice. The defect in the plaint could be cured by a slight amendment and the residue could be ascertained in that suit itself and a proper decree for partition made.

A Hindu testator governed by the Bengal School of law disinherited by his will his two sons *X* and *Y* and after giving certain legacies to his two daughters and making provision for his wife, marriage expenses of his grandchildren, etc., provided for the residue as follows : " The sons of my said two sons *X* and *Y* shall get all the properties." At the time of the testator's death there were three sons of *X* and one son of *Y* in existence. On a question whether the grandsons took the property *per stirpes* or *per capita,*

Held, by the majority (Mehrchand Mahajan *contra*) : As the residuary estate has been given to all the grandsons of the testator, though they are the sons of different parents, they constitute only one class whose relationship to the testator is identically the same. The grandsons take as one class and there is no scope for the application of the *per stirpes* rule in such cases and they take only *per capita.*

Per Mehrchand Mahajan : There are sufficient indications of a different intention in its context to justify the distribution of the residue amongst the sons of the sons *per stirpes.* The general rule applicable to class gifts stands displaced accordingly. Hence in the distribution of the estate the rule applicable would be *per stirpes* and not *per capita.*

Principles governing construction of wills stated.

Rule applicable to class gifts elaborately discussed.

Panchanan Ghosh, Senior Advocate, Federal Court (*B. Banerjee,* Advocate, Federal Court and *S. C. Mitter,* Advocate, Calcutta High Court, with him), instructed by *P. K. Chatterjee,* Agent, for Appellant.

N. N. Dalal, Senior Advocate, Federal Court (*S. N. Mukherjee,* Advocate, Federal Court, with him), instructed by *P. K. Bose,* Agent, for Respondents.

The Court delivered the following

JUDGMENTS : *The Chief Justice.*—I have read the judgment prepared by Mukherjea, J. I agree with the reasoning and conclusion of that judgment and have nothing to add.

Mukherjea, J.—This appeal is directed against a judgment of a Division Bench of the Calcutta High Court dated the 14th of November, 1944, by which the learned Judges reversed a decree of dismissal made by the Subordinate Judge, First Court, Alipore, in a suit for partition and accounts.

The material facts are not controverted and may be briefly stated as follows. The properties which are described in the schedules to the plaint belonged admittedly to one Kedar Nath Das, who died on December 18, 1920, leaving behind him a will which was executed on July 5, 1916. The near relatives of Kedar who survived him were his wife Golapmoni, two sons—Bejoy Sashi and Benoy Sashi—and two daughters Hemnalini and Mrinalini. There were four grandsons also born during the lifetime of the testator and actually in existence at the date of his death, three of whom were sons of Bejoy Sashi and one of Benoy Sashi. By his will, the testator disinherited both his sons. The younger son Benoy Sashi was given an allowance of Rs. 50 per month. A similar allowance was given to the family of Bejoy Sashi but not to Bejoy Sashi himself; and after giving certain legacies to his two daughters and making provisions for his wife and the education and marriage expenses of all his grandchildren, the testator gave the entire residuary estate to the sons of his two sons.

It appears that after the death of the testator, neither of his two sons took any steps for taking out probate of his will; on the other hand, they applied for and obtained a Succession Certificate for collecting the debts due to the deceased on the footing that he died intestate. On July 31, 1922, Bejoy Sashi died. On September 4, 1933, Hemnalini the elder daughter of the testator filed an application in the Court of the District Delegate at Alipore for Letters of Administration in respect of the estate of her deceased father with a copy of the will annexed.

This application being opposed by Benoy Sashi, it was returned to the applicant and was refiled in the Court of the District Judge at Alipore, where it was registered as a contested suit. During the pendency of these proceedings, the three sons of Bejoy Sashi filed, as plaintiffs, a suit for partition and accounts in the Court of the Subordinate Judge, 24 Parganas and it is out of this suit that the present appeal has arisen. Jiban Krishna, the minor son of Benoy Sashi, is the first defendant in the suit and Benoy Sashi himself figured as defendant No. 2, though he died pending the hearing of the suit. The other two defendants are Hemnalini and Mrinalini, the two daughters of the testator, to whom certain legacies were given by the will. Golapmoni, the widow of the testator, was already dead when the suit was instituted. As the proceedings for Letters of Administration were, at the date of the institution of the Partition Suit, still pending before the Probate Court, the reliefs prayed for by the plaintiffs were cast in an alternative form. It was prayed in the first place that if the Probate Court pronounced in favour of the will, the plaintiffs, as the three grandsons of the testator, were entitled to separate possession, by partition, of a three-fourths share of the residuary estate of the testator after excluding the legacies payable under the will, and the defendant No. 1 was entitled to the remaining one-fourth share. The alternative prayer was that in case the decision of the Probate Court was against the existence or genuineness of the will and the properties of Kedar were to devolve as on intestacy, the plaintiffs were entitled to half share of the entire property, the other half going to defendant No. 1.

The records show that on the application of Benoy Sashi, the hearing of the Partition Suit was stayed pending the disposal of the proceeding for Letters of Administration in the Probate Court. This proceeding ended in the Court of the Subordinate Judge at Alipore on March 25, 1936 and Letters of Administration, with a copy of the will annexed, were granted to Hemnalini. Against this order, an appeal was taken by Benoy Sashi to the Calcutta High Court and the appeal was dismissed on January 27, 1938. After this, the Partition Suit instituted by the plaintiffs proceeded and on the application of the plaintiffs, the description of Hemnalini, who was defendant No. 3 in the suit, was altered and she was described as Administratrix to the estate of late Kedar Nath Das. Written statements were filed both by Hemnalini as well as by Jiban Krishna, the defendant No. 1. The defence raised was substantially of a two-fold character. In the first place, it was contended that the plaintiffs as residuary legatees could not claim partition as against the Administratrix in possession of the estate so long as administration was not completed and the residue was not ascertained. The other defence was that on a proper construction of paragraph 4 of the will, the share of the three plaintiffs in the residuary estate would be one-half and not three-fourths as claimed by them.

The Subordinate Judge, who heard the suit, accepted both these contentions and the plaintiffs' suit was dismissed. It was held by the Subordinate Judge that as administration of the estate was not complete and legacies had not been paid off, the estate was still in the Administratrix and the plaintiffs had not acquired title to any ascertained residue on the basis of which they could claim partition. As the suit was dismissed on this preliminary ground, it was, strictly speaking, not necessary for the trial Judge to go into the other question raised in the suit. The Subordinate Judge, however, for the purpose of giving completeness to his judgment dealt with the question of construction of the will and held that the grandsons of the testator were under the terms of the will entitled to share the residuary estate *per stirpes* and not *per capita*. The result, therefore, was that the plaintiffs, according to the decision of the learned Subordinate Judge, were entitled to 8 annas' share in the residuary estate and the other 8 annas' share was to go to the defendant No. 1.

Against this decision, an appeal was taken by the plaintiffs to the High Court of Calcutta and the appeal was heard by a Division Bench consisting of Mitter and Khundkar, JJ. The learned Judges allowed the appeal differing from the Court below on both the points mentioned above.

On the first point, the High Court held that it was amply proved from the materials on the record that the debts of the testator had been paid off long ago and all his assets were realised. The directions in the will relating to the education and marriage expenses of the testator's grandchildren were also carried out and the wife of the testator being already dead, there was no question of paying her any allowance as directed by the will. There remained only the two legacies payable to the two daughters. As regards Hemnalini, the elder daughter, who was given as her legacy G. P. Notes of the face value of Rs. 6,000, it was pointed out by the High Court that on her obtaining the Letters of Administration, she got possession of all the G. P. Notes belonging to the testator, and out of them she gave G. P. Notes of the face value of Rs. 6,000, which was precisely the amount she was entitled to under the will, as security for the due administration of the estate. In substance, therefore, Hemnalini in her capacity as Administratrix gave assent to the legacy in her favour. So far as Mrinalini, the other daughter, was concerned, the will provided for her, 3 cottas of land out of a larger area situated at 47, Paddopooker Road and a sum of Rs. 500 in cash. The evidence showed that the Administratrix had in her hands funds much exceeding the sum of Rs. 500 and to complete the administration, the only thing necessary was to pay over the sum of Rs. 500 to Mrinalini and to demarcate the 3 cottas of land that were given to her by the will. In these circumstances, the High Court held that it would not be right to throw out the suit on the ground that it was premature and drive the plaintiffs to bring a fresh suit for administration and partition. The defect in the plaint could, according to the learned Judges, be cured by slight amendment and in this very suit the residue could be ascertained and a proper decree for partition made. On the other point, the High Court held disagreeing with the trial Judge that the words used by the testator in his will did not show that he intended his grandsons to take his estate *per stirpes* and not *per capita*. The plaintiffs, therefore, were entitled to have three-fourths of the residuary estate in their shares, the remaining one-fourth to be allotted to defendant No. 1.

The result was that the appeal was allowed and the case was sent back to the trial Court. The plaintiffs were given liberty to amend the plaint within a certain time and on the plaint being amended, the trial Judge was to proceed with the suit and make an order for partition on the lines indicated in the judgment of the High Court.

Against this decision, the defendant No. 1 obtained leave to appeal to His Majesty in Council. The records, however, were not transmitted to England prior to the passing of Act I of 1948 which enlarged the jurisdiction of this Court. The records accordingly came to this Court, and the petition of appeal was filed by the appellant in June, 1948. Mr. Panchanan Ghosh appearing in support of the appeal has reiterated both the points upon which the High Court decided adversely to his client.

So far as the first point is concerned, it seems clear that there are no merits in the contention of the appellant. Technically it is true that the properties have not yet vested in the plaintiffs as the legacies have not been fully paid and the residue ascertained. That is no reason, however, to drive the plaintiffs to institute a fresh suit for administration and partition. There could be a specific prayer for administration added to the plaint in the present suit and as circumstances show, very little is necessary to complete the administration. No question of limitation arises in this case and I cannot accept the contention of Mr. Ghosh that in giving the plaintiffs an opportunity to amend the plaint, the High Court really allowed them to substitute one cause of action for another. Ascertainment of residue after completion of administration is certainly a pre-requisite to a claim for partition but the material facts were all set out in the plaint and there is nothing in law which stands in the way of combining prayers for administration and partition in one and the same suit. As a matter of fact, there was a prayer for partitioning the estate, after excluding the legacies payable under the will, in the plaint as it originally stood. The respondents have stated in their case filed in this Court that the legacy

to Mrinalini has already been paid, and the ascertainment of the residue is now a mere formal matter. As the Judicial Committee observed in *Ma Shwe Mya* v. *Maung Mo Hnaung*[1] :

"The rules of procedure are nothing but provisions intended to secure the proper administration of justice, and full powers of amendment must be enjoyed and shold be liberally exercised to serve that purpose."

To throw out a suit for partition on the technical ground that there is no specific prayer for administration in the plaint would not, I think, serve the ends of justice at all. I have no hesitation, therefore, in holding against the appellant on the first point raised by his learned Advocate.

The second point raised by Mr. Ghosh involves a question of construction of the will, and the question is whether on a proper interpretation of the terms of the will, the residuary estate that is bequeathed to the sons of the two sons of the testator is to be distributed amongst them *per capita* or *per stirpes*.

The trial Court held that the gift was not to a 'class' and that the intention of the testator was that his estate should go in two equal halves to the sons of his two sons. There is indeed nothing stated definitely in the will as regards this method of distribution but the Subordinate Judge points out that in construing a will executed by a Hindu it is quite legitimate to take into consideration the ordinary notions and wishes of a Hindu ; and as according to the Bengal School of Hindu Law, which governs the parties, the grandsons take his share of their own father, it may be presumed that the testator had in his mind this normal mode of division according to the law of succession when there was nothing in the will to indicate a contrary intention. This construction, according to the Subordinate Judge, receives support from another provision in the will which gives the same amount of monthly allowance to the families of the two sons of the testator. This view was not accepted in appeal by the High Court and the learned Judges of the High Court are of opinion that in the absence of any specification of shares, the interest of all the grandsons must be held to be equal. According to the learned Judges, there is nothing in the body of the document or in the surrounding circumstances which would go to show that the intention of the testator was that his grandsons would get the residuary estate *per stirpes*. The question for our consideration is whether or not the view taken by the High Court is correct.

Now all the authorities agree, that in construing a will the cardinal maxim to be observed is that the Court should, in all cases, endeavour to ascertain the real intention of the testator. The intention means the intention which the will itself by express words or by implication declares, and the primary duty of the Court is to ascertain from the language of the entire document what the intentions of the testator are. The meaning to be attached to the actual words used may certainly be affected by surrounding circumstances and in interpreting the language, the Court has got to bear in mind other matters than mere words used. As was observed by their Lordships of the Judicial Committee, the Court must consider the surrounding circumstances, the position of the testator, his family relationships, the probability that he would use words in a particular sense and many other things which are often summed up in the somewhat picturesque figure :

"The Court is entitled to put itself into the testator's arm-chair," (vide *Narasimha* v. *Parthasarathy*[2]).

Amongst such surrounding circumstances, the Court in construing the will of a Hindu is competent to take into consideration what are known to be the ordinary notions and wishes of a Hindu with respect to the devolution of property, and a testator may be presumed to have made the bequest with these ideas in his mind (vide *Mahomed Shumsool* v. *Shewakram*[3] and *Radha Prosad* v. *Ranimoni*[4]). These

1. (1921) L.R. 48 I.A. 214 : I.L.R. 48 Cal. 832 (P.C.).
2. (1913) 26 M.L.J. 411 : L.R. 41 I.A. 51 : I.L.R. 37 Mad. 199 (P.C.).
3. (1874) L.R. 2 I.A. 7 (P.C.).
4. (1908) 18 M.L.J. 287 : L.R. 35 I.A. 118 : I.L.R. 35 Cal. 896 (P.C.).

surrounding circumstances are relevant, however, for the purpose of putting the right interpretation upon the actual words used by the testator and it is from these words alone that the intention of the testator has got to be gathered.

These propositions are too well settled to require any discussion. The technical rules of construction adopted by the English Courts which have grown up under a special law of property and an artificial system of conveyancing, are, no doubt, not of much assistance in construing the wishes of a Hindu who views most transactions from a different standpoint, and may presumably be altogether ignorant of these rules. But a rule of construction which is not based on any technicality of English law and is helpful to Court in getting at the substance of the intention of the parties can certainly be invoked even in construing a Hindu will. It is well known that many of the rules of construction of wills which have been embodied in the Indian Succession Act and made applicable to Hindus are based upon decisions of English Courts.

I will now examine the contents of the will in the present case in the light of the above principles.

The will is a short document and is divided into five paragraphs. In the preamble, the testator gives his reason for making a will. He says that as there is a chance of all his properties being ruined if they fall in the hands of his sons, it became necessary for him to make a will. The terms of the will are set out in the five paragraphs that follow.

The first paragraph relates to the appointment of executors and three person were appointed executors, none of whom were related to the family. In the second paragraph, the testator makes provision for his two daughters. The elder Hemnalini was given G. P. Notes of the face value of Rs. 6,000 and the younger Mrinalini was to get 3 cottas of tankfilled land out of a larger area situated at 47, Paddopooker Road and a sum of Rs. 500 in cash. The third paragraph provides *inter alia* that Golapmoni, the widow of the testator, was to enjoy during her lifetime the interest on G. P. Notes of the face value of Rs. 10,000 which were kept in deposit with Army and Navy Co-operative Stores, Ltd., by way of security on behalf of a friend of the testator who was an employee in that firm. After the widow's death, this money was to go to the estate. There is also a small provision for charity in this paragraph. The fourth paragraph is most important for our present purpose and it runs thus :

> " I have two sons Bejoy Sashi Das and Benoy Sashi Das. My elder son Bejoy Sashi Das is a man of very loose moral character and is addicted to drinking and prostitutes. I, therefore, think that if any property is given to him, it will be lost. My younger son Benoy Sashi has no sense of right or wrong and is of extremely irritable disposition. So I think that they may at any time do some thing wrong, or waste the properties. Hence, the sons of my said two sons Bejoy Sashi and Benoy Sashi shall get all the properties. Bejoy Sashi Das shall get nothing. His wife and children—such of them as will remain alive—shall get a monthly allowance of Rs. 50 and my youngest son Benoy Sashi Das shall get a monthly allowance of Rs. 50. Be it also stated that the marriages of their sons and daughters shall be performed from this estate."

Then follow certain directions regarding the marriage and education expenses of the grandchildren and the paragraph ends by saying that if the testator's wife does not pull on well with his sons or their families, the wife would have the right to reside in the family dwelling house at 56, Landsdowne Road and the sons or their families would have to shift elsewhere for their residence. The fifth and the last paragraph lays down that if any of the properties disposed of by the will are acquired by Government, the executors shall purchase other properties with the compensation money which would be held subject to the same terms and conditions as are given in the will.

To determine whether the testator intended his residuary estate to be divided *per capita* or *per stirpes* amongst the grandsons, it is necessary, in the first place, to look closely into the language of the will for it is from the words actually used by the testator that his intention has primarily to be gathered. The language used by the testator in making the bequest to his grandsons is very simple. The words are:

"The sons of my said two sons Bejoy Sashi and Benoy Sashi shall get all the properties."

The plain meaning of the words obviously is that everyone who would stand in the relation of a son to either of the two sons of the testator at the time of distribution would be entitled to get the properties left by him. It is not disputed, that when a gift is made in favour of a number of persons either individually or as members of a class, each of them in the absence of any specification of shares will take an equal interest in the property given. *Prima facie*, therefore, the grandsons of the testator would take the residuary estate *per capita* and not *per stirpes* unless a contrary intention is deducible from the will. On behalf of the appellant stress is laid upon the fact that the testator uses the expression "sons of two sons" and does not describe the objects of his bounty as 'grandsons' simply. The suggestion is that the sons of the two sons do not form a class to whom the gift is made. It appears that the trial Judge in his judgment expressed an opinion that in the present case the gift could not rank as a gift to a class and as some arguments were advanced before us on this point by the learned lawyers on both sides, it is necessary, I think, to examine the matter a little more in detail.

A gift to a "class" as distinguished from a gift to individuals has a well-recognised meaning in law. The expression undoubtedly has its origin in English Courts, but it has been adopted in the Indian Succession Act, and the provisions relating to it are applicable to the Hindus also. As was said by Lord Cottenham :

"A gift to a class implies an intention to benefit those who constitute the class, and to exclude all others; but a gift to individuals described by their several names and descriptions, though they may together constitute a class implies an intention to benefit the individuals named." (vide *Barber* v. *Barber*[1]).

Important legal consequences flow from this distinction. Thus the addition or diminution of members does not affect a class, the share of each being dependent upon the ultimate number of persons. Again in case of death of a member of the class, the legacy does not lapse but passes by survivorship to the other members. These matters, however, are hardly relevant for our present enquiry. It is not the contention of the appellant that the gift in the present case is a gift to individuals as distinguished from a class, and even if that be so, the position of the appellant would not in any way be improved. What the appellant really wants to say is that the sons of the two sons of the testator constitute two classes and not one, and there may be equal division only between these two classes *inter se* but not between the individuals comprised in them as they do not form a single class. This contention, I think, cannot be accepted as sound. Ordinarily, a class gift means gift to a class of persons who are included and comprehended under some general description and bear a certain relation to the testator. The true test is, however, the intention of the testator and the gift would rank as a class gift if the testator intended that the donees should take as a class. There are instances again of "composite class," recognised in English law such as when a gift is made to the children of *A* and the children of *B* (per Lord Davey in *Kingsbury* v. *Walter*[2]). In the case before us the sons of the two sons of the testator do come under a general description and do bear the same relation to the testator. I do not think that because they were described not as 'grandsons' simply but as 'sons of two sons,' it should be held that the testator intended them to take as two distinct classes and not one. The testator certainly intended that after his sons were excluded, his grandsons as a class should get his properties. The decision of the House of Lords in *Kingsbury* v. *Walter*[2] referred to above would be an instructive case in point. Here the gift was to *A* and the child or children of *B*. *A* was a niece of the testator being the daughter of a sister of his and *B* was another sister. *A* died during the testator's lifetime. It was held that the bequest did not lapse as the intention of the testator was to make one class of nephews and nieces and the gift was to that class. It was held by the Bombay High Court in *Khimji* v. *Morarji*[3], that the expressions 'sons of

1. (1838) 3 My. & Cr. 688 : 40 E.R. 1091.
2. (1901) A.C. 187, 192.
3. (1897) I.L.R. 22 Bom. 533.

sons' and 'daughters of sons' should be treated as denoting a class; and even 'wives of sons' would form a class amongst the Hindus as polygamy is permissible under Hindu Law. This view seems to me to be perfectly sound. On the language of the will in the present case, I have no hesitation in holding that the bequest was to the testator's grandsons as a class and all the members of the class would take *per capita* unless different shares were indicated in the will.

Questions have frequently arisen before the Courts in England as to whether division should be capital or stirpital when a gift is made to a number of donees taking as a class or combination of classes. Thus a gift may be made to one person and the children of another, or it may be made to the children of several persons, and the general rule that is followed in such cases is that *prima facie* and apart from the context or special circumstances the division shall be *per capita* and not *per stirpes* (vide In re *Daniel*: *Jones* v. *Michael*[1]). The *prima facie* rule can however be displaced by the language of the instrument or any surrounding circumstance which indicates an intention to divide the gift *per stirpes*. The authorities on this subject are numerous, and I will advert only to some of the recent pronouncements upon it for the purpose of determining, if possible, the general principles that guide the English Courts in such matters.

It happens frequently that bequest is made of property to be divided equally between *A* and the children of *B*. If *A* and the children of *B* belong to the same generation or are equally related to the testator, it has been held in In re *Alcock*[2] that the *prima facie* rule of capital distribution would not be displaced. The position might be otherwise if *A* was a stranger to the testator whereas *B* was his brother or sister, or if *A* was of a different or higher generation from the children of *B*, and such circumstance might indicate that division *per stirpes* was intended. When a gift is made to one brother or sister of the testator along with the children of the other brothers and sisters a stirpital division is ordinarily indicated, for the testator must be deemed to have intended to benefit the families of all his brothers or sisters equally and a capital division would work injustice in such cases. This principle can be well illustrated by reference to two very recent decisions of the English Courts. In re *Daniel* : *Jones* v. *Michael*[1] a testatrix by her will directed the residue of her estate

> "to be equally divided between my sister *M.A.M.*, should she predecease me her children to benefit in her share, the children of my deceased sister *E.T.* and the children of my deceased brother *T.E.*"

The testatrix was survived by her sister *M. A. M.*, three children of the deceased sister *E. T.* and two children of her deceased brother *T.E.* It was held that the division should be *per stirpes* and *M. A. M.* would get one-third of the residuary estate. If capital division was directed in such cases, *M. A. M.* would get only a sixth share in the estate and that sixth share would devolve on her children in case she predeceased the testatrix. The intention was clearly to benefit the families of the three sisters and hence stirpital division was the proper rule to apply.

The other decision which is still more recent is to be found reported in In re *Hall*[3]. Here a testatrix by her will give half of the estate to one of her sisters, and a legacy of £100 to one *E. P.* and directed the residue to be divided equally between her sister *M* and her niece '*I*' and her children. This '*I*' was the only child of another sister of the testatrix. Harman, J., held that the *prima facie* rule would yield here to the special circumstances of the case and *M* would get half of the residuary estate, the other half going to the niece of the testatrix and her children. Stress was laid by the learned Judge on the existence of a comma after *M*, and it was said that

> "the distribution being a family distribution a stirpital rather than a capital distribution was intended."

1. (1945) A.E.R. 101.
2. (1945) 1 Ch. 264.
3. (1948) 1 Ch. 437.

The testatrix obviously intended not to benefit *M* the individual only, but her family as well and it would be inequitable if one of the sisters who herself might have several children of her own be given a *per capita* share with the niece and her children. In a family distribution the essential thing is that the gift is meant not merely for the individual legatee but for his or her children as well. The rights of the children to step into the shoes of the parent may be expressly mentioned in the instrument or that might be the implication of the grant. When, however, the children of different parents are mentioned together as one single group or class they must take *per capita* unless there is any other indication of an intention to divide the gift *per stirpes*. There are numerous authorities in support of this proposition[1] and it is covered entirely by the decision in In re *Dale*[2]. In this case there was a gift by the testator of certain proceeds of sale to

"be divided equally between the children of my son *A*, and my daughter *B*."

The gift was construed to be one for the testator's grandchildren comprising the children of both his son and his daughter, and it was held that all of them would take *per capita*.

The principle is that when all the objects of the testator's bounty belong to the same class and bear the same degree of relationship to the testator, it should be presumed that unless the testator makes any distinction between them they are to share the gift equally between them. This would be a case of individual and not of family distribution and the *per stirpes* rule would not be the proper rule to apply.

In the case before us the residuary estate has been given to all the grandsons of the testator, and although they are sons of different parents, they constitute only one class whose relationship to the testator is identically the same. If the gift had been to the sons of the testator and their children or if it had been to one of the sons and the children of the other *per stirpes* rule would certainly have been applicable according to the principles discussed above. As the sons are eliminated altogether there is no further question of stocks of families. The grandsons take as one class and there is no scope for the application of the *per stirpes* rule in such cases.

In my opinion, the present case comes directly within the purview of the principle enunciated in In re *Dale*[2]. The distribution, therefore, should be capital distribution unless it is shown that there are other circumstances from which a different intention can be gathered. I will now examine these other circumstances upon which reliance has been placed by the learned Advocate for the appellant.

I am not impressed by the argument of Mr. Ghosh that the testator's only intention in executing the will was to disinherit his two sons, and bequeath his properties to his grandsons, so that they might take them in the same way as they would do on intestacy.

It is quite true that the testator was very much apprehensive of the fact tha his properties might be wasted if they were to devolve upon his two sons after his death, and it was his intention certainly that none of his two sons should get his properties. But the entire provisions of the will do not, in my opinion, indicate that the testator intended that after his two sons were excluded, his properties should devolve in the same way as they would on intestacy. On the other hand, they go to show that when the testator did execute a will he attempted to make what he considered to be a better and more equitable distribution of his properties than would be possible under the law of intestacy. In the first place, he does not give the entire estate to his grandsons who would be his next heirs after the sons. They get only the residuary estate after the legacies are paid off. The testator has given substantial legacies to both of his daughters, who would get nothing under the law of inheritance. In the second place, he has set apart a fund however small for charity and the provisions made for the wife are also different from what

1. *Vide* Halsbury's Laws of England, 2nd Edn., Vol. 34, p. 357.

2. (1931) 1 Ch. 357.

she would be entitled to under the Hindu law after the death of her husband. She has been given the interest on G. P. Notes of the face value of Rs. 10,000 during her lifetime and a right of residence in the family dwelling house. Under the Hindu law applicable to the parties, she would be entitled to a share when a partition took place between her sons or grandsons and this right obviously she could not exercise after the will. In the third place he has expressly provided for defraying the marriage and education expenses of all his grandchildren from out of the estate. No distinction has been made in this respect between the families of the two sons. These directions are certainly inconsistent with the idea of giving the grandsons all they were entitled to as intestate heirs under the Hindu law.

The fact that a sum of Rs. 50 was given as monthly allowance both to Benoy Sashi as well as to the family of Bejoy Sashi does not, in my opinion, throw any light on the question as to whether the testator intended that his grandsons should take the property *per stirpes* or *per capita*. If there had been a direction by the testator for application of the annual income of his properties equally among the two sets of grandsons until the distribution took place, it would certainly have afforded an indication of his intention that the actual distribution should also be a stirpital distribution. There is, however, no such direction in the will. These monthly allowances do not by any means represent the income of the estate nor are they given to the two sets of grandsons. It is also not clear whether the directions regarding the payment of these allowances are to be in force only so long as the estate is not distributed. It is difficult to see what is the period of distribution which the will contemplates. If it is the date of the testator's death, these monthly allowances to Benoy Sashi and the family of Bejoy Sashi would apparently remain charged on the residuary estate and would have to be paid even after the sons of the two sons get the estate. If distribution is to be postponed till both the sons are dead, the maintenance allowance in favour of Benoy Sashi would undoubtedly cease but there is nothing in the will to show that the liability to pay the sum of Rs. 50 to the family of Bejoy Sashi will not still remain. The will is apparently obscure on many points and no argument, in my opinion, can be founded on this provision for monthly allowances as indicating the way in which the testator intended his grandsons to take the property.

I will now advert to the argument upon which considerable stress was laid by the learned Advocate for the appellant, namely, that in construing a Hindu will, the Court should take into consideration the ordinary notions and wishes of a Hindu in respect to devolution of property. It is argued that as under Hindu law in case of division of grandfather's property, the grandsons take *per capita* and not *per stirpes*, the testator must have had that idea in his mind when he made the dispositions in favour of his grandsons. The presumption, therefore, will be that he intended his grandsons to take the property *per stirpes* unless a contrary intention appears from the body of the will. I do not think that this contention really assists the appellant in the present case.

The case of *Mahomed Shumsool* v. *Shewukram*[1] is possibly the earliest pronouncement of the Judicial Committee, where it was authoritatively laid down that in construing a Hindu will the ordinary notions and wishes of a Hindu as regards devolution of property would be a legitimate matter for consideration. The proposition was affirmed and reiterated in the subsequent case of *Radha Prosad* v. *Rani Mani*[2]. In *Shumsool's case*[1], a Hindu inhabitant of Bihar executed a document of a testamentary character, by which he made a gift of his ancestral properties in favour of his widowed daughter-in-law Rani Dhun Kowur. The testator had already lost his wife and only son, and his brother and brother's wife were also dead at the time when the document was executed. The only near relatives he had at that time were his widowed daughter-in-law Rani Dhun Kowur and two daughters

1. (1874) L.R. 2 I.A. 7.
2. (1908) L.R. 35 I.A. 118 : I.L.R. 35 Cal. 896 : 18 M.L.J. 287 (P.C.).

of his son born of her *to wit* Mussummat Shitaboo and Bebee Dularee. After reciting the deaths of his wife, son and brother, the testator said

"except Mussummat Rani Dhun Kowur aforesaid, none other is, nor shall be, my heir and malik."

He proceeded then to refer to daughters of Rani Dhun Kowur and said as follows :

"Furthermore, to the said Mussummat Rani too, these very two daughters named above together with their children who after their marriage may be given in blessing to them by God Almighty, are and shall be heir and malik."

The first of these passages would seem to confer an absolute estate on the daughter-in-law but the second introduced an element of inconsistency and indicated that the testator desired that the property should go to his grand-daughters and their children. In these circumstances, having regard to the fact that the property disposed of was ancestral property, their Lordships held that it could be assumed that a Hindu would naturally desire to retain such property in his family, and it might be assumed further that the testator was well aware that as a general rule women under Hindu law do not take an absolute estate of inheritance which they can alienate at pleasure. The ordinary ideas and wishes of a Hindu were thus taken into consideration to explain the apparent inconsistency in the will and it was held that the entire will could be harmonised and consistently explained if it was taken to mean that Mussummat Dhun Kowur would take the limited interest of a Hindu female heir and after her death the property would go to her daughters.

The position was not much dissimilar in the subsequent case of *Radha Prosad* v. *Rani Mani*[1]. In that case, a Hindu testator *inter alia* directed his executors to make over and divide the whole of his estate

"unto and between his daughters in equal shares, to whom and their respective sons, the same was given, devised and bequeathed."

The High Court of Calcutta held that each of two daughters became entitled under the terms of the will to a moiety of the estate absolutely. This judgment was reversed on appeal by the Privy Council and their Lordships pointed out that the gift was not to the daughters merely but to their sons as well, and there was an express provision that in case of a daughter dying without male issue, her share would go to the other daughter and her sons to the exclusion of female heirs in both cases. It was observed by the Judicial Committee that as an orthodox Hindu the testator could not tolerate the idea of his daughter's daughter, who could confer no spiritual benefit upon him, succeeding to his property ; and to reconcile the different parts of the will, the only proper construction to be put upon it was that the testator intended to create an estate for life in favour of the two daughters with the benefit of survivorship between them, the remainder being vested in the daughter's sons.

In my opinion the correct position is, that the ordinary wishes and feelings of a testator, who belongs to a particular community could be taken into consideration only for the purpose of interpreting the will as a whole by removing any ambiguity or inconsistency in its provisions, and for putting the right meaning upon the words which the context might show were not used in their ordinary or literal sense. But in the absence of any ambiguity or inconsistency the plain meaning of the words has certainly to be accepted. In the case before us, as I have said already, in no part of the will has the testator expressed an intention that after his two sons are excluded from inheritance, the devolution of his properties would be according to the ordinary rules of intestate succession. There is nothing in the context or in the surrounding circumstances which throw doubt upon the plain meaning of the words that have been actually used and there is no indication anywhere that the testator contemplated or proceeded on the footing that his grandchildren would take his property not in equal shares but according to the shares which their fathers might have obtained if they were not disinherited. When

1. (1908) L.R. 35 I.A. 118 : I.L.R. 35 Cal. 896 : 18 M.L.J. 287 (P.C.).

no discrepancy is created either by the context or surrounding circumstances, the words in the will should be taken in their ordinary sense and it is immaterial that the testator being a Hindu was likely to have particular ideas on particular matters.

I would like to add that I am extremely doubtful whether it could be said at all, that the social usage or religious feeling of the Hindus is opposed to the idea of allowing grandsons by different sons to take the property of their grandfather in equal shares. Division *per stirpes* is certainly the rule of Hindu law which is applicable when the grandfather's property is to be divided among grandsons but the Hindu law recognises *per capita* division in many other cases and amongst grandsons by different sons division *per stirpes* is prescribed by the Hindu law givers on the ground

> "that their interest in the wealth (of their grandfather) is founded on their relation by birth to their own father and they have a right to just so much as he (the father) would have been entitled to"

(*vide* Dayabhag, Chapter III, section 2, paragraph 21). When the father himself is disinherited, the very foundation of the right of the grandsons to step into the shoes of their father is gone and in such circumstances there is nothing unusual to make the grandsons equal sharers in their grandfather's property.

It may be pointed out here that under the Statute of Distribution in English law, when the intestate's children are all dead leaving children of their own, the descendants take *per stirpes* and not *per capita*[1]. This has not influenced in any way the rule of construction adopted by English Courts that in gifts to grandchildren as a class, each one would take *per capita* irrespective of the shares which their parents would have got had they been alive.

In my opinion, the view taken by the High Court is right, and this appeal should be dismissed with costs.

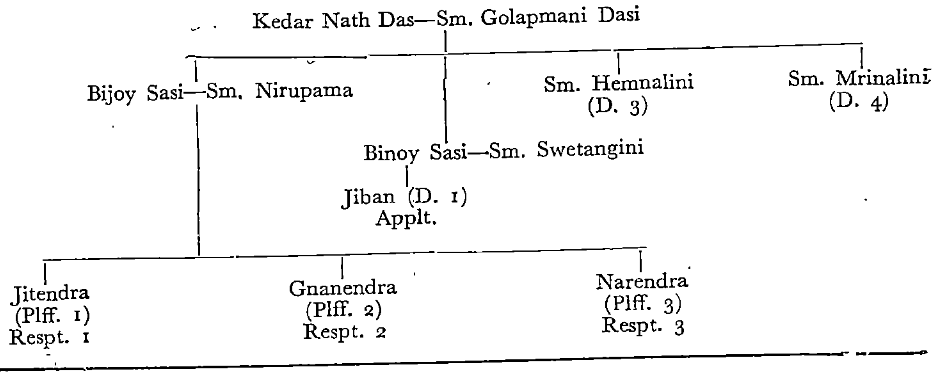
Fazl Ali, J.—In this difficult case, I am not quite confident that the view taken by the High Court is wrong, and therefore I agree that the appeal should be dismissed.

Patanjali Sastri, J.—I agree that the appeal should be dismissed with costs.

Mahajan, J.—This is an appeal against the judgment of the Calcutta High Court, delivered by Mitter, J., reversing the decree of the Subordinate Judge of Zilla 24-Parganas, 1st Court at Alipore, dated 21st December, 1940, in Title Suit No. 37 of 1934.

The question turns upon the meaning and effect of the will of one Kedar Nath Das. The will was executed on 5th July, 1916. The testator died on the 18th December, 1920.

At the date of the will and the testator's death the state of the testator's family was as appears from the following table :—



1. *Vide* Williams on Executors, Vol. II, page 1024.

What happened after the death of the testator may now be briefly stated. Soon after the death of their father, the two sons took out a succession certificate in regard to his estate ignoring the will. They thus entered into enjoyment of the properties left by their father as tenants in common. Bejoy Sashi died in July, 1922 and a succession certificate to his estate was taken out by his widow. This state of affairs continued for a period of over thirteen years, when in September, 1933, Shrimati Hemnalini Dasi one of the daughters of the testator, made an application for the grant of Letters of Administration with a copy of the will annexed before the District Delegate of Alipore. This application was not granted till the 25th March, 1936. The grant was finally confirmed by the High Court on the 27th January, 1938.

During the pendency of the application, the suit out of which this appeal arises was instituted by the three sons of Bejoy Sashi for partition of the properties left by Kedar Nath Das. The plaintiffs claimed a three-fourths share in the estate on the basis of the will and a half share in it in case the execution and genuineness of the will was not established. In the plaint it was expressly set out that the residue of the estate be ascertained after payment of cash legacies and after excluding the properties to which the legatee-defendants were entitled. Partition was claimed of the properties left after distribution of the legacies. As indicated above, this suit was instituted fourteen years after the death of the testator and the question about payment of the funeral expenses and of any debts outstanding was then no longer a live matter. This suit remained stayed till the decision of the application for letters of administration. It was revived in July, 1939, and two months before this, Benoy Sashi, the second son of the testator, had also died. In reply to the plaint the defendants raised a number of pleas and in particular, emphasis was laid on two grounds, (1) that the suit was premature as the estate was still in the hands of the administrators and administration had yet not been completed and residue not ascertained, and (2) that on a true construction of the will, the plaintiffs could not claim a three-fourths share in the residue but were only entitled to a moiety, the rule governing distribution of the estate being not *per capita*, but *per stirpes*. As many as ten issues were framed on the pleadings of the parties. The material issues in the case however were issues 2 and 6, and the other issues were either not pressed or became unnecessary at a later stage of the case.

Issue 2 :—Is the suit maintainable in its present form? Is it premature?

Issue 6 :—Are the plaintiffs entitled to get three-fourths share of the properties in suit under the terms of the will of deceased Kedarnath Das? If not, what is their share therein? Are the plaintiffs entitled to partition of the estate as prayed for herein?

The trial Judge on issue 2 gave a finding in favour of the defendants and as a result of this finding dismissed the suit. The learned Judge, however, while dismissing the suit also expressed an opinion on issue 6 in favour of the defendants that the estate was distributable between the grandsons of the testator *per stirpes* and not *per capita*. This opinion is in these terms :—

"The words "*dujaner putragam*" do not seem to have been used to exclude daughters' sons as urged for the plaintiffs as daughters' sons are expressed by word '*douhitra*.' Nor was the term "*poutra*" appears to have been used. There was thus no gift to a class also here. Two sons were given equal amount of maintenance and "*dujaner putragam*" appear to have been used to indicate that the estate will go to them *per stirpes* and not *per capita* under the will. There appears nothing in the whole will to indicate that the testator had in his mind to give the property to all the grandsons *per capita* and, in my opinion, perusal of the whole will seems to indicate that the testator's intention was to bequeath the estate in equal halves to the sons of his two disinherited sons as no distinction was made in giving their maintenance in consideration of the number of members of the family of each. . . . Considering the ordinary predilictions of the Hindus to which community the testator belonged and in the absence of any expression to indicate his desire to give them in equal share *per capita* it seems to be more reasonable to hold that the testator's intention was to bequeath the properties *per stirpes*."

This decision of the Subordinate Judge was set aside on appeal by the Calcutta High Court on both the points. The case was remanded to the trial Court and opportunity was given to the plaintiffs to amend the plaint in the manner indicated in the judgment. Direction was given to the Court to pay the legacy to the daughter

and to partition the rest of the properties on the rule of *per capita* between the plaintiffs and the first defendant. On an application having been made to the High Court for leave to appeal against the decree of that Court to His Majesty in Council, a certificate was granted to the plaintiffs as required by section 110 of the Code of Civil Procedure on 31st August, 1935. The records of the case, however, were not transmitted to the Privy Council before the statute enlarging the jurisdiction of this Court was enacted. In view of the provisions of this new statute the records were transmitted to this Court in May, 1948, and petition of appeal was lodged here on 9th June, 1948.

The same two questions which were agitated before th High Court were urged before us. The question about the premature character o the suit does not require any serious consideration. The High Court disposed of thi question with the following observations :—

"On the grant of Letters of Administration to Hemnalini, the administrator *pendente lite* made over possession to her and she gave Government Promissory Notes of he face value of Rs. 6,000 which belonged to Kedar Nath as security for the due administration of the estate. The one-sided evidence is that Hemnalini, as administrator *pendente lite,* has cash assets or equ alent to cash assets which would enable her to pay the legacy of Rs. 500 to her sister Mrinalini. Th evidence further is that the debts of the testator had long been paid and the monies owing to the t tator at the time of his death had been realized. All that is, therefore, necessary in respect of the estate now is that the legacy of Rs. 500 is to be made over to Mrinalini and she should be given ssession of the said three cottas of land. Hemnalini has already taken away her legacy for she s given Government Promissory Notes of the face value of Rs. 6,000, which belonged to her fa er Kedar Nath Das as security to the District Judge, when the grant of Letters of Administrati was made to her. So, it is in a technical sense only that it can be said that the residue h s not been ascertained; because Mrinalini has not been actually paid her legacy although a s m wh ch would amply cover the pecuniary legacy to her is in the hands of the administratrix and the land is there. I these circumstances, we do not think it right that this suit should be dismissed, leaving th part s to bring a suit for administration and partition. A little amendment of the plaint would be uite sufficient."

I fully concur in this decision and in the reasons on which is based. It may further be observed that though the suit in form was one for p tition, in substance and in effect it was a suit for administration of the estate of t deceased. It was clearly stated in the plaint that the property be divided metes and bounds between the plaintiffs and the defendant after excluding th properties that had been given to the legatees under the will and by ascertain the residue. It was not expressly designated as an administration suit as the pla ffs were disputing the execution and the genuineness of the will and on the date e suit that matter was in issue between the parties in the Letters of Adminis on proceedings above referred to. The plaint wanted the residue of the estate e ascertained and after that had been done, it wanted its partition by metes an ounds between the contesting parties. No change in any legal relationship ween the parties could happen by allowing an amendment of this plaint an converting its form into one of an administration suit. The dismissal of the on the ground of being premature at the stage at which it was so dismiss the trial Court was not justifiable. In the situation that was created by ef of time the decision that a suit for administration of the estate was necessary suit for partition must fail amounted to a denial of justice. For the reasons above the first contention of the learned counsel for the appellant is negati

The substantial point in the appeal howev he second one. The will, so far as is material, is in the following terms :—

"I have two sons Bejoy Sashi Das and Benoy Sashi y elder son Bejoy Sashi Das is a man of very loose moral character and is addicted to drink prostitutes. I, therefore, think that if any property is given to him, it will be lost. ounger son, Benoy Sashi has no sense of right or wrong and is of extremely irritable on. So I think that they may at any time do something wrong, or waste the properti nce, the sons of my said two sons Bejoy Sashi and Benoy Sashi shall get all the properties. ashi Das shall get nothing. *His wife and children—such of them as will remain alive—shall get a lowance of Rs. 50 and my youngest son Benoy Sashi Das shall get a monthly allowance of Rs. 50.* Be mated that the marriages of their sons and daughters shall be performed from this estate. The s shall spend Rs. 500 in the case of marriage of a son and Rs. 700 in the case of marriage of a , and if the executors consider it necessary,

they may also incur such larger expense therefor as they, in their decision, think proper, and as regards the education expenses of their sons and daughters, the executors shall spend such amount therefor if they think reasonable in their decision. Neither of my said two sons shall be competent to transfer all those properties at any time by gift, or otherwise and if they do the same, it shall be null and void and shall be rejected by Court. Be it also stated that the house at No. 56 Lansdowne Road shall remain for residence only—my wife, two sons and youngest daughter shall live there. If my wife Srimathi Gopal Moni Das does not pull on well with my said two sons, or their wives and children, then, it is my wife who shall live in that house and my sons or their wives and children, as the case may be, shall have no right to live in the said house. They shall live elsewhere on renting house at their own expense."

In his anxiety to preserve his property from waste by one extravagant and the other half-witted son and in giving it to the sons of these two sons, the testator, has set a problem which is somewhat novel so far as my experience goes. The difficulty in construing the will is occasioned by the bequest of the residue of the estate to the sons of the two sons (*dujner putragam*). If an English will was expressed in similar terms, it would in all probability be held that all the grandsons at the time of distribution of the estate should share the residue *per capita*, unless there was something in the surrounding circumstances in which the will was made or in its context to render that view improbable and to lead to the conclusion that the sons of the sons were to take the residue *per stirps*. This is the general rule of English law applicable to class gifts. The trial Judge held that the gift in the present case could not fall within the description of class gifts. In this decision, in my view, he was not right.

The question whether the gift is one to a class depends upon the mode of the gift itself, namely, whether it is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time. A gift to a class impl an intention to benefit those who constitute the class and to exclude all others. One has to look to the description, and those who do answer to it are the legatees described. The decease of any person constituting a class during the testator's lifetime wi ccasion no lapse because in such a case the testator looks to the body as a whole ther than to the number constituting the body. The legal incidents of those g are in some respects analogous to the case of a member of an undivided Hindu fa y under the Mitakshara system. Judged on the above principles, the gift to so sons is a bequest to a class of persons as such. The observations of Tyabji, J., Khimji v. Morarji[1], support this view. The learned Judge stated as follows :—

"It is, of course, beyo oubt that the expression 'sons of sons' and 'daughters of sons' must necessarily be treated as d ng a 'class' as defined in *Leake* v. *Robinson*[2], and Jarman on Wills (4th Edn.) page 268. The 'widows of sons' raises more difficulty; but as Hindus are, by their law, permitted to marry to have more than one wife at the same time, I must hold that they also form a 'class.'"

The general rule of ibution of the estate between the legatees who constitute a class is stated by man on Wills in the Sixth Edition at page 1711 of Volume II in these terms

"Where a gift is to the chil of several persons, whether it be to the children of *A* and *B*, or to the children of *A* and the c of *B*, they take *per capita*, not *per stirpes*."

According to this view, t to sons of sons taken by itself would entitle the legatees to take *per capita*. T le, however, is subject to certain qualifications. If the context of the will or urrounding circumstances indicate a different intention, then that intention ils and distribution has to be made amongst the class as desired by the testa The rule is firmly established that the Court must look at the whole will to d what really was the intention of the testator. Jarman, while stating the abov , further remarked :—

"This mode of construction will yiel ry *faint glimpse* of a different intention in the context. Thus the mere fact, that the annual inc til the distribution of the capital, is applicable *per stirpes*, has been held to constitute a suf round for presuming that a like principle was to govern the gift of the capital."

1. (1897) I.L.R. 22 Bom. 533.

2. (1817) 2 Mer. 363 : 35 E.R. 979.

The decision of the Master of the Rolls, Lord Langdale, in *Brett* v. *Horton*[1], is an authority in support of the above statement. In that case the testatrix directed the trustees to divide the rents of her real estate between *A*, *B*, *C* and *D*, widow of *E*, until *E's* children attained twenty-one and upon their attaining twenty-one, the trustees were to sell and divide the produce between *A*, *B*, *C* and the children of *E* in equal shares and proportions as tenants in common ; but if *D* married, her part of the income was to be applied to the maintenance of *E's* children ; and she gave the residue of her real and personal estate equally between *A*, *B*, *C* and the children of *E* who attained twenty-one. There were four children of *E* who attained twenty-one. It was held that they did not take the property *per capita* with *A*, *B* and *C* but one-fourth between them. When delivering the judgment, the Master of the Rolls observed as follows :—

"The testatrix had given the purchase-money to arise from the sale of the real estate, and the residue, in such terms, as, if taken by themselves, would, I think most clearly, have entitled every one of the children to an equal share in the fund ; that is, according to the construction which the Court has frequently given to words of this kind, it would have to be divided into seven parts. But though this would be the effect of the words taken by themselves, yet, in this case, as in all cases, we must look at the whole will to see if we can discover what really was the intention of the testatrix, and this must control those technical and arbitrary rules which would otherwise prevent the real intention from being carried into execution."

As the income of the fund had been divided equally between *A*, *B*, *C* and the children of *E*, it was held that though *A*, *B*, *C* and the children formed a class, yet the distribution between them should be as if they constituted four separate groups.

In *Parker* v. *Knight*[2], Harman, J., observed that the *prima facie* rule of construction whereby the division would be *per capita* can be easily displaced. In that case the testatrix disposed of her estate in the following terms :—

"I leave to my sister *M.B.P.* half of my estate—£100 to *E.P.*, the remainder to be divided equally between my youngest sister *M* and my niece *I*, and her children."

The testatrix left surviving her three sisters, the said *M.B.P.* and *M*, and one other, whose only child was the niece *I*. It was held that there were sufficient circumstances and context to displace the *prima facie* rule and that the sister *M* was entitled to a one half share of the residuary estate, and the niece and her children to the other half share. It was further observed that the reconciling principle to be gathered from the authorities was that cases of stirpital distribution were cases of family distribution, and cases of capital distribution were cases not of family distribution.

In re *Daniel* : *Jones* v. *Michael*[3], Vaisey, J., applied the stirpital rule with the following observations :—

"I start with the undoubted presumption that *prima facie* and apart from the context or special circumstances, the division in such a case must be *per capita*. In other words, I must approach this will with the *prima facie* impression that where there is a direction for equal division between a number of persons, each of those persons takes the same amount as each of the others. . . . . In the present case I have come to the conclusion that the testatrix has indicated that the division should be into one-third shares."

The circumstances on which this decision was based was that the living sister who was given a share, if she died during the lifetime of the testatrix, her children were to take her place. As I will show later, in the present will the uncle and the nephews in one particular matter were put on the same footing.

On a careful reading of the will as a whole, I am of the opinion that there are sufficient indication of a different intention in its context to justify the distribution of the residue amongst the sons of the sons *per stirpes*. The general rule applicable to class gifts stands displaced accordingly. In the operative part of the gift the testator said that his sons "may at any time do something wrong, or waste the properties. Hence, the sons of my said two sons Bejoy Sashi and Benoy Sashi shall get all the pro-

1. (1841) 4 Beav. 239 : 49 E.R. 331.
2. (1948) 1 Ch. 437.
3. (1945) 2 Ch. D. 101.

perties." The words employed (*dujaner putragam*) instead of the word *Poutras*, give me the impression that he was treating the sons of the two sons, Bejoy Sashi and Benoy Sashi, as their representatives and as standing in their shoes. He just substituted them for these two sons. The dominant intention of the testator in executing this will was to save the property from waste by his two sons, one of whom was, as I have already said, half-witted and of an irritable disposition and the other a wastrel and a drunkard. With this object in view he wanted to eliminate the two sons from the order of inheritance as laid down in Hindu Law. If he had simply disinherited his two sons without saying more and without conferring his estate on some one else, it would have resulted in intestacy. To avoid this, he named the sons of these two sons as legatees in the will. It cannot be gathered in this bequest from any circumstance whatsoever that the intention of the testator was to deprive the descendants of one son of their right to take equal share with the descendants of the other son in the inheritance. So far as I can see, the testator did not want to interfere with the normal course of inheritance except to the extent of excluding his two sons from it. The interpretation that I am placing on the will is supported by the whole scheme of this document. Throughout the will the testator treated the families of the two sons as two separate entities. In giving maintenance to these two families, he gave this maintenance in equal shares. Bejoy Sashi was given nothing whatever, but his wife and children were given a monthly allowance of Rs. 50 and the younger son was also given a monthly allowance of Rs. 50. It is noteworthy that the descendants of one son were placed on an equal footing with the other son, *i.e.*, the uncle and nephews were given equal maintenance. This clause supports the claim of the defendants for a distribution of the residue *per stirpes* and indicates the intention of the testator to that effect. This is also consistent with the rule of intestate succession under which the grandsons would take *per stripes* the property of their grandfather. The grandson represents his father at the time of partition and takes equally with his uncles. It has to be presumed that the testator knew that by eliminating the sons from the inheritance and in substituting the grandsons in their place he was doing no violence to the ordinary rules of intestate succession and was not in any way disturbing the shares in which they would take his estate. In construing the will of a Hindu gentleman a construction has to be placed which is more consonant with the rules of succession and it is not improper to take into consideration what are known to be ordinary notions of Hindus with respect to the devolution of properties.

Lord Macnaghten in delivering the judgment of their Lordships of the Privy Council in *Bhagabati Barmanya* v. *Kalicharan Singh*[1], quoted with approval and emphasis the observations of Wilson, J., in *Ram Lal Sett* v. *Kanai Lal Sett*[2], in the passage reported at page 678 of that report. The passage to which attention was called is in these terms :—

" It is no new doctrine that rules established in English Courts for construing English documents are not as such applicable to transactions between natives of this country. Rules of construction are rules designed to assist in ascertaining intention ; and the applicability of many of such rules depends upon the habits of thought and modes of expression prevalent amongst those to whose language they are applied. English rules of construction have grown up side by side with a very special law of property and a very artificial system of conveyancing, and the success of those rules in giving effect to the real intention of those whose language they are used to interpret, depends not more upon their original fitness for that purpose than upon the fact that English documents of a formal kind are ordinarily framed with a knowledge of the very rules of construction which are afterwards applied to them. It is a very serious thing to use such rules in interpreting the instruments of Hindus, who view most transactions from a different point, think differently, and speak differently from Englishmen, and who have never heard of the rules in question."

Not only are the families to the two sons treated as two separate entities in the maintenance clause but towards the concluding portion of clause 4, when dealing with the residential house, the testator mentions the two sons alone. He uses the expression " my sons or their wives and children " as indicating two separate entities. When dealing with the house, he does not even mention the grandsons, he

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1. (1911) 21 M.L.J. 387 : L.R. 38 I.A. 54 : I.L.R. 38 Cal. 468 (P.C.).
2. (1886) I.L.R. 12 Cal. 663.

only mentions "my wife, two sons and youngest daughter." It is no doubt true that in the clause dealing with marriage expenses and education expenses of the sons and daughters of the sons, he places them on a footing of equality. This is also in consonance with the ordinary Hindu notions as to the responsibility of the head of the family to educate and marry the dependent members. It seems to me that in this matter what the testator had in view was that while the family remained joint each member of the family should be treated on the same footing except, of course, in the matter of the maintenance allowance. If there had been nothing wrong with the two sons, in all likelihood there would have been no occasion for the testator to make a will and the property would have gone to the two sons equally and their sons would get it in the same ratio. The sons' incapacity to preserve the property was the only reason for making the will and he intended to give to the grandsons no more than they would have got under the law as descendants of their fathers. That to my mind is the true construction of the bequest. The residue therefore is distributable *per stirpes.* It was argued that in all likelihood the testator had no intention one way or the other on the point whether his grandsons would take the estate *per capita* or *per stirpes.* This contention has to be overruled in view of the observations of Jessel, M.R., in an English case to the following effect. It is the duty of the Court to find out the meaning of a will, howsoever obscure, and though it is probable that the testator himself may have no particular meaning, still that is no reason why the Court should not find a particular meaning.

The High Court, on this part of the case, made the following observations :—

"As the respective shares of his grandsons, the sons of Benoy Sashi and Bejoy Sashi, are not specified, *prima facie* they would take equally unless there is something in the will, or in the surrounding circumstances which would modify the *prima facie* effect of the aforesaid disposition.

The learned Subordinate Judge has relied upon two circumstances which, according to him, modify the *prima facie* effect of the aforesaid disposition. He says that the intentions of the testator were that his grandsons would not take *per capita,* that is to say not equally, but *per stirpes,* the sons of Bejoy Sashi getting half and the son of Benoy Sashi getting the other half, because the testator made equal provisions with regard to maintenance for his two sons Bejoy Sashi and Benoy Sashi. That is the first circumstance on which the learned Subordinate Judge relies for his conclusion and the second circumstance on which the learned Subordinate Judge relies for his conclusion is that as the Hindu law is that grandsons take *per stirpes* and not *per capita,* that had been the intention of the testator because in the clause which we have quoted above he does not use the phrase that 'his grandsons would get' but the phrase that the sons of his two sons 'would get.' We do not think that the learned Subordinate Judge is right. The provision for maintenance of his sons has no bearing upon the question as to what shares the grandsons were intended to take. We do not also think that it is legitimate to speculate upon the intentions of the testator. His intentions must be gathered from the words he has used. There is nothing in the will which modifies the *prima facie* effect of the disposition which he makes."

This decision does not go beyond criticizing, and not very accurately, the judgment of the trial Court. It is not quite correct to say that the testator had made equal provision with regard to the maintenance of his two sons. The fact is that he made no provision whatsoever for the maintenance of one son at all. As pointed out above, his descendants were given equal maintenance with the other son. The import of the equal maintenance clause in the will does not seem to have been fully realized by the learned Judges when they observed that the provision for maintenance has no bearing on the question as to what shares the grandsons were intended to take. This provision certainly gives a glimpse into the intention of the testator. It is also not correct to say that the reference to the provision of intestate succession under Hindu law amounted to a speculation on the part of the Subordinate Judge, as to the intentions of the testator. It was a relevant matter to be taken into consideration because that may provide the key to the mind of the testator. It may point to the fact that there would ordinarily be no idea in the testator's mind to affect the rights of the grandsons *inter se* and to reduce one grandson's share by 50 per cent. Though in holding this opinion I am in a minority of one, I feel satisfied that if the interpretation that I have put on this will was read out to the testator he would not have demurred to it.

For the reasons given above I am of opinion that the learned trial Judge construed the will correctly and the High Court in appeal was not justified in setting aside his judgment. The result, therefore, is that in disagreement with my brothers on the Bench I would allow the appeal, set aside the judgment of the High Court and would direct that in the distribution of the estate between the plaintiffs and the defendant, the rule applicable is *per stirpes* and not *per capita.*

By the Court.—In accordance with the opinion of the majority, the appeal is dismissed with costs.

V.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Venkatachalam Chetty and another .. *Petitioners**

v.

Ramaswami Chetty and another .. *Respondents.*

Criminal Procedure Code (V of 1898), sections 145 and 528—District Magistrate transferring application to file of a First Class Magistrate—Preliminary order by the First Class Magistrate who is subsequently found to have no territorial jurisdiction over some of the properties—Jurisdiction of District Magistrate to withdraw case to his own file.

No doubt the general proposition is that proceedings instituted in a Court which has no jurisdiction in respect of them cannot be regarded as legally instituted and a superior Court cannot transfer them to a Court having jurisdiction and thereby cure a defect. But that does not mean that a power of transfer once exercised cannot be further invoked for the purpose of correcting an inadvertent and unthought of mistake.

Where a District Magistrate had transferred an application under section 145 of the Criminal Procedure Code to a First Class Magistrate who passed the preliminary order and it was subsequently found that he had no jurisdiction over some of the properties,

Held, the District Magistrate has jurisdiction to withdraw the case and take it on his own file.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Additional District Magistrate of Tiruchirapalli, dated 21st July, 1948, and made in M. C. No. 25 of 1948.

V. T. Rangaswami Aiyangar for Petitioners.

V. Rajagopalachari and *V. Seshadri* for Respondents.

The Court made the following

ORDER.—The Inspector of Police, Law and Order, Tiruchirapalli Town, apprehending that a breach of the peace is likely to occur between the petitioners and counter-petitioners herein regarding the possession of certain lands and houses belonging to Chetty Chatram Charities applied to the Sub-Divisional Magistrate, Tiruchirapalli, under section 145, Criminal Procedure Code, for necessary enquiry and action ; whereupon the Sub-Divisional Magistrate sent up the records to the District Magistrate, Tiruchirapalli, apparently because of the heavy file in the former's Court. The Additional District Magistrate, Tiruchirapalli, transferred the case to the file of the Additional First Class Magistrate, Tiruchirapalli, for enquiry and disposal. It so happened that the Additional First Class Magistrate had no territorial jurisdiction over some of the properties ; but this was not noticed or apparently realised when a preliminary order was passed on 17th July, 1948, under section 145 (1), Criminal Procedure Code. Both the petitioners and the counter-petitioners appeared before the Magistrate and were served with notice and copy of the preliminary order. The petitioners then took objection to the preliminary order on the ground that the Additional First Class Magistrate had no territorial jurisdiction over some of the properties and the matter was adjourned for arguments to 20th July, 1948. Meanwhile the respondents applied

*Cr.R.C. No. 766 of 1948. 20th August, 1948.
(Cr.R.P. No. 722 of 1948).

to the Additional District Magistrate on 19th July, 1948, praying for the withdrawal of the proceedings before the Additional First Class Magistrate to his own file and this application was granted without notice to the petitioners on 21st July, 1948, by an order passed in the following terms :

"M.C. No. 33 of 1948 on the file of the Additional First Class Magistrate, Trichy, is hereby withdrawn from that Court and taken on file in this Court. The Additional First Class Magistrate, Trichy, should send the records immediately to this Court."

After withdrawing the case to his file, the Additional District Magistrate also passed a preliminary order under section 145 (1) and granted time to the parties to file written statements. It is this order that Mr. V. T. Rangaswami Aiyangar on behalf of the petitioners-B party wants to revise on two grounds: firstly, the Additional District Magistrate had no jurisdiction to withdraw the case from the file of the Additional First Class Magistrate thereby curing and condoning a defect in the jurisdiction of the Additional First Class Magistrate and secondly a second preliminary order is illegal and inoperative since the earlier preliminary order passed by the Additional First Class Magistrate had not been withdrawn or dissolved by the legal processes laid down in section 145, Criminal Procedure Code.

That the Additional First Class Magistrate had jurisdiction only over some of the properties and that Additional District Magistrate has territorial jurisdiction over the entire properties have been conceded by both the parties. Therefore, according to Mr. V. T. Rangaswami Aiyangar the preliminary order of the Additional First Class Magistrate is operative only as regards some portion of the properties and void as regards the rest. Relying upon the decisions in *Chellapathi Naidu* v. *Subba Naidu*[1], *Sikka Goundan*, In re[2], *Subbanna*, In re[3] and *Abdul Sattar Sahib*, In re[4], it is contended that the Additional District Magistrate ought not to have withdrawn the case to his own file. These decisions, no doubt, lay down the general proposition that proceedings instituted in a Court which has no jurisdiction in respect of them cannot be regarded as legally instituted and a superior Court cannot transfer them to a Court having jurisdiction and thereby cure a defect. In *Sikka Goundan*, In re[2] it is further laid down that the High Court in its inherent powers of supervision can direct the Court not to proceed further. In *Chellapathi Naidu* v. *Subba Naidu*[1], Reilly, J., observed that the order of a District Magistrate transferring the proceedings to a Sub-Divisional Magistrate who had no jurisdiction over the land concerned was wrong and therefore any order passed by a Sub-Divisional Magistrate to whom such transfer was made was therefore without jurisdiction. Now applying the principle stated above, it is seen that the earlier order of the Additional District Magistrate sending the proceedings to the Additional First Class Magistrate who has territorial jurisdiction over *only* a portion of the properties is without jurisdiction and the preliminary order with regard to a portion of the properties is therefore illegal. I do not think that there is anything illegal or unjustifiable in the Additional District Magistrate rectifying a mistake. None of the decisions go to this extent that a power of transfer once exercised under section 528 cannot be any further invoked for the purpose of correcting an inadvertent and unthought of mistake. If the attention of the Additional District Magistrate had been drawn even at the outset to the circumstance that the Additional First Class Magistrate has jurisdiction over a part of the properties only, then, the sending of the case to the Additional First Class Magistrate would not have taken place. The decisions cited above deal only with instances of total absence of jurisdiction and not with partial absence in the matter of territorial powers. I cannot therefore uphold the contention that the Additional District Magistrate should not have withdrawn the case to his own file. Regarding the second argument that there was a valid preliminary order with regard to a portion of the properties which has not been

1. (1928) 55 M.L.J. 693 : I.L.R. 52 Mad. 241.
2. (1922) 72 I.C. 351.
3. (1939) 1 M.L.J. 899.
4. (1942) M.W.N. (Crl.) 187.

set aside in accordance with law, no authority has been brought to my notice holding that once a preliminary order has been passed, even though it is erroneous in some respects it cannot be amended or confirmed by subsequent legal proceedings. But it is unnecessary to decide that position now for the reason that the withdrawal of the case to the file of the Additional District Magistrate carried with it the earlier preliminary order with regard to some portion of the properties and hence the order of the Additional District Magistrate should be construed as affecting that portion of the properties over which the Additional First Class Magistrate had no power to pass a preliminary order.

At one stage of his argument Mr. V. T. Rangaswami Aiyangar seemed to suggest that the preliminary order of the Additional District Magistrate is likely to affect his client adversely because if it is shown that his client was in possession within two months of the Additional First Class Magistrate's order but beyond two months of the Additional District Magistrate's order there will be great prejudice caused to him. After all the difference in time between the two orders is only 4 days and even if the B party shows that it was in possession of the properties over which the Additional First Class Magistrate had power within two months of the date of that order, in the view which I am taking that order is partly valid the Magistrate will have to declare his possession of such properties. Such contingency can only arise if Mr. V. T. Rangaswami Aiyangar's client can show that he was dispossessed between 17th May, 1948, and 21st May, 1948, and not at any earlier date. I therefore hold that the preliminary order of the Additional District Magistrate is valid from 21st July, 1948, to the extent of the properties over which Additional First Class Magistrate had no jurisdiction and is also valid from 17th July, 1948, over those properties over which Additional First Class Magistrate had jurisdiction as the subsequent preliminary order of Additional District Magistrate recording the latter properties is only a confirmation of the earlier valid portion of the order of the Additional First Class Magistrate.

I see no reason to interfere with the order of the Additional District Magistrate, dated 21st July, 1948, and dismiss the criminal revision case.

V.P.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE PANCHAPAGESA SASTRY.

Pydipalli Joga Rao .. *Petitioner**

v.

Pydipalli Venkata Rao .. *Respondent.*

Court-fee—Suit for partition—Defendant pleading that some of the family properties were purchased in the names of strangers by plaintiff fraudulently and collusively and benami and that they should be included in the suit—The benamidars added as parties—Defendant need not pay Court-fee on his share of such items.

Where, in a suit for partition, one of the defendants pleaded that the plaintiff had purchased some properties in the names of strangers fraudulently and collusively and benami with a view to defeat the rights of the several members to the family properties and that those items should be brought into the hotchpot, and the benamidars also were added as parties, that defendant is not bound to pay court- fees in respect of his share in such items as in a suit for declaration as no question of set-off or counterclaim arises and there is no provision in the Court-Fees Act which requires court-fee to be paid in respect of such a claim by a defendant in a partition suit.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Cocanada, dated 1st April, 1947, and made in O. S. No. 35 of 1945.

C. Rama Rao for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) and *K. Bhimasankaran* for Respondent.

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*C.R.P. No. 702 of 1947. 26th October, 1948.

The Judgment of the Court was delivered by

Satyanarayana Rao, J.—This is an application by the second defendant in the suit, O. S. No. 35 of 1945 in the Court of the Subordinate Judge of Cocanada, to revise the order of the learned Subordinate Judge dated 1st April, 1947, directing him to pay court-fee in respect of his one-third share in the properties which were alleged by him to have been purchased benami in the name of defendants 4 to 11 by the plaintiff. The plaintiff, first defendant and second defendant are brothers. In this suit for partition, the plaintiff, according to the case of the defendants, omitted certain items. The second defendant in his written statement pleaded that some of the family properties were purchased in the name of defendants 4 to 11 by the plaintiff fraudulently and collusively and benami with a view to defeat the rights of the several members to the family property. He therefore claimed that these items also should be brought into the hotch-pot. Having taken this objection in the written statement, he filed I.A. No. 2222 of 1945 to get those persons impleaded as parties and the Court directed them to be added as defendants 4 to 11.

The plaintiff paid a court-fee of Rs. 100 on the plaint under Article 17-B of the Court-Fees Act. After defendants 4 to 11 were impleaded the court-fee examiners raised an objection that the plaint was not properly valued and the court-fee paid was not sufficient. According to them the plaintiff had to pay a further sum of Rs. 500 in respect of the immoveable property purchased in the name of defendants 4 to 11 as if the plaintiff was bound to pray for a declaration of the title of the family in respect of the suit properties. They also raised a further question that in respect of a sum of Rs. 1,500 which the second defendant claimed should be decreed to him as representing the amount of dowry which was paid into the hands of the plaintiff, the second defendant was liable to pay also on that amount a sum of Rs. 149-15-0. With the objections filed by the parties the matter came up for consideration before the learned Subordinate Judge and he by his order dated 1st March, 1947, overruled the contention raised in the check-slip by the court-fee examiners on the ground that as it was a suit for partition and as the plaintiff did not claim any share in the properties standing in the name of defendants 4 to 11, there was no necessity for him to pay any court-fee in respect of those items. As regards the dowry amount claimed by the second defendant also, he held that as it was merely an item in the account taking, there was no necessity to pay separate court-fee. After this order the suit proceeded to trial and after the plaintiff closed his evidence and while the first defendant was in the witness box, the learned Subordinate Judge *suo motu* raised the question whether the second defendant was not liable to pay court-fee in respect of the items standing in the name of defendants 4 to 11 and in which he claimed a one-third share, and by his order dated 1st April, 1947, the learned Subordinate Judge directed the 2nd defendant to pay court-fee on his 1/3rd share. This order, it may be stated, was passed by the learned Subordinate Judge without notice either to the plaintiff or to the defendants and without even hearing arguments on the point as the order itself clearly indicates. This, to say the least, is somewhat an extraordinary procedure for the learned Subordinate Judge to have adopted in disposing of a question of this description without giving an opportunity to the parties to argue the matter.

The learned Subordinate Judge was of opinon that as the title of defendants 4 to 11 was involved in the suit, there was necessity for a declaration of the title of the family in respect of the properties standing in the names of defendants 4 to 11 and that therefore the second defendant claiming a one-third share in those properties should pay court-fee on the footing that the written statement of the second defendant impliedly contained a prayer for declaration and partition. According to him the partition being consequential relief, court-fee had to be paid on the one-third share under section 7, cl. (*v*) of the Court-Fees Act. He gave a very short time for payment of the court-fee and did not determine the amount of court-fee payable.

In this civil revision petition, it is contended on behalf of the petitioner that the order of the learned Subordinate Judge is without jurisdiction and is also vitiated by irregularity in that he did not give an opportunity to the parties to be heard. We are of opinion that the contentions urged on behalf of the petitioner on both the points are well founded.

The only provision which has any bearing on this question is Article 1 of Schedule I, which states :

> "Plaint or written statement pleading a set-off or counter-claim or memorandum of appeal (not otherwise provided for in this Act) or of cross-objections presented to any Civil or Revenue Court except those mentioned in section 3."

Then the amount of court-fee is indicated in columns 2 and 3 varying with the value of the subject-matter. The claim of the second defendant is contained in the written statement and it cannot certainly be treated as a plaint. No question of any set-off or counter-claim arises in the present case. There is no provision in the Court-Fees Act which requires court-fee to be paid in respect of such a claim by a defendant in a partition suit. In fact, it is not seriously contended before us by the learned Government Pleader that there is any provision in the Court-Fees Act which justifies the order of the learned Subordinate Judge calling upon the second defendant to pay court-fee in respect of his one-third share on the basis of his claim in the written statement.

We have therefore no hesitation in holding that the order of the learned Subordinate Judge is wrong and must be set aside. It is not necessary to refer to the decisions in *Venkatasubbamma* v. *Ramanadhayya*[1] and *Hemchandra Mahto* v. *Prem Mahto*[2], which point out the procedure regarding the payment of the court-fee in a partition suit, as they do not touch the question raised before us. The revision petition is therefore allowed and the order of the learned Subordinate Judge is set aside. There will be no order as to costs.

V.P.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAGESA SASTRY.

G. Rengaraja Rao .. *Appellant**

v.

A. Tulasibai Ammal .. *Respondent.*

Madras Civil Courts Act (III of 1873), section 29 (1)—Notification under by the High Court empowering a subordinate Court to issue a succession certificate—Scope and effect—Issue of succession certificate by Subordinate Judge—Jurisdiction—Appeal—Forum—Succession Act (XXXIX of 1925), section 388 (2) proviso—Not applicable when subordinate Court not invested with powers of High Court under that section.

An appeal against an order of a Subordinate Judge in proceedings taken cognizance of by him by virtue of a notification under section 29 (1) of the Madras Civil Courts Act shall be only to the High Court irrespective of the pecuniary limits imposed by section 13 of the Madras Civil Courts Act. Where a Subordinate Judge thus empowered by a notification under section 29 (1) issues a succession certificate an appeal lies to the High Court and not to the District Court. The proviso to sub-section (2) of section 388 of the Succession Act is inapplicable when there is no notification by the Provincial Government either under section 26 of the Succession Certificate Act (VII of 1889) or under section 388 of the Succession Act (XXXIX of 1925), investing a Subordinate Judge's Court with powers to exercise the functions of the District Court and it cannot be said that the forum of appeal will be the District Court and not the High Court.

The proper way of construing section 29 (1) of the Madras Civil Courts Act and section 388 of the Indian Succession Act is to say that the general words of section 29 (1) of the Madras Civil Courts Act should be limited to proceedings under the Succession Act, 1925, other than Part X for which the special provision in section 388 of the Act alone will apply. In this view the High Court notification under section 29 (1) of the Madras Civil Courts Act does not and cannot confer any power upon a Subordinate Judge as such to entertain applications under Part X of the Indian Succession Act, in the absence of a special notification under either the old section 26 of the Succession Certificate Act or the new section 388 of the Indian Succession Act. Accordingly the

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1. (1932) 63 M.L.J. 845 : I.L.R. 55 Mad. 975. 2. (1925) 90 I.C. 739.

* A.A.O.No. 235 of 1947. 7th January, 1949.

Subordinate Judge's Court has no jurisdiction to entertain an application for succession certificate and the issue of such a certificate by that Court is not a matter which can be cured by section 21 of the Code of Civil Procedure.

[The practice from 1939 appears to have been for Subordinate Judges' Courts as such to entertain applications under Part X of the Succession Act also].

Appeal against the order of the Court of the Subordinate Judge of South Arcot at Cuddalore, dated 20th January, 1947, and made in O. P. No. 10 of 1946.

R. Partha Rao for Appellant.

T. R. Srinivasan and *S. Gopalaratnam* for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal against the order of the Subordinate Judge of Cuddalore directing the issue of a succession certificate to the respondent Tulasi Bai. She is the daughter of one Venkobai Ammal who is said to have executed a will dated 9th March, 1944, bequeathing all her properties to her daughter. The appellant who is the step-son of Venkobai opposed the application to the grant of succession certificate. His objections were firstly that succession certificate could not be issued by reason of section 370 of the Indian Succession Act, 1925 (XXXIX of 1925) ; secondly that the Subordinate Court had no jurisdiction as the deceased was residing at the time of her death within the district of Chittoor where she is said to have executed the will and where she died ; and thirdly that the will was not true and valid. All his contentions were overruled. Hence the appeal by him to this Court.

A preliminary objection is taken by the respondent's advocate that the appeal would lie only to the District Court of South Arcot and not to this Court. He relied on the proviso to sub-section (2) of section 388 of the Act. The appellant's advocate argues that the proviso is inapplicable as there was no notification by the Provincial Government investing the Subordinate Court of Cuddalore with power to exercise the functions of a District Judge under Part X of the Indian Succession Act (XXXIX of 1925). It is admitted that neither under section 26 of the Succession Certificate Act (Act VII of 1889), nor under section 388 of the Indian Succession Act (XXXIX of 1925) was there any notification by the Provincial Government investing the Subordinate Judge's Court of Cuddalore with powers to exercise the functions of the District Court. The proviso therefore relied on by the respondent's advocate is inapplicable. On the other hand section 29 of the Madras Civil Courts Act, 1873, and a notification issued under sub-clause (1) of the said section by the High Court are relied on, as the authority under which the Subordinate Judge of Cuddalore is empowered to issue succession certificates. Assuming this to be correct, it would follow that the appeal against the order of the Subordinate Judge would only lie to the High Court by virtue of section 384, sub-clause (1) of the Indian Succession Act, 1925, and section 29, sub-clause (3) of the Madras Civil Courts Act, 1873 (Act III of 1873). Section 384 (1) of the Indian Succession Act provides that an appeal shall lie to a High Court from an order of a District Judge granting a certificate under Part X of the Act, subject to other provisions of the said Part X. The only other provision dealing with the form of appeal in the said Part X of the Act is the proviso to sub-clause (2) of section 388 which I have considered earlier in this judgment. The said proviso being inapplicable to the circumstances of the present case, section 384, clause (1) would apply and the appeal will be only to the High Court. It may be noted that clause (3) of section 29 of the Madras Civil Courts Act, 1873, provides that proceedings taken cognizance of by a Subordinate Judge under the provisions of section 29 shall be disposed of by him subject to the law applicable to like proceedings when disposed of by the District Judge, and this notwithstanding anything contained in section 13 of the said Act, Section 13 provides for the form of appeal from judgments and decrees of Subordinate Judges. The reference to section 13 in sub-clause (3) of section 29 of the Madras Civil Courts Act, 1873, is made only because the proceedings of the Subordinate Judge

under section 29 shall be governed in the matter of appeals also by the same law as would apply to proceedings by a District Judge. In other words, the right of appeal is provided and this right of appeal is on the same basis as if the Subordinate Judge is a District Judge in dealing with this matter. That would mean that an appeal against an order of a Subordinate Judge in proceedings taken cognizance of by him by virtue of a notification under section 29 (1) shall be only to the High Court irrespective of the pecuniary limits imposed by section 13 of the Madras Civil Courts Act. In this view the preliminary objection fails and is overruled.

On the merits I have no hesitation in concurring with the finding of the Subordinate Judge that the will is proved to be true and valid. The evidence of P.W. 1 is sufficient. Nor is it necessary to take out probate or letters of administration in respect of this will as it was not executed within the Presidency town of Madras, and as it does not deal with any of the immoveable properties within those limits.

The further contention of the appellant's advocate that Venkobai was a permanent resident in the district of Chittoor at the time of her death and that therefore the Subordinate Court of Cuddalore had no jurisdiction is in my opinion not open to him by reason of section 21 of the Civil Procedure Code which is applicable to proceedings relating to the issue of succession certificates under the Succession Act also by reason of section 141 of the Civil Procedure Code. I do not think it necessary therefore to deal with the contention whether her permanent place of residence at the time of her death was really in the district of Chittoor or not. All the contentions raised by the learned advocate for the appellant having been negatived, it would follow that this appeal should be dismissed.

But, at a late stage of the arguments, and in the course of the discussion, a further point emerged which raises a question of great importance, and it is this: whether a notification by the High Court under section 29 (1) of the Madras Civil Courts Act would vest jurisdiction in a Subordinate Judge to issue a succession certificate under Part X of the Indian Succession Act (XXXIX of 1925). It may be pointed out that under the Succession Certificate Act (Act VII of 1889) there were notifications under section 26 of the said Act empowering certain selected Subordinate Judges' Courts and District Munsiffs' Courts to issue succession certificates. The Courts of the Subordinate Judges so empowered were those of Cocanada, Ellore, Madura (East) and Madura (West), Cochin, Tanjore, Kumbakonam, Negapatam, Mayavaram, Dindigul and Tuticorin. These notifications do not seem to have been superseded but there was a general notification in G. O. No. 1731 Law (General) Department dated 5th June, 1924, and published at page 649 of Part I of the *Fort St. George Gazette*, dated 10th June, 1924, which was as follows :—

> "Under the provisions of sub-section (1) of section 26 of the Succession Certificate Act, 1889 (VII of 1889) the Local Government are pleased to invest all Courts of Subordinate Judges and all Courts of District Munsifs in the Presidency except those situated at headquarters of Districts other than Bellary, Coimbatore and Tinnevelly with the functions of a District Court under the said Act within the local limits of their respective jurisdictions. In these excepted districts, however, the Principal Subordinate Judge's Court at Coimbatore, the Principal Subordinate Judge's Court at Tinnevelly and the Court of the District Munsif at Bellary, shall perform the functions of a District Court under the said Act within the local limits of their jurisdictions."

This notification, however, was superseded by the notification in G. O. No. 24 Law (General) Department dated 7th January, 1925, which reads as follows :—

> "Under the provisions of sub-section (1) of section 26 of the Succession Certificate Act, 1889 (VII of 1889), and in supersession of Law (General) Department Notification No. 371 dated 5th June, 1924, published at page 649 of the *Fort St. George Gazette*, dated 10th June, 1924, the Local Government are pleased to invest all Courts of District Munsiffs in the presidency except those situated at headquarters of districts with the functions of a District Court under the said Act within the local limits of their respective jurisdiction."

The Succession Certificate Act was repealed and re-enacted as Part X of the Indian Succession Act (XXXIX of 1925). Though there has been no fresh

notification under section 388 (1) of the Indian Succession Act, the previous notifications under the superseded Succession Certificate Act, such of them as were in force continued to be in force even after the enactment of the Indian Succession Act, 1925. In the year 1926, the Indian Legislature passed Act XIV of 1926 whereby section 29 was inserted in the Madras Civil Courts Act, 1873. This, it may be noted, is an enactment of the Indian Legislature and not of the Madras Legislature. Under the newly added section 29 the High Court is empowered, by general or special order, to authorise any Subordinate Judge to take cognizance of any proceedings under the Indian Succession Act, 1925, which cannot be disposed of by District Delegates. In 1927, in exercise of the powers conferred by clause (1) of section 29 of the Madras Civil Courts Act, 1873, and in exercise of the powers conferred by section 265 of the Indian Succession Act, 1925, the High Court made two notifications which are set out below:

> " (*i*) Under the provisions of section 265 of the Indian Succession Act, 1925 (Act No. XXXIX of 1925) and in supersession of all previous notifications on the subject, the High Court hereby appoints *ex officio* as District Delegates under that Act within the local limits of their respective jurisdictions, all Subordinate Judges who are exercising jurisdiction under that Act.
>
> (*ii*) Under the provisions of section 29 (1) of the Madras Civil Courts Act, 1873, as amended by the Madras Civil Courts (Amendment) Act, 1926 (Act No. XIV of 1926), the High Court hereby authorises all such Subordinate Judges to take cognizance of any proceedings under the Indian Succession Act, 1925 (Act XXXIX of 1925), which cannot be disposed of by the District Delegates."

In the year 1939, these notifications of 1927 were superseded by fresh notifications made by the High Court and they are as follows:

> " 1. Under the provisions of section 265 of the Indian Succession Act, 1925 (Act XXXIX of 1925), and in supersession of High Court's notification, dated 23rd July, 1927, published at page 1138, Part II of the *Fort St. George Gazette*, dated 23rd August, 1927, the High Court hereby appoints all Subordinate Judges *ex officio* as District Delegates under that Act within the local limits of their respective jurisdiction.
>
> 2. Under the provisions of section 29 (1) of the Madras Civil Courts Act, 1873, as amended by the Madras Civil Courts (Amendment) Act, 1926 (Act XIV of 1926) and in supersession of High Court's notification dated 23rd July, 1927, published at page 1138, Part II of the *Fort St. George Gazette*, dated 23rd August, 1927, the High Court hereby authorizes all Subordinate Judges to take cognizance of any proceedings under the Indian Succession Act, 1925 (Act XXXIX of 1925) which cannot be disposed of by District Delegates."

The question that falls to be considered now is whether on a proper interpretation of section 29 (1) of the Madras Civil Courts Act, 1873, and section 388 of the Indian Succession Act (XXXIX of 1925), any jurisdiction can be conferred by a notification of the High Court under section 29 of the Madras Civil Courts Act upon Subordinate Judges to grant succession certificate under Part X of the Indian Succession Act. It will be noted that the Succession Certificate Act of 1889 empowered the Provincial Government to invest Courts inferior to District Courts with jurisdiction to act as District Judge in the matter of granting succession certificates and that power was continued by section 388 of the Indian Succession Act in Part X which takes the place of the old Succession Certificate Act. Under this power the High Court has empowered all District Munsiffs other than those at headquarters of Districts to take cognizance of applications for grant of succession certificates. Except the special notifications in favour of certain selected Subordinate Judge's Courts empowering them to act similarly under section 26 of the Succession Certificate Act of 1889, there is no notification by the Provincial Government, empowering all Subordinate Judges as such or other Subordinate Judges than those already mentioned to take cognizance of proceedings under Part X of the Act. The Sub-Court of Cuddalore has not been empowered by any notification by the Provincial Government either under section 26 of the Succession Certificate Act (1889) or section 388 of the Indian Succession Act, 1925. The power to entertain succession certificate applications by the Subordinate Judge's Court of Cuddalore is sought to be rested only on section 29 (1) of the Madras Civil Courts Act, 1873, and the High Court's notification of 1939 set out above. In the first place it may be noted that section 29 (1) of the Madras Civil Courts Act refer to " any proceedings under the Indian Succession Act, 1925, which cannot be disposed of by District Delegates "

and the notification also adopts the same language. In explicit terms there is no authorisation to deal with proceedings under Part X of the Indian Succession Act. But the argument is that the words :

"any proceedings under the Indian Succession Act, 1925, which cannot be disposed of by District Delegates"

are very wide and are quite general and must necessarily include proceedings under Part X of the Indian Succession Act as well. Reliance is placed upon the decision in *Karthiruma Goundar* v. *Rangammal*[1]. There, however, the question related only to the jurisdiction of a Subordinate Judge authorised by the notification aforesaid, to deal with an application under section 192 which is contained in Part VII of the Indian Succession Act. The learned Judges held that the expression :

"any proceedings under the Indian Succession Act of 1925 which cannot be disposed of by District Delegates"

are not confined to contentious proceedings relating to the issue of probate and letters of administration which could not be disposed of by District Delegates but the words are wide enough to include applications under section 192 of the Act as well. It is unnecessary for me to say anything more about this judgment than that it is not an authority dealing with the point now under discussion, *viz.*, whether applications under Part X of the Act could also come under the expression used in the notification following the language of section 29 (1) of the Madras Civil Courts Act. Section 388 of the Indian Succession Act is not repealed wholly or in part and continues to be in force. If we should interpret the general words of section 29 (1) of the Madras Civil Courts Act as including also proceedings under Part X of the Succession Act, it might result in an inconsistency and possibly in a conflict of powers between the High Court and the Provincial Government. The Provincial Government may invest either Subordinate Judges or District Munsiffs with power to act under Part X and an appeal from an order of the Court so invested with power will be to the District Court. The High Court on the other hand cannot invest any District Munsiff with like power but can only empower, if at all, a Subordinate Judge and an appeal against his order would lie to the District Court. If a Subordinate Judge is invested both by the High Court and by the Provincial Government, it will be difficult to say whether the appeal would lie only to the District Court or to the High Court. Further the power to authorise can be exercised from time to time and the authority conferred may be withdrawn from time to time. It may possibly result in a conflict if both the Provincial Government and the High Court should have concurrent powers to authorise all or any of the Subordinate Judges to act under Part X of the Succession Act, or to withdraw the powers so given. It seems to me that the words in section 29 (1) should really read as excluding proceedings under Part X at least of the Indian Succession Act, 1925, wherein there is a special provision for investing inferior Courts with jurisdiction to act under that part and that power is given not to the High Court but to the Provincial Government. The two sections have got to be read together and reconciled in such a manner that they do not lead to conflict of powers or jurisdiction. Assuming that the amendment of the Madras Civil Courts Act of 1873 by the insertion of the new section 29 by Act XIV of 1926 was intended to give power to the High Court to authorise the Subordinate Judges to dispose not only merely all contentious matters relating to the issue of probate and letters of administration which could not be disposed of by District Delegates, still even the wide powers claimed under section 29 (1) should be restricted to proceedings under the Indian Succession Act, where the said Act itself does not contain a special provision empowering an authority to invest inferior Courts with jurisdiction to act in respect of certain specified proceedings. It may not be inappropriate to point out that there were enactments which permitted a delegation of powers to deal with contentious matters of probate and letters of administration to Subordinate Judge's Courts both under the Indian Succession Act of 1865.

1. (1932) 62 M.L.J. 622 : I.L.R. 55 Mad. 701.

and the Probate and Administration Act (V of 1881) as for instance the provisions which will be found in the Civil Courts Acts of some other Provinces. See for instance section 23 of Bengal, Agra and Assam Civil Courts Act, 1887, section 28-A of the Bombay Civil Courts Act of 1869, section 19 of the Central Provinces Courts Act (I of 1917) and section 30 of the Punjab Courts Act of 1918. These it may be pointed out refer to delegation of certain proceedings under the Indian Succession Act of 1865 and the Probate and Administration Act, 1881. It was apparently on those lines that power was intended to be conferred on the High Court in Madras also, on the recommendations contained in the report of the Civil Justice Committee. However by the year 1926, when the Amending Act was passed by the Indian Legislature inserting section 29 in the Madras Civil Courts Act of 1873, the Indian Succession Act of 1865 and the Probate and Administration Act of 1881 and various other Acts including the Succession Certificate Act (Act VII of 1889) and the Property Protection Act of 1841 had all become consolidated in Act XXXIX of 1925 which was referred to as the Indian Succession Act, 1925. That is why in the new section 29 of the Madras Civil Courts Act reference is made to :

"any proceedings under the Indian Succession Act, 1925, which cannot be disposed of by District Delegates"

and not to proceedings under the Indian Succession Act of 1865 or the Probate and Administration Act of 1881. It is because of this reference to the Indian Succession Act of 1925 which also consolidated the provisions of the Property Protection Act and the Succession Certificate Act along with the other two Acts mentioned above, that this question has now arisen for decision in this Province. Whatever may be the case with reference to section 192 in Part VII of the Indian Succession Act, is to which it may be noted there was and is no power to delegate such functions of the District Judge to inferior Courts apart from section 29 (1) now under consideration, so far as Succession Certificate Act of 1899 and Part X of the Indian Succession Act are concerned, there was and is always a machinery to empower such delegation and it was the Provincial Government who had and has the power to do so and that is kept intact by the re-enactment of the old section 26 of the Succession Certificate Act in section 388 of the Indian Succession Act of 1925. It seems to me therefore that the proper way of construing section 29 (1) of the Madras Civil Courts Act and section 388 of the Indian Succession Act is to say that the general words of section 29 (1) of the Madras Civil Courts Act should be limited to proceedings under the Succession Act, 1925, other than Part X for which the special provision in section 388 of the Act alone will apply. In this view it would follow that the notification in question does not and cannot confer any power upon the Subordinate Judge as such to entertain applications under Part X of the Indian Succession Act, 1925. Apart from the notification of 1939 made in exercise of the powers under section 29 (1) of the Madras Civil Courts Act, 1873, there has been no special notification empowering the Subordinate Judge's Court of Cuddalore under either the old section 26 of the Succession Certificate Act or the new section 388 of the Indian Succession Act. The Provincial Government were advised to give such powers apparently only to Courts of District Munsiffs other than those at headquarters and some selected Subordinate Courts. In the circumstances, it would follow that the Subordinate Judge's Court of Cuddalore had no jurisdiction at all to entertain this application for succession certificate and this is not a matter which can be cured by section 21 of the Code of Civil Procedure. In the result this appeal is allowed but having regard to the fact that the practice from 1939 appears to have been for Subordinate Judge's Courts as such to entertain applications under Part X of the Succession Act also, in the circumstances of the case, I order that each party should bear his or her own costs.

The order of the lower Court is set aside and the petition in the lower Court will stand dismissed.

K.S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

Narayanaswami Reddi and others .. *Petitioners**

v.

AL. VR. ST. Veerappa Chettiar and another .. *Respondents.*

Civil Procedure Code (V of 1908), *Order* 21, *rules* 87, 98, 99 *and* 103—*Application to remove obstruction—One day's delay in filing it—Application dismissed as 'not pressed'—Fresh application for removal on a later execution petition—Whether maintainable.*

A decree-holder executed his decree and the present petitioners obstructed him and therefore he filed his application against them under Order 21, rule 97, Civil Procedure Code, on 26th January, 1946, and this application was dismissed as 'not pressed' on 17th March, 1947, as there was one day's delay in presentation, the limitation period being 30 days from the date of obstruction under Article 167, Limitation Act. A fresh application was again preferred under Order 21, rule 97 along with an execution petition. On the question whether the fresh application for removal of obstruction was barred by the decision on the previous one,

Held : that on the facts of the case, the second application arising out of a subsequent execution petition was maintainable and not barred by any law in view of the dismissal of the earlier application which was filed under Order 21, rule 97, one day late, and on which no order under Order 21, rule 98 or 99 was in fact passed.

Cannanore Bank, Ltd. v. *Madhavi,* (1941) 2 M.L.J. 956 : I.L.R. 1942 Mad. 336 (F.B.) and *Kaleswar Mills* v. *Govindaswami Naicker,* (1945) 2 M.L.J. 403, distinguished.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Gobichettipalayam, dated 23rd July, 1948, in E.A. No. 255 of 1947 in O.S. No. 408 of 1939.

K. V. Ramachandra Aiyar for Petitioners.

R. Kesava Aiyangar for Respondents.

The Court delivered the following

JUDGMENT.—The petitioners were respondents 1 to 4 in an application filed by the decree-holder under Order 21, rule 97, Civil Procedure Code, impleading them as obstructors to his taking delivery. They put forward the position that it was barred by a previous application under the same provision of law E.A. No. 59 of 1946 filed in a previous execution petition E.P.R. No. 158 of 1945 which was dismissed as "not pressed" on 17th March, 1947, and that the decree-holder's remedy was only by a suit within one year under Order 21, rule 103, Civil Procedure Code. The District Munsiff negatived this contention and held that a fresh application for removal of obstruction, was maintainable.

The short relevant facts are these. The obstruction the decree-holder encountered took place on 26th December, 1945. He filed E.A. No. 59 of 1946 against the present petitioners under Order 21, rule 97 on 26th January, 1946. This execution application after several adjournments was dismissed as "not pressed" on 17th March, 1947, as there was one day's delay in presentation, the limitation period being 30 days from the date of the obstruction under Article 167 of the Limitation Act. The decree-holder filed a fresh execution petition without undue delay on 12th April, 1947, accompanied by this fresh execution application under Order 21, rule 97. It is quite clear that had it not been for this technical bar of limitation, the decree-holder would have prosecuted his original application for removal of obstruction.

Mr. Ramachandra Aiyar for the petitioners has argued that the order dismissing the application as not pressed was an order passed against the decree-holder under Order 21, rule 103, Civil Procedure Code. But this provision requires an order being passed under Order 21, rule 98, 99 or 101. Order 21, rule

* C.R.P. No. 1063 of 1948. 23rd February, 1949.

98 requires the Court to be satisfied that resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation. Order 21, rule 99 requires it to be satisfied that the resistance or obstruction was occasioned by any person other than the judgment-debtor claiming possession on his own account in good faith. In the present case the Court had no opportunity to direct its judicial mind to an order under Order 21, rule 98 or 99, Civil Procedure Code, for the simple technical reason that the application under Order 21, rule 97 was time-barred. Had the application been dismissed as "not pressed" by the decree-holder who had filed it in time under Order 21, rule 97, the position might have been different; and the argument that the order dismissing the petition should be construed as one under Order 21, rule 99 in view of the decree-holder's non-prosecution which was tantamount to a *prima facie* recognition of the obstructor's rights may perhaps have been tenable. Learned counsel for the petitioners concedes that Order 21, rule 103, Civil Procedure Code, comes into play or operation only in the event of an application being filed under Order 21, rule 97, Civil Procedure Code. It is unnecessary for me to consider here the position of a decree-holder who withdraws an application under Order 21, rule 97, Civil Procedure Code after he has filed it in time, in which case the Court has had the opportunity to direct its attention to passing an order within the scope of Order 21, rule 98 or 99, Civil Procedure Code. There appears to be no specific provision in the Code under which any matter can be "dismissed" as " not pressed " though such an order is frequently passed on execution petitions which at the option of the decree-holder he does not press further for the time being. The more correct order on such an execution petition should be " not pressed—Struck off." The present E.A. No. 59 of 1946 was rightly " dismissed " however as it was time-barred. Order 23, Civil Procedure Code, which provides for the withdrawal of suits and other matters specifically excludes execution petitions by virtue of rule 4 of that Order.

My attention has been drawn to two decisions to reinforce the argument for the petitioners. The first is *Cannanore Bank, Ltd.* v. *Madhavi*[1], a Full Bench decision which deals with an order on a claim petition under rule 58, and an order dismissing such a petition as " not pressed " which was held to be an adverse order against the claimant within the meaning of Order 21, rule 63 of the Civil Procedure Code. It was held that it was open to the claimant to file a suit within one year from the date of such an order, although he did not choose to press his claim before the executing Court then. But Order 21, rule 58 relates to a third party to execution proceedings whereas here we are concerned with the rights of a decree-holder to execute his decree. That decision does not help us very much in view of the application under Order 21, rule 97, Civil Procedure Code, having been filed out of time. Another decision *Kaleswar Mills* v. *Govindaswami Naicker*[2], is relied on, but there was in that case a clear order of dismissal of the application for removal of the obstruction on the ground that the obstructors were entitled to do so in their own right and were not in possession on behalf of the judgment-debtors.

I have no hesitation, on the facts of the present case, in agreeing with the learned District Munsiff that the second application under Order 21, rule 97, Civil Procedure Code, arising out of a subsequent execution petition is in the circumstances maintainable and not barred by any law in view of the dismissal of the earlier application which was filed under Order 21, rule 97 of the Civil Procedure Code, one day late, and on which no order under Order 21, rule 98 or rule 99 was in fact passed.

The petition is dismissed with costs.

K.C. *Petition dismissed.*

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1. (1941) 2 M.L.J. 956 : I.L.R. 1942 Mad. 336 (F.B.). 2. (1945) 2 M.L.J. 403.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN.

Sashi Ammal .. *Appellant**

v.

PS.Ar.Ar. Arunachalam Chettiar by Agent Sivaraman Chettiar .. *Respondent.*

Madras Agriculturists Relief Act (IV of 1938), *section* 19—*Requirements under—Relevancy of agriculturist character of the debtor—Crucial dates.*

The object of the Act is clearly to provide relief for debtors who are agriculturists at the commencement of the Act, while section 19 read with the definition of 'agriculturist' seems to require that the debtor seeking relief should be an agriculturist at the time of the application and the 1st paragraph of the section further requires, with a view to prevent abuse of the provisions of the Act, that the debtor should have been an 'agriculturist' on the 1st October, 1937, as the proposal of affording relief to indebted agriculturists was made known on that date. The agriculturist character of the debtor is not relevant for purposes of scaling down debts under the Act except with reference to these three dates.

Appeal against the appellate order of the District Court of Coimbtaore, dated 18th July, 1947, in A.S. No. 38 of 1947 preferred against the order in I.A. No. 597 of 1944 in O.S. No.45 of 1933, District Munsif Court, Tiruppur.

K. V. Ramachandra Aiyar for Appellant.

T. K. Subramania Pillai for *A. C. Sampath Aiyangar* for Respondent.

The Court delivered the following

JUDGMENT.—The statement of the plaintiff's claim as embodied in the decree in O.S. No. 452 of 1933 was "defendants have executed a security bond charging the suit properties for the suit debt and other debts. The plaintiff prays for a charge on the plaint properties." After decreeing the claim on the promissory note executed by defendants 1 and 2, the operative portion of the decree with reference to the charge referred to above ran :

"It is further ordered that the plaint properties hereunder described shall be sold for the realisation of the decree amount."

There was no specific provision in the decree calling upon the fifth defendant apart from her liability under the scurity bond, to pay any portion of the amount, decreed.

The decree-holder filed E.P. No. 448 of 1943 to realise the amount decreed by the sale of the properties on which a charge had been created. On 7th April, 1944, the decree-holder applied in E.A. No. 445 of 1944 to reduce the upset price. In opposing that application the fifth defendant, whose position was that of a usufructuary mortgagee under a deed of mortgage for Rs. 1,500 executted on 26th August, 1931, contended that that mortgage had been discharged on 15th December, 1943. A receipt from the fifth defendant acknowledging payment of the mortgage, debt of Rs. 1,500 was filed into Court. It was this right of a usufructuary mortgage that had been included as one of the items charged in the security bond executed by defendants 2, 3 and 5. Quite obviously the second defendant, the original mortgagor, had notice of the security bond, which in effect constituted the plaintiff a sub-mortgagee. On 19th July, 1944, the Court held that the payment of Rs. 1,500 did not affect the right of the plaintiff who was a sub-mortgagee and that he could bring the property, *i.e.*, the rights of the usufructuary mortgagee, to sale. The upset price was reduced.

On 29th May, 1944, defendants 2 and 5 filed I.A. No. 597 of 1944 under section 8 of the Madras Act IV of 1938. The second defendant's claim to scale down the decree was allowed. The fifth defendant's petition was dismissed on 3rd October, 1944 ; but on appeal the dismissal of fifth defendant's application was set aside, and the petition was remanded for disposal afresh. Eventually on 10th August, 1946, the fifth defendant's application, I.A. No. 597 of 1944,

* A.A.A.O. No. 231 of 1947. 16th March, 1949.

was dismissed on the ground that the fifth defendant was not an agriculturist on the date of the application, 29th May, 1944, as she had no further saleable interest in the usufructuary mortgage, because admittedly she had received the amount due to her under the deed of mortgage. On appeal the learned District Judge agreed with the view taken by the learned Munsif. Against the dismissal of the appeal the fifth defendant has preferred this second appeal.

The main question that arose for determination in the Courts below and arose again before me was whether the appellant was an agriculturist within the meaning of section 19 of Madras Act IV of 1938. I agree with the view taken by the Courts below that the appellant had no further saleable interest in the property on 29th May, 1944; and it was not the case of anyone that apart from her interest as usufructuary mortgagee she had any further interest which would make her an agriculturist.

The learned advocate for the appellant contended that it was not necessary that the appellant should have been agriculturist on 29th May, 1944. It was quite enough if it was proved that the fifth defendant was an agriculturist on 1st October, 1937, the date referred to in section 8 (1) of the Act, and on 22nd March, 1938, when the Act came into force. It should be remembered the alleged discharge was only on 15th February, 1943. I am unable to accept this contention. In *Palani Goundan* v. *Peria Goundan*[1], in dealing with the requirements under section 19 of the Act, Patanjali Sastri, J., delivering the judgment of the Bench observed :

> "The object of the Act is clearly to provide relief for debtors who are agriculturists at the commencement of the Act (*see* section 17) while section 19 read with definition of 'agriculturist' seems to require that the debtor seeking relief should be an agriculturist at the time of the application, and the first paragraph of section 10 further requires, with a view to prevent abuse of the provisions of the Act, that the debtor should also have been an 'agriculturist' on the 1st October, 1937, as the proposal of affording relief to indebted agriculturists was made known that date. Thus, it is clear that the agriculturist character of the debtor is not relevant for purposes of scaling down debts under the Act except with reference to these three dates."

The same Bench had occasion to refer to that decision in *Papammal* v. *Ramaswami Chettiar*[2], where the learned Judges pointed out the difference between the requirements of section 19 of Madras Act IV of 1938 and the requirements to be proved in a suit itself where the debt had to be scaled down in accordance with the provisions of the Act. For the second category of cases whether the debtor was an agriculturist on a date subsequent to the 22nd March, 1938, was not considered material. I am unable to accept the contention of the learned advocate for the appellant, that what was embodied in *Palani Goundan* v. *Peria Goundan*[1], should be taken merely as *obiter dicta*. It is a clear pronouncement of what were the requirements of section 19 of the Act. As I have already said, I agree with the Courts below in holding that the fifth defendant had no saleable interest on 29th May, 1944, the date of her application under section 19 of the Act.

Independently of the fifth defendant's right to have the debt scaled down is the other question, put forward for the first time during arguments in second appeal, whether the position of defendants 5 and 2 with reference to the security bond was that of co-mortgagors, and whether the discharge of the mortgage debt by the second defendant would also operate as a valid discharge of that mortgage debt by the fifth defendant. This question was not raised either at the trial Court or in the lower appellate Court. In support of that contention the learned advocate for the appellant relied on *Kailasa Thevar* v. *Ramaswami Aiyangar*[3]. Though it is a question which the appellant was allowed to raise in second appeal, it is not a question that can be answered with the data available in the record before me. The plaint itself is not before me; nor is the security bond executed by defendants 2, 4 and 5 before me. It is not possible to decide on the material available to me whether defendants 2 and 5 really occupied the position of co-mortgagors

1. (1940) 2 M.L.J. 887.
2. (1942) 2 M.L.J. 498.
3. (1948) 2 M.L.J. 28.

with reference to the amount for which defendants 2, 4 and 5 executed that security bond. Should their position really be that of co-mortgagors, to what extent the principles laid down in *Kailasa Thevar* v. *Ramaswami Aiyangar*[1], would apply would be a point for consideration. I think that these questions should be dealt with in the first instance by the trial Court. The petition is therefore remanded to the learned Munsif for disposal afresh in the light of the observations in this judgment.

It was appellant's own fault that this point was not raised till the stage of the second appeal. So I direct that the appellant do pay the plaintiff, respondent in appeal, the latter's costs in the trial Court, and in the lower appellate Court. The costs of this second appeal will be costs in the cause and will abide the result of the petition.

V.P.S. ——— *Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Muthukaruppayee Achi *alias* Visalakshi Achi .. *Appellant**

v.

Pothapular Pillai and others .. *Respondents.*

Provincial Insolvency Act (V of 1920)—Powers of Official Receiver—Order of Court to sell properties of insolvent subject to encumbrances—Right of Official Receiver to sell free from encumbrances.

The Official Receiver has, under the Provincial Insolvency Act, an unquestionable legal right to sell all properties of the insolvent and is not bound to go by the administrative advice tendered to him by the Insolvency Court though he undoubtedly stands in danger of being removed from the office or being sued by the parties for damages, for such failure.

Appeal against the order of the District Court, Ramnad at Madura in Civil A.S. No. 23 of 1946 preferred against the order of the Court of the Subordinate Judge, Sivaganga, in I.A. No. 346 of 1945 in I.P. No. 4 of 1936.

G. R. Jagadisan for Appellant.

M. Natesan for Respondents.

The Court delivered the following

JUDGMENT.—The facts in this appeal are very peculiar. One Meyyappa Chettiar was adjudicated insolvent in I.P. No. 4 of 1936 on the file of the Sub-Court, Sivaganga. Among his properties were two items, subject to a mortgage, dated 31st March, 1925, in favour of the first respondent Pothapular Pillai, for Rs. 125. Several attempts by the Official Receiver to sell these two items for a reasonable price *subject to the mortgage met* with failure. So, he wrote to the Sub-Court, Sivaganga, asking for permission to sell the properties *free of all encumbrances*, as the first respondent, the mortgagee, was willing to bid for Rs. 200 and buy the properties and write off the rest of the amount due to him under the mortgage. It is, of course, well known that Official Receivers move the Insolvency Courts often for a sale of mortgaged properties *free of encumbrance*, one of the ideas in doing so being to get an extra commission. But, curiously enough, in this case, there was a comedy of errors. The Insolvency Court passed an order permitting the Official Receiver to sell the mortgaged properties *subject to the mortgage*, with an upset price of Rs. 200. The Official Receiver, who never applies and never need apply for a sale of mortgaged properties *subject to the mortgage*, erroneously took the order to mean that his request to sell the properties *free of encumbrances* had been granted, without perusing it closely or carefully as he was bound to do. He sold the properties *free of encumbrances*, in July, 1938, with an upset price of Rs. 200 and, of course, the first respondent bought them for that price and wrote off the rest of the dues under the mortgage. The Official Receiver

1. (1948) 2 M.L.J. 28.

* A.A.A.O. No. 100 of 1947. 18th March, 1949.

discovered his mistake, to his horror, in August, 1939, and requested the insolvency Court to correct the clerical mistake of the Court, as he conceived it to be, or to instruct him whether he could cancel the sale at that stage and ask the party to return to him the sale deed duly executed in his favour on 8th August, 1938 and hold a fresh sale. He suggested that the phrase "subject to the mortgage" in the order of the Insolvency Court was a clerical slip for "free from all encumbrances." The Insolvency Court, by its order, dated 20th September, 1939, informed the Official Receiver, that in its opinion, there was no clerical error in the previous order (passed by a preceding Sub-Judge) which appeared to have been deliberately worded by the preceding Judge whose intention must undoubtedly have been that the properties should be sold subject to the mortgage starting with an upset price of Rs. 200. It went on to say that the Official Receiver should, therefore, cancel the sale and proceed to sell the properties afresh by proclaiming it subject to the mortgage. But, of course, this letter of the Insolvency Court left the Official Receiver in a quandary. He had already confirmed the sale and executed a registered sale deed more than a year before. He could only file a suit against the purchaser for cancellation of that sale pleading mistake, and it was extremely doubtful whether he would have succeeded in such a suit in the circumstances of this case. So, the then Official Receiver did nothing. He did not carry out the directions of the Insolvency Court. His successor moved the Insolvency Court to exercise its discretion and condone the irregularity and regularise the sale which had been held free of all encumbrances. The Insolvency Court did so by an order, dated 13th June, 1945.

Meanwhile, the adjudication of Meyyappa Chettiar was itself annulled on 2nd February, 1946, but the properties were vested in the Official Receiver. The first respondent sold the properties to the third respondent for Rs. 380 on 3rd August, 1943. Muthukaruppayee Achi *alias* Visalakshi Achi, the appellant, who is no other than the wife of the insolvent, though she claimed to be a creditor of his in addition, filed a petition under sections 4 and 56 (3) of the Provincial Insolvency Act, I.A. No. 346 of 1945, in the Sub-Court, Sivaganga, for declaring that the properties still belong to the estate of the insolvent, for directing the second respondent, the Official Receiver, Ramnad, to sell the same in public auction subject to the mortgage and with an upset price of Rs. 200 as directed by the Insolvency Court, and to direct an enquiry into the mesne profits due from the first respondent to the estate. The Subordinate Judge, Sivaganga, dismissed her application with the costs of the first respondent, holding that an application under section 4 would not lie five years after the annulment of the adjudication, that the Official Receiver had a perfect legal right to sell the properties free of all encumbrances in spite of an administrative order of the Insolvency Court directing him to sell the properties subject to the mortgage, that the order of the Insolvency Court directing the Official Receiver to cancel the sale and sell the properties afresh was not a judicial order binding on him but only an administrative advice tendered to him, which he was not bound to follow, and that the Insolvency Court itself had condoned the irregularity by its order, dated 13th June, 1945.

The matter was taken in appeal by the petitioner. The District Judge, Ramnad, agreed with the findings of the trial Court. He held further that the price, Rs. 200, realised at the sale by the Official Receiver free of all encumbrances, was not proved to be inadequate at the time when the sale was held, and, while not deciding whether an application under section 4 would lie in this case, was of opinion that it might not lie in the circumstances. He dismissed the appeal with costs. Hence the second appeal.

I have perused the entire records and heard the learned counsel on both sides. There is no doubt whatever, in my mind that both the lower Courts were right in not interfering with the sale held by the Official Receiver in 1938. The Official Receiver has, under the Provincial Insolvency Act, an unquestionable legal right to sell all properties of the insolvent and is not bound to go by the administrative advice tendered to him by the Insolvency Court, though he undoubtedly stands

in danger of being removed from the office, or being sued by the parties for damages, for such failure. The first respondent, the purchaser, is not proved to have known about the orders issued by the Insolvency Court. The mistake of the Official Receiver in thinking that his request to sell the properties free of encumbrances had been granted was also in a way explainable, as he need not have approached the Insolvency Court for orders to sell the properties subject to the mortgage, and the properties could not be sold several times before when brought to sale subject to the mortgage. Nor could the Official Receiver have cancelled the sale and held a re-sale in a summary fashion, as advised by the Insolvency Court. He could have only filed a suit for cancellation of the sale, and relied on mistake, and that plea appears to be pretty nigh hopeless in the circumstances of this case. That is why, the Official Receiver did not cancel the sale and why his successor urged the Insolvency Court to revise its order and condone the irregularity which the Insolvency Court finally did, after depriving the Official Receiver of his commission on Rs. 200 as a penalty for his carelessness and laches. The price fetched was a proper price at the time the sale was held. Nor may section 4 of the Provincial Insolvency Act apply to cases like this. I have no doubt, therefore, that the appellant's request to cancel the sale and hold a fresh sale, declaring the properties sold to belong still to the estate of the insolvent, was rightly negatived by both the lower Courts, but I have no doubt also that, in the peculiar circumstances of this case, the appellant should not have been directed to pay any costs to the first respondent. So, I dismiss this appeal, but direct all the parties to bear their own costs throughout, deleting the provision in the orders of both the lower Courts directing the appellant to pay the costs of the first respondent. Leave refused.

V.P.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE PANCHAPAKESA SASTRI.

N. V. R. Nagappa Chettiar and another .. *Appellants**

v.

The Madras Race Club by its Secretary, Mr. H. L. Raja Urs and others .. *Resp ndents.*

Company—Shareholders when entitled to bring an action against the company—Companies Act (VII of 1913), section 81 (2) and Proviso—" Not less than twenty-one days "—Meaning—Day of service and day of meeting, if both to be excluded—Waiver of objection as to legality of notice of meeting—What would constitute—Company meetings—Chairman—Applicability to, of the maxim that no one can be a Judge in his own cause.

Though generally nothing connected with internal disputes between shareholders is to be made the subject of an action by some one shareholder on behalf of himself and others, yet shareholders are entitled to bring an action (1) in respect of matters which are *ultra vires* the company and which the majority of shareholders were incapable of sanctioning ; (2) where the act complained of constitutes a fraud on the minority ; and (3) where the action of the majority is illegal. Further, where a special resolution is improperly passed it would be open to a shareholder or shareholders to maintain a suit in respect of such illegality.

The expression " not less than twenty-one days " occurring in sub-section (2) of section 81 of the Companies Act means twenty-one clear days exclusive of the day of service and exclusive also of the day on which the meeting was to be held (*i.e.*,) there must be an interval of twenty-one days in between the date of the meeting and the date of the service of notice.

Under the proviso to section 81 (2) the requirement as to this twenty-one days' notice may be dispensed with by an agreement of all the members *entitled to attend and vote* and not merely of all the members *entitled to vote and present in person or proxy* at the meeting. This proviso indicates the intention on the part of the Legislature that the provision in sub-section (2) is mandatory and that it can be dispensed with only by the agreement of all members. It is not enough that the members present at the meeting indicated either expressly or impliedly that they consented to or acquiesced in shortening the period of notice. An express consent of all the members to waive the notice has to be established to sustain a plea of waiver of objection as to legality of notice.

The maxim that no man can be a Judge in his own cause will apply to the case of a chairman of a meeting whose functions are to decide as to the validity of certain nominations, including his

* O.S.A. No. 22 of 1948. 5th October, 1948.

own. Such a chairman is in the position of a quasi-judicial officer and he has to be a Judge in his own cause. There is no distinction in this respect between the meeting of a company and other meetings.

Appeal against the judgment and decree of Bell, J., dated 12th April, 1948, in C. S. No. 526 of 1947, Original Side, High Court, Madras.

V. C. Gopalaratnam and *N. Rajagopala Aiyangar* for Appellants.

O. T. G. Nambiar instructed by *King and Partridge* and *L. V. Krishnaswami Aiyar* for Respondents.

The Court delivered the following

JUDGMENT.—This appeal arises out of an action by the members of the Madras Race Club. The action was tried on the original side by Bell, J., and by his judgment he dismissed the suit of the plaintiffs. Hence this appeal by the plaintiffs.

The Madras Race Club is a body corporate registered under the Indian Companies Act of 1913 before it was amended in 1936. The object of the Club, as its name indicates, is to carry on the business of a race club and to provide certain amenities to its members. The Memorandum of Association and the Articles of Association are contained in Ex. P-29. The Memorandum of Association prohibits the division of profits by way of dividend amongst the members, and they have to be utilised only for the purpose of the club. There are two classes of members, namely, club members and stand members. There are about 260 club members, and they alone are entitled to vote, while the stand members have certain other privileges, but not the right to vote. The management of the business of the Club is vested in six Stewards who must be club members. They occupy the position of the directors of a company and discharge similar functions in respect of the Club. The Articles provide as usual for the qualification for Stewards, for their retirement by rotation, filling up of vacancies, and also their powers and duties. After every annual general meeting of the Club the senior Steward is elected at the first meeting of the Stewards, who is to preside at every meeting of the Stewards. The quorum for a meeting of the Stewards is fixed at three. They are charged with the duty of calling for a general meeting annually and also, on the requisition of a prescribed number of members, calling for an extraordinary general meeting for special business. Article 50 prescribes the period of notice and the manner of issuing the notice for a general meeting. The senior Steward also presides as chairman at a general meeting. Article 73 lays down the manner of serving notices on members. After the Companies Amending Act of 1936 was passed the Articles of this Club were also amended in 1941, and Ex. P-29 contains the articles which were in force in 1947.

Sometime in April, 1947, 45 members of the Club sent a requisition to the Club for convening an extraordinary general meeting, *inter alia*, to appoint a committee to consider the revision of the Articles of Association and to suggest changes wherever necessary (Ex. P-1). In pursuance of this an extraordinary general meeting was duly held on the 21st of June, 1947, and in that meeting a special committee of seven members besides the Stewards, who were *ex officio* members thereof was constituted for the specific purpose of the revision of the Articles of Association and the suggestion of changes. They were required to submit a report on that behalf by the end of September, 1947, and it was also decided that a meeting of the general body should be called for not later than 31st of October, 1947, for the consideration of the report. The special committee had several sittings, and in the meeting of the 13th of September, 1947, they proposed several alterations to the Articles, the most important of which were that the management of the business of the Club should vest in a Managing Committee of 12 members instead of the Stewards, and that from among the members of the Managing Committee a senior Steward and five other Stewards should be elected, who should be solely responsible for the racing. They also recommended the abolition of the proxy system of voting. Under a licence granted by the Central Government under section 26 (2) of the Indian Companies Act, 1913, the Club was permitted to be registered as a company

with a limited liability without the addition of the word "limited" to its name. The Provincial Government on whom the duty of issuing licences subsequently devolved framed regulations under the said section governing the issue of licences (*vide* Development Department Notification, *Fort St. George* March 6th, 1937, G. O. No. 549). Under clause 8 of this Notification,

"If the Memorandum and Articles of Association are altered without the previous approval of the Government having been obtained in that behalf, the licence granted by the Government shall be deemed to have become void."

In view of this requirement the special committee directed the solicitors of the Club to draft the necessary resolutions in proper form altering the Articles of Association in the manner suggested, and at a subsequent meeting of the 26th of September, 1947, in which some more alterations were suggested, the Club's solicitors were also requested to further revise the draft and send it to the Government for approval. The solicitors sent the revised draft to the Government on the 29th of September, 1947 (Ex. P-5). On the 11th of October, 1947, the Government approved the revised Articles of Association proposed by the Club but with one modification relating to Article 69. The Government also pointed out that the revised Articles of Association should be adopted by passing a special resolution under section 81 (2) of the Indian Companies Act. Section 20 of the Indian Companies Act also requires a special resolution to alter or add to the existing Articles. On the 15th of October, 1947, the special committee at its meeting considered the order of the Government and resolved that an extraordinary general meeting of the members by convened on the 7th of November, 1947, at 6-30 P.M. to consider the report and pass a special resolution and requested the solicitor, Mr. Small to draft the resolutions. The Committee was adjourned to meet again at 5 P.M. on 7th November, 1947 (P-1). At this meeting of the special committee were present nine members of whom one was the senior Steward, Mr. Annamalai Chetti, and two Stewards. On the 16th of October, notice was issued to the Club members of the extraordinary general meeting on the 7th of November, 1947, at 6-30 P.M. The contents of this notice (P-8) are material for the decision of this case, and therefore it is necessary to set them out *in extenso* :

"Notice is hereby given, that an Extraordinary General Meeting of Club members of the Madras Race Club will be held at the Members' Stand of the Club at Guindy, on Friday the 7th day of November, 1947, at 6-30 o'clock in the evening for the following purposes :

(1) To receive the report of the Chairman of the Special Committee constituted to revise the Articles of Association of the Club and to suggest developments of the Club's present amenities ;

(2) To consider and, if thought fit, to pass as a Special Resolution 'That the Articles in the printed document submitted to the meeting, and for the purpose of identification subscribed by the Chairman thereof, be approved, with or without modification, and adopted as the Articles of Association of the Club in substitution for and to the exclusion of all the existing Articles of Association thereof' ;

(3) If the said Special Resolution be duly passed then to elect twelve Club members as the first Managing Committee of the Club, to hold office until the Annual General Meetnig of Club Members to be held in November 1948 ; and

(4) To consider the Special Committee's following proposals for development of the Club's amenities and to give directions to the Managing Committee thereon :—

(*a*) That the present Lunch Room be furnished suitably to serve as a Lounge for Club members ;

(*b*) That the northern corner of the verandah adjoining the Lunch Room be equipped to serve as a Card room for Club members ;

(*c*) That the present Billiards room be reserved for use only by Club members when a separate Recreation room can be provided for Trainers and Jockeys ; and

(*d*) That arrangement be made to serve Refreshments also.

N.B.—(1) A print of the proposed amended Articles of Association will follow shortly.

(2) Each nomination of a Club member as a candidate for election to the Managing Com mittee should be signed by two Club members and sent to the Secretary fourteen clear days before the date of meeting."

This notice, it is common ground, was posted at Guindy on the 16th October. About the same time notice of the annual general meeting of the Club fixed to 18th

November, 1947, was also issued to the members. The extraordinary general meeting was also advertised in the *Hindu* of 18th October, 1947 (Ex. P-10) and the *Madras Mail* of even date (Ex. P-11). In pursuance of the notice, Ex. P-8, the Club received 24 nominations for the membership of the Managing Committee which was communicated to the members by notice, dated 27th October, 1947 (Ex. P-12). By 29th October, 1947, the Club received notice of amendments to the Articles of Association from Messrs. T. T. Krishnamachari, G. Narasimham, A. R. Srinivasan and the Rajah of Vizianagaram, and these were notified to the members by a notice of 29th October, 1947 (Ex. P-13). On the 21st of October, 1947 (it is admitted before us by both sides, though there is no evidence regarding it) the Club sent the printed draft of the proposed amendments to the Articles of Association, Ex. P-30, to all the members. On the 5th of November, 1947 the Government of Madras suggested that the Articles of Association might be suitably amended to eliminate voting by proxy and to delete Articles 55, 56 and 57 altogether with a view to make the members of the Race Club take full responsibility for the proper conduct of racing. In the light of this suggestion the Government wanted a fresh draft on those lines, or alternatively that the existing Articles suitably altered and approved by the general body be submitted to them through the Registrar of Joint Stock Companies, Madras, for approval before "it is finalised". At 5 P. M. on the 7th November, 1947, the special committee met and considered the proposal of the Government. They passed at that meeting two resolutions :

"(1) Resolved that the letter be placed before the General Body Meeting to be held at 6-30 P.M. with the recommendation that the suggestion of the Government be accepted ; and

(2) Resolved also that this Committee recommends that the spirit of the letter of the Government of Madras be observed by refraining from using proxies at to-day's meeting and subsequent meeting as well as the Annual General Body Meeting."

These resolutions were passed, one member Mr. Annamalai Chettiar dissenting. The extraordinary general body meeting was held on the 17th November, 1947, at 6-30 P.M. which was presided over by Mr. P. Natesan as the senior Steward, Mr. Annamalai Chettiar expressing his unwillingness to take the chair. What exactly happened at that meeting is a matter of serious controversy between the parties, and the fate of this case mostly depends upon our decision on this point. What purported to be the proceedings of the meeting of the 7th November were communicated by the Club to the members, and the plaintiffs filed the communication received by them, which is marked as Ex. P-18. The solicitors of the Club by their letter of 10th November, 1947, communicated to the Registrar of Joint Stock Companies the proposed revised Articles which, it was alleged, were adopted at the meeting of the 7th November. The Registrar of Joint Stock Companies through a telephonic message of 14th of November, 1947, asked the solicitors whether the revised set of Articles was adopted by a special resolution at the meeting of the 7th, and that, if so, a copy of the resolution and a copy of the notice convening the meeting should be sent to him for reference. It was also pointed out by the Registrar that if the Articles were adopted by a special resolution, prior sanction of the Government ought to have been obtained and the Government might have to be addressed to condone the omission. To this the solicitors replied by their letter of 15th November, 1947, pointing out that there was no such necessity. The general meeting was held on the 18th at which some formal business was transacted, and the members were informed that there was no necessity to elect the Stewards as at the first meeting of the Managing Committee held on the 10th of November, 1947, Mr. P. Natesan was elected Chairman and five persons were elected as Stewards. Mr. Annamalai Chettiar wrote to the Registrar of Joint Stock Companies on the 18th (Ex. P-20) that the proposed special resolution had not been put to the meeting at all by the Chairman, Mr. Natesan, on the 7th of November, 1947 and that it had not been passed by the requisite statutory majority. The present plaintiffs issued through their lawyers a notice to the Club questioning the legality of the meeting of the 7th November and of the election of the members of the Managing Committee on that date on the grounds elaborately specified in that notice

including the fundamental objection that the special resolution was not moved or put before the meeting and was not voted upon. The notice demanded the Managing Committee to accept the invalidity of the proceedings of the meeting of 7th November failing which it was intimated a suit would be instituted for appropriate reliefs. The reply of the Club is Ex. P-23, dated 25th of November, 1947, and was sent through their solicitors. In this the allegations in the notice, Ex. P-21 were denied.

This was followed by the present suit which was filed on the 8th of December, 1947, by two members of the Club for themselves and on behalf of the other members of the Club other than those who were originally impleaded as defendants in the suit after obtaining the necessary permission under Order 1, rule 8, Civil Procedure Code. The first defendant is the Race Club. Defendants 2 to 13 are members of the Club who were elected as members of the Managing Committee. The suit was originally filed impleading only defendants 1 to 13. Defendants 14 to 90 who are some of the other members of the Club were impleaded as parties at their own request, as they wanted publicly to dissociate themselves from the plaintiffs.

The main reliefs claimed in the plaint were : (1) a declaration that the meeting of the general body of the members of the Club held on the 7th November, 1947, was invalid and void and that all business transacted thereat was invalid null and void ; (2) a declaration that the Managing Committee comprising defendants 2 to 13 purported to have been elected at the said meeting was not lawfully or validly elected and were not entitled to assume office ; (3) a declaration that the proposed amended Articles have not been duly passed and are ineffective ; (4) a declaration that the Stewards who were in office prior to 7th November, 1947, still continue to be in office and are the persons legally and lawfully entitled to be in management and control of the Club ; and (5) a declaration that the proceedings of the general meeting of the 18th of November, 1947, are illegal, invalid and void. There is also a relief for an injunction against defendants 2 to 13.

The grounds on which the reliefs claimed in the plaint were sought to be sustained before us may be catalogued as follows : (1) The meeting of the 7th of November, 1947, was not convened by the proper authority under the Articles, *viz.*, the Stewards. (2) The notice of the meeting, Ex. P-8, which was posted on the 16th October, 1947, contravened the provision of section 81 (2) of the Indian Companies Act as 21 days were not allowed between the date of the meeting and the receipt of the notice. (3) The notice of the meeting did not contain the necessary particulars as it did not comply with the requirement that the general nature of the business should be indicated in it, the proposed amended Articles of Association not having been sent along with the notice so as to give notice thereof of 21 clear days. (4) Item No. 2 in the agenda, the special resolution relating to the proposed amendment of the Articles was not moved or put before the meeting for being voted upon. (5) In any event even if the voting of 66 members at that meeting was in support of the special resolution, that did not constitute the statutory three-fourths majority of the members present, who numbered according to the plaintiffs 105. (6) The amendments moved were not within the scope and ambit of the original resolution and could not have been validly made. (7) The election of the 12 members of the Managing Committee was illegal as the notice regarding it was insufficient as regards the time and was also defective as the members were not informed of the qualifications and the functions of the Managing Committee before they were called upon to submit nominations. (8) The election of the entire Managing Committee was illegal, or in any event that of Mr. Natesan, was clearly illegal as he was disqualified to preside at the meeting, being himself a candidate for election to the Managing Committee. (9) If the meeting of 7th November, 1947, was void, the annual general meeting of 18th November, 1947, was equally void, as proxies were illegally excluded.

These charges are of course denied by defendants 2 to 8, 10, 12 and 13. In paragraph 5 of the written statement filed on behalf of the first defendant, the

first defendant stated with reference to the allegations in paragraph 6 of the plaint that although 105 members signed the attendance sheet during the period of the meeting and 49 proxies were registered, only 66 members were actually present at the time when the resolution to adopt the new articles was put to vote. The other defendants 2 to 8, 10, 12 and 13 filed a separate written statement practically adopting the written statement filed on behalf of the first defendant. Defendant 9 seems to have signed the written statement of defendants 2 to 8, 10, 12 and 13 but without looking into the written statement filed on behalf of the first defendant. Mr. Vijayaraghavan, the 9th defendant wanted to see the written statement of the first defendant before their written statement was actually filed into Court. For this purpose he wrote to his solicitors on the 10th of January, 1948, communicating his intention to see the written statement of the first defendant before the written statement bearing his signature was actually put into Court. To this the reply of the solicitors dated 12th January, 1947, was that their written statement was filed in Court on that day as Mr. Small was otherwise engaged that morning and that it was too late to withhold the filing of their written statement. Mr. Vijayaraghavan was informed that the written statement signed by him merely adopted the written statement filed on behalf of the Club. On the 15th January, 1948, Mr. Vijayaraghavan by his letter protested against this action of the solicitors and pointed out that paragraph 5 of the first defendant's written statement was highly misleading and even incorrect. According to him, when the resolution was put to vote at the meeting, 66 persons voted for, one member said he was neutral and about 30 to 35 other members did not vote either way. He pointed out that the statement in paragraph 5 of the written statement of the Club that only 67 members were present at that time was not true and that therefore he could not subscribe to it. After this protest when the written statement of the defendants 2 to 8, 10, 12 and 13 was returned the solicitors scored out his name. Mr. Vijayaraghavan filed a separate written statement engaging another counsel. Mr. Vijayaraghavan in his written statement denied the allegations in paragraph 5 of the written statement, reaffirmed the facts as stated in his letters and left other questions to be decided by the Court. Annamalai Chettiar also filed a separate written statement setting out his contention.

The learned Judge who tried the suit held, that, though there were some irregularities at the meeting and though he was not prepared to accept in their entirety the contentions put forward by the Club relating to "waiver," "estoppel" and the like, the plaintiffs had failed to substantiate their contention on the material issues. He was of opinion that there was no illegality in the proceedings of the meeting of 7th November, and that the special resolution was validly passed at that meeting. He characterised the action as a case of "a storm in a tea cup" and dismissed the plaintiffs' suit.

At the outset it is necessary to consider the question whether the suit as framed is maintainable. The action was brought by two plaintiffs who are the members of the Club for themselves and also on behalf of the other members after obtaining the requisite leave under Order 1, rule 8, Civil Procedure Code. The learned Judge was of opinion that the suit was incompetent as what is known as the rule in *Foss* v. *Harbottle*[1], applied to the case. The rule in *Foss* v. *Harbottle*[1], is that a Court will not inferfere with the ordinary management of a company acting within its powers and has no jurisdiction to do so at the instance of the shareholders. A shareholder is entitled to institute a suit to enforce his individual rights against the company such as his right to vote, or his right to stand as a director of a company at an election. If the shareholder however intends to obtain redress in respect of a wrong done to the company or to recover monies as damages alleged to be due to the company, the action should ordinarily be brought by the company itself. In order therefore to enable a shareholder to institute a suit in the name of the company, in such a case, there must be the sanction of the majority for corporate action. In ordinary cases, therefore, this principle implies the

1. (1843) 2 Hare 461 : 67 E.R. 189.

supremacy of the will of the majority. It is open to a majority always to set right a thing which was done by the majority either illegally or irregularly, if the thing complained of was one which the majority of the company were entitled to do legally and was within the powers of the company by calling a fresh meeting. That is the reason why in such cases the Court refuses to interfere at the instance of a a shareholder even in a representative action brought by him. If the majority however acts in an oppressive manner, it is not as if the minority are without a remedy. This possibility was foreseen by Sir James Wigram, Vice-Chancellor who delivered the judgment in *Foss* v. *Harbottle*[1]. At page 492 the Vice-Chancellor says :

"If a case should arise of injury to a corporation by some of its members, for which no adequate remedy remained, except that of a suit by individual corporators in their private characters and asking in such character the protection of those rights to which in their corporate character they were entitled, I cannot but think that the principle so forcibly laid down by Lord Cottenham in *Wallworth* v. *Holt*[2], and other cases would apply and the claims of justice would be found superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue."

In such a case where action by a shareholder is permitted, the plaintiffs would not have a larger right to relief than if the company itself were the plaintiff and are not entitled to complain of acts which are valid, if done with the consent of the majority of the shareholders or are capable of ratification by the majority.

The later decisions however have recognised exceptions to what is conveniently known as the rule in *Foss* v. *Harbottle*[1]. James, L.J., in *MacDougall* v. *Gardiner*[3], considered the rule and stated the exceptions in the following passages at page 21 which has since become classic :

"I think it is of the utmost importance in all these companies that the rule which is well known in this Court as the rules in *Mozley* v. *Aston*[4] and *Lord* v. *Copper Miners Co.*,[5] and *Foss* v. *Harbottle*[1], should be always adhered to ; that is to say, that nothing connected with internal disputes between the shareholders is to be made the subject of a bill by some one shareholder on behalf of himself and others, unless there be something illegal, oppressive, or fraudulent—unless there is something *ultra vires* on the part of the company *qua* company or on the part of the majority of the company, so that they are not fit persons to determine it ; but that every litigation must be in the name of the company, if the company really desire it."

From this it follows that a shareholder or shareholders are entitled to bring an action (1) in respect of matters which are *ultra vires* the company and which the majority of shareholders were incapable of sanctioning ; (see *Burland* v. *Earle*[6]) ; (2) where the act complained of constitutes a fraud on the minority ; and (3) where the action of the majority is illegal. The decisions in *Baillie* v. *Oriental Telephone and Electric Co. Ltd.*,[7] and *Cotter* v. *National Union of Seamen*[8], recognised a fourth exception where a special resolution was required by the Articles of the company and the company obtained the assent of the majority to such special resolution by a trick, or even where a company authorised to do a particular thing only by a special resolution does it without a special resolution duly passed as in such a case to deny a right of suit to the shareholders without using the name of the company would in effect result, the company doing the thing by an ordinary resolution. In other words, this means that where a special resolution was improperly passed, if the rule that the company alone is the proper plaintiff to institute a suit questioning such resolution were to be enforced, the shareholders by a bare majority could defeat and prevent the minority from using the name of the company. The result of such a course would be indirectly to uphold the validity of a special resolution which was otherwise invalid. To avoid this result this exception was recognised in the two decisions. The rule and the exceptions thereto are also stated in Palmer's Company Law, 17th Ed., at pages 236 and 237 and Halsbury's Laws of England (2nd Ed.), Vol. 5, page 445, paragraph 728. The appellants' learned advocate placed before us the authorities bearing on the rule and the exceptions, and the

1. (1843) 2 Hare 461 : 67 E.R. 189.
2. (1841) 4 Myl. & Cr. 619 at 635 : 41 E.R. 238.
3. (1875) 1 Ch.D. 13.
4. (1847) 1 Ph. 790 : 41 E.R. 833.
5. (1848) 2 Ph. 740 : 41 E.R. 1129.
6. (1902) A.C. 83.
7. (1915) 1 Ch. 503.
8. (1929) 2 Ch. D. 58.

respondents' learned advocate did not challenge the position contended for by the appellant. It is needless to consider the authorities in detail as the substance of the decisions is as stated above.

The attempt of the learned advocate for the appellants is to bring the present case under two exceptions, namely, that the acts complained of are illegal acts, and secondly that if the special resolution was not passed or was passed illegally the effect of applying the rule in *Foss* v. *Harbottle*[1], to this case would be indirectly to sanction by an ordinary resolution that which the law requires to be passed only by a special resolution. For reasons given below, in our judgment the present suit falls within these two exceptions and that it is maintainable.

It will be convenient to deal first with the objection that the special resolution, item 2 in the agenda, was not put to the meeting and was not passed, for this question goes to the root of the matter. If we find that no special resolution was passed at the meeting of the 7th November, 1947, the whole proceedings of that meeting fall to the ground. Section 20 of the Indian Companies Act requires a special resolution to alter the articles. If there was no special resolution sanctioning the alteration, the action of the Club in altering the Articles without authority would be void and the alterations would have no legal effect. It is unfortunate that in this case notwithstanding the presence of the solicitor of the Club, Mr. Small, at the proceedings of the meeting and notwithstanding the fact that the chairman of the meeting and the shareholders were men of status in life there is no authentic record of the proceedings of the meeting. This has made our task more difficult. According to the plaintiffs one and only one resolution was put before the meeting on that day, that is, resolution No. 1 of the special committee in Ex. P-16, and that it was this resolution that was passed by 66 voting for, and one remaining neutral out of the members present. The plaintiffs categorically asserted in the plaint that the special resolution (items in the agenda) was not put to the meeting and was not passed. This of course was denied by the defendants. According to the version of the defendants the special resolution alone was put to the meeting, and it was in respect of that that the counting of the votes took place and it was carried by 66 votes, one remaining neutral. According to both versions it would be clear from the evidence that there was only one counting of the votes at which it was found that 66 were in favour of the resolution, whether it was the resolution of the special committee that was put to the meeting or the special resolution itself. As regards the number of persons present at that sole count, there is also conflicting evidence.

[After discussing the evidence bearing on this question their Lordships concluded.]

We therefore hold agreeing with the contention of the plaintiffs that the special resolution was not put to the meeting and was not passed.

If the special resolution was, in fact, put to the meeting and was passed by 66 voting for, we have no doubt on the evidence adduced even by the plaintiffs that there were no more than about 10 or 20 members who did not take part in the voting and therefore the 66 would constitute the required majority for declaring the resolution carried. In view of the finding that the special resolution was not passed, the amendment of the Articles and the consequent election of the members of the Managing Committee are wholly void.

This really disposes of the suit in favour of the plaintiffs. In this view it may not be necessary to consider the other objections to the meeting. However we will deal with the other objections also, as in our opinion, some of them are well-founded.

We now proceed to consider them in the order in which they were enumerated earlier. The first of the objections is that the meeting was not convened by the proper authority. The Stewards constitute the authority under the Articles (Art. 49) to call for an extraordinary general meeting as well as the annual general

1. (1843) 2 Hare 461 : 67 E.R. 189.

meetings. The quorum for the meeting of Stewards is fixed at three. The notice, Ex. P-8, was signed by the Secretary. It is common ground that there was no separate meeting of the Stewards in which they decided that an extraordinary general meeting should be convened on the 7th November. No minutes of any such meeting have been placed on record. Of the six Stewards Mr. Lawrence died sometime ago, Mr. Chidambaram Chettiar was out of India and according to Mr. Small, Mr. Hume was at the time of the notice in Ceylon, though he had no personal knowledge of it. Mr. Hume was present on the 7th both at the special committee meeting and also at the extraordinary general meeting. It may be assumed that Mr. Hume also was not available at the time Ex. P-8 was issued. The notice, Ex. P-8 did not indicate the authority under which the meeting was called. The extraordinary general meeting decided on the 21st June, 1947 (Ex. P-2) that after the report of the special committee then constituted for revising the Articles was submitted, a meeting of the general body should be called for not later than 31st October, 1947, for the consideration of the report. This authority would not avail, because the time fixed had expired, and the meeting was subsequently convened only on the 7th November, 1947. The defendants relied on Ex. P-7 which contains a resolution of the special committee passed on 15th October, 1947, that an extraordinary general body meeting should be convened on the 7th November, 1947. This meeting of the special committee was attended by 9 members of whom three were Stewards who were *ex officio* members of the special committee. As three of the Stewards who constituted the quorum for a meeting of the Stewards and who were the only persons available in India at that time took part in the special committee meeting, it is urged on behalf of the defendants that the resolution of that meeting may be deemed to be a resolution of the Stewards and therefore justified the calling of the meeting. Alternatively, it is also contended that in any event this is at the most an irregularity and not an illegality which justifies the setting aside of the resolution. If a general meeting is convened by the Secretary without proper authority it is not valid. See *Haycraft Gold Reduction and Mining Company*, In re[1] and *State of Wyoming Syndicate*, In re[2]. Where the directors however met and decided to convene a general meeting but the meeting of the directors itself was not properly convened, it was held in *Browne* v. *La Trinidad*[3], that by reason of the irregularity of the Board meeting the general meeting was not incapacitated from acting. In the case in *Harbon* v. *Phillips*[4], a Board meeting of the directors was held which decided to convene an extraordinary general meeting. At the Board meeting the plaintiffs who were the directors were refused admittance to the meeting by the Secretary under the direction of persons in possession of the Board room. The plaintiffs protested and withdrew. The persons in possession of the Board room purporting to act as a Board adjourned their meeting to the next day to a different place, the office of their solicitor, and on the requisition presented to the meeting on the next day which was attended by three of the defendants appointed a special committee to convene an extraordinary general meeting. At the meeting of the Board there was unquestionably a person who took part in the meeting and who was not a director. It was held that the meetings of the Board of Directors on the two days were unlawful and that everything that was done at those meetings was invalid. The consequence was that the appointment of the special committee and the notice convening the meeting were also invalid. It was pointed out in answer to an argument that there was a quorum of the directors and therefore the meeting was lawful that it was not enough that there was a quorum as the lawfully constituted directors were prevented from attending the meeting. The convening of the meeting, according to this decision, was not a mere ministerial act. The directors have to exercise their discretion and have to fix the time within which and the place at which the meeting should be held, and whether a meeting should at all be held. In the light of these decisions it is difficult to say that there was a valid meeting of the Stewards. There is no doubt

1. (1900) 2 Ch.D. 230.
2. (1901) 2 Ch.D. 431.
3. (1887) 37 Ch.D. 1.
4. 23 Ch.D. 14.

some force in the argument of the respondents that the proceedings of the special committee in which three of the Stewards who were available in India were present may be deemed to be a valid meeting of the Stewards. The objection of the plaintiffs is technical. The mere presence of the other members of the special committee at that meeting may not vitiate the resolution to which the Stewards were a party. We do not however think it necessary to express any final opinion on this question.

The next question for consideration is whether the notice, Ex. P-8, posted on the 16th October, 1947, complied with the requirement of Section 81, sub-clause 2 of the Indian Companies Act that there should be a notice of "Not less than 21 days." There were 260 Club members of whom 23 were living outside British India. 51 members who were absent members and 59 members lived at places which could be served through post after more than a day had elapsed from the date of posting. 127 members were within one day's reach from the date of posting. The notice of the meeting therefore posted on the 16th at Guindy could have been received by less than half the members only on the 17th. More than a day was required at least in respect of 59 members. Excluding therefore the date of service of notice and the date of the meeting there was only an interval of 20 days in respect of 127 members and a still less interval in the case of others. Section 81 (2) of the Indian Companies Act provides :

"A resolution shall be a special resolution when it has been passed by such a majority as is required for the passing of an extraordinary resolution and at a general meeting of which not less than twenty-one days' notice specifying the intention to propose the resolution as a special resolution has been duly given.

Provided that, if all the members entitled to attend and vote at any such meeting so agree, a resolution may be proposed, and passed as a special resolution at a meeting of which less than twenty-one days' notice has been given"

It is obligatory to serve notice of the meeting of a company with a statement of the business to be transacted at the meeting on every member in the manner laid down for service of notice under the Articles. Article 49 of Table A of the Indian Companies Act which is the same as Article 50 of the Articles of the Club lays down :

"Subject to the provisions of sub-section (2) of section 81 of the Indian Companies Act, 1913, relating to special resolutions, fourteen days' notice at the least (exclusive of the day on which the notice is served or deemed to be served, but inclusive of the day for which notice is given) specifying the place, the day and the hour of meeting and, in case of special business the general nature of that business, shall be given in manner hereinafter mentioned, or in such other manner if any, as may be prescribed by the company in a general meeting to such persons as are under the Indian Companies Act 1913, or the regulations of the company, entitled to receive such notices from the Company; but the accidental omission to give notice to or the non-receipt of notice by any member shall not invalidate the proceedings at any general meeting."

The manner of serving notices is provided by Article 112 of Table A which is the same as Article 73 of Ex. P-29. It states :

"112. (1) A notice may be given by the Company to any member, either personally or by sending it by post to him to his registered address or (if he has no registered address in British India) to the address if any within British India supplied by him to the Company for the giving of notice to him.

(2) Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the notice and, unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post."

It is admitted on behalf of the respondents that if regard be had to the expression "not less than twenty-one days" occurring in section 81 (2) there should be an interval of 21 clear days and indeed this position could not be disputed as it was established by decisions where similar expressions occurring in the Companies Act and also other statutes were considered. See *Railway Sleepers Supply Company, In re*[1], and *Rex* v. *Turner*[2]. The argument however that was pressed on behalf of

[1] (1885) 29 Ch.D. 204.

[2]. (1910) 1 K.B. 346.

the respondents was that the section should be construed in the light of Article 49 of Table A which includes the date of the meeting in cases where only 14 days' notice is required. It was also argued that it was permissible to refer to the Articles for the purpose of ascertaining the intention of the legislature in the body of the Act. In support of this contention the decisions in *Barnad's Banking Co.* In re, *Ex parte The Contract Corporation*,[1] *Lock* v. *Queensland Investment and Land Mortgage Company*[2], and Haisbury's Laws of England, Vol. 5, Second Edition, page 292, para. 504 were referred to. There can be no dispute that the principle of construction contended for on behalf of the respondents is correct. As Article 49 is expressly made subject to the provisions of sub-section 2 of section 81 it cannot be inferred that in construing that sub-section the Legislature intended to include the the date of the meeting within the period of 21 days. It cannot be assumed that because that date was included in other cases the Legislature intended to include it also in case of special resolutions covered by sub-section 2 of section 81. The very fact that a specific reference is made in Article 49 to include the date of the meeting within 14 days in cases in which a notice of 14 days is required is a clear indication that it was not intended to apply to cases of meetings which require 21 days' notice. Under the corresponding provisions of the English Companies Act of 1929 the Court of Chancery had to consider a similar question. Sub-section (2) of section 117 of the English Act corresponds to sub-section (2) of section 81 of the Indian Act, and Article 42 of the English Act corresponds to our Article 49. In the case reported in *Hector Whaling Limited*, In re, a notice convening an extraordinary general meeting of the Company on 30th May, 1935, was dated 8th May, 1935 and was posted on that day. By virtue of the Articles of Association of the company the notice is deemed to have been served on the following day, that is, 9th May, 1935. Excluding the date of the meeting it would be noticed that in that case the interval was only 20 days. Article 138 of the company in question stated :

> "Any notice or other document if served by post shall be deemed to have been served on the day following that on which the letter containing the same is put into the post, and in proving such service it shall be sufficient to prove that the letter containing the notice or document was properly addressed and put into the post office as a prepaid letter or prepaid registered letter as the case may be."

On the authority of the decisions in *Rex* v. *Turner*[4], and *Chambers* v. *Smith*[5], Bennett, J., held that the expression "not less than twenty-one days' notice" contained in sub-section (2) of section 117 meant 21 clear days exclusive of the day of service and exclusive also of the day on which the meeting was to be held. It was also pointed out that it was not open by the Articles of Association to curtail the length of time which the statute had fixed. No doubt in that decision, specific reference was not made to the language of Article 42, and the contention now advanced was not raised and considered. It cannot however be assumed that the Counsel who argued the case and the learned Judge who decided it were not aware of the language of Article 42. In view of the clear language of the Article the point does not admit of any doubt, and perhaps that was the reason why the contention was not raised as of no substance.

It was next argued that in any event we should count 21 days from the date of posting, and that if that was done, there was an interval of clear 21 days even if the date of the meeting was excluded. The argument, in our opinion, is opposed to the clear language of Article 112. The Article states that unless the contrary is proved the notice must be deemed to have been effected at the time at which the letter would be delivered in the ordinary course of post, and this would be the 17th in the case of at least half the number of the members. This extraordinary contention is not supported by any decisions. Form No. VIII in which a special resolution has to be communicated to the Registrar of Joint Stock Companies was relied on. In the

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1. 3 Ch. A. 105 at p. 113.
2. (1896) A.C. 461.
3. (1936) 1 Ch.D. 208.
4. (1910) 1 K.B. 346.
5. (1843) 12 M. & W. 2 : 152 E.R. 1085.

Form one of the columns is "Date of despatch of notice specifying the intention to propose the resolution as a special resolution or extraordinary resolution." We do not think that it is permissible to rely on the language of the form to interpret the section and the Article. The date of the meeting and the date of service of notice are therefore to be excluded, and in between the dates there should be an interval of 21 days. The notice issued to all the members therefore was inadequate and did not comply with the statutory requirement and is therefore illegal. The meeting therefore was not legally convened.

The next branch of argument on behalf of the respondents in this part of the case was that as none of the members including the plaintiffs, who though absent appointed proxies on their behalf, objected at the time of the meeting, it must therefore be deemed that the members present either in person or by proxy had waived the objection. This plea was not specifically raised in the written statement nor in the issues. All that was said in paragraph 3 of the written statement was that the plaintiffs had received the notice of the meeting in due time and raised no objection to the validity of the notice at any time at or about the meeting though they were present by proxy at the meeting. Issue 3 raises in a general form the question whether the plaintiffs were entitled to quesion the validity of the notice of the meeting or the proceedings of the meeting at the general body of the 7th November, 1947, as stated in paragraph 3 of the written statement. As the facts have been pleaded in the written statement, though the point was not specifically raised in the form of waiver, we thought that the respondents should be allowed to argue the question. The respondents wanted also to raise a point based on the proviso to sub-section (2) of section 81; but as it was nowhere raised we refused to grant them permission to raise and argue it for the first time in appeal. In 31 Halsbury, 2nd Edition at page 559 it is stated that,

"a statutory right which is granted as a privilege may be waived either altogether or in a particular case."

If the plaintiffs had waived their right to question the legality of the notice, it is urged that they are precluded from maintaining the suit not only on their behalf but also on behalf of other members. Strong reliance was placed on the decision in *Burt* v. *The British Nation Life Assurance Association*[1], where it was held that a plaintiff who has a right to complain of an act done to a numerous society of which he is a member, is entitled to sue on behalf of himself and all others similarly interested, though no other may wish to sue, so although there are a hundred who wish and are entitled to sue, still, if they sue by a plaintiff who is personally precluded from suing, the suit cannot proceed, although other persons on whose behalf the suit was instituted might maintain the action as plaintiffs. The question therefore resolves itself into this, namely, whether in view of the imperative provision regarding the notice in section 81 (2) it is open to the plaintiffs to waive their right to object to an illegality, the right being certainly not their personal right but a right belonging to them in their corporate character. The proviso to section 117 (2) of the English Act was added for the first time in 1929 in view of the decision in *Oxford Motor Co., In re*[2], which decided that it was competent for the shareholders of the company acting together to waive the formalities required by section 69 of the Companies (Consolidation) Act, 1908 as to notice of intention to propose a resolution as an extraordinary resolution. In that case all the share-holders met and passed a resolution without objection and it was held that the want of notice could be waived. The Indian Companies Amending Act of 1936 introduced a similar proviso in section 81 (2). Under this proviso, it would be seen that the requirement as to 21 days' notice may be dispensed with by an agreement of all the members *entitled to attend and vote* and not merely of all the members *entitled to vote and present in person or proxy* at the meeting. It

1. (1859) 4 De.G. & J. 158 : 45 E.R. 62. 2. (1921) 3 K.B. 32.

requires therefore an agreement of all the members of the Club in order to dispense with the requirement of 21 days' notice. The proviso in other words indicates the intention on the part of the Legislature that the provision in sub-section (2) is mandatory and that it can be dispensed with only by the agreement of all the members. It is not enough that the members present at the meeting indicated either expressly or impliedly they consented to or acquiesced in shortening the period of notice. An express consent of all the members to waive the notice has not been established in this case. Even if the members present agreed to waive the defect in the notice the meeting would not be a valid meeting. The plaintiffs therefore are not precluded from raising the contention that the notice contravened the provisions of sub-section (2) of section 81.

The next objection is that the notice was insufficient, in that it did not give full particulars of the nature of the business. Under the Articles the notice should indicate the general nature of the business intended to be transacted at the meeting. The draft proposed amendments to the Articles of Association did not accompany the notice and were in fact posted only on the 21st October, and therefore must have been received on the 22nd. On this question there is no evidence on record; but it was agreed before us by the learned advocates appearing for the appellants and the respondents as that the printed draft was posted on the 21st of October. It is therefore urged that the notice did not indicate the general nature of the business. We are not prepared however to agree with this contention. It was on the initiative of the general body that a special committee was appointed to consider the amendments, if any, to the Articles of Association. The notice clearly stated that a print of the proposed amended Articles of Association will follow shortly. From the 22nd to 7th of November the members had ample time to consider the proposed amended Articles. We do not think that the notice was insufficient and therefore bad on this ground. No useful purpose would be served by referring to the decisions to which our attention was drawn, as the decision of the question would invariably rest on the facts of each case.

In Palmer's Company Precedents, Part I, at page 1002 it is pointed out that,

> "Where a large number of alterations have to be made, it is generally more convenient to adopt a new set of articles altogether. Where this course is adopted, a copy of the new regulations should lie for inspection at the office, and the notice convening the meetings should state the fact; and in some cases it may be deemed expedient to send printed copies of the proposed new articles with the notices. According to the decision of Kekewich, J., in *Normandy* v. *Ind. Coope & Co.*[1], the notice should call attention to any material alterations; and in *Baillie* v. *Oriental Telephone and Electric Co.*,[2] the Court of Appeal held that a notice of a proposed resolution to alter articles involving a large increase in the remuneration of the directors was invalid on the ground that the proposed increase was not fully and frankly disclosed . . . .
>
> The notice should state that a copy of the new articles is enclosed, or that a copy of the proposed new articles may be seen at the Company's office."

In this case in the notice it was stated that the proposed Articles would be sent shortly, and they had been posted within six days from the date of posting of the notice. In the light of the principles stated above we think that there is substantial compliance with this requirement of law and that the notice was not bad on this ground.

Nor is there any force in the objection that the amendments moved relating to the proxies were not within the scope and ambit of the original resolution. Notice of the amendments was given in Exhibit P-13 by Mr. T. T. Krishnamachari and others, and the Government later pointed out that it would be advisable in the interests of racing that proxies should be abolished to make the members take active interest in racing. The amendments proposed by Mr. Eswara Aiyar cannot be said to be outside the scope of the original resolution.

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1. (1908) 1 Ch. 84.
2. (1915) 1 Ch. 503.

The next objection relates to the election of 12 members of the Managing Committee. If our view that the special resolution was not at all moved and the amendments were not passed by a special resolution is correct, the meeing had no authority to elect 12 members to the Managing Committee, as the old Articles continued to be in force. Apart from this, we think that the election was illegal, as the notice was not sufficient in the circumstances of the case. Exhibit P-8 was posted on the 16th October, and it required nominations for election to the Managing Committee to be submitted to the Secretary 14 clear days before the date of the meeting. That means, the nominations should be posted by a member either on the 21st October or on the 22nd to reach the Secretary. The members were not made aware of the functions and the duties of the Managing Committee, and in fact they did not receive the proposed alterations earlier than the 22nd, taking the view most favourable to the defendants. It is impossible for the members to make up their mind with no data before them and to submit nominations. Practically they had no valid notice of the election and the election was rushed through at the meeting of the 7th. The election is also invalid on the further ground that Mr. Natesan presided at the meeting. He was himself a candidate for the Managing Committee. There were 24 nominations and 19 actually contested the election. Objection was raised at the meeting that the new rule came into existence only on that day and that nominations were proposed 14 days before the passing of the rule. The chairman had to give a ruling on the question, and he decided in favour of the validity of the nominations including his own. The chairman's ruling may be correct or may be incorect. Perhaps in view of the decision in *Pacific Coast Coal Mines Ltd.* v. *Arbuthnot*[1], a notice for election of the members of the Managing Committee may retrospectively be validated by passing a special resolution, but that is not the question. Here is an instance where the chairman was in the position of a *quasi*-judicial officer, and he had to be a Judge in his own cause. There was clearly a conflict between his duty and his interest. In the normal course he should have vacated the chair and requested another member who was not a candidate to take it, and this was not done. That a person cannot be a judge in his own cause is an elementary rule, and if an authority is wanted it is to be found in *Rag* v. *Owens*[2]. In *Fanagan* v. *Kernan*[3], it is stated :

> " There is no more sacred maxim of our law than that no man shall be a judge in his own cause, and such force has that maxim that interest constitutes a legal incapacity to a person being a judge in every case . . . . It is impossible for a Court of Law to allow him to exercise the function of presiding at that election of which he could influence the result."

No man can preside at his own election and return himself. See *The Queen* v. *White*[4]. These principles are well established, ad it is unnecessary to deal with them elaborately. In fact, the respondents' advocate does not dispute the propositions, but contends that those principles apply to meetings other than the meetings of a company. Under the Articles provision is made for the appointment of a chairman, and he continues to preside at the meeting whether the meeting is one for transacting ordinary business or passing a special resolution or for the election of members to the Board, and the mere fact that the chairman is also a candidate for a committee or a Board of management will not vitiate the proceedings. So ran the argument. No authority in support of this distinction was placed before us, and we do not see any reason for making a distinction between meeting of Company and other meetings. The principles above referred to are elementary and are of universal application. We therefore hold that the election of the 12 members of the Managing Committee was illegal, even apart from the question whether the special resolution was put to the meeting and passed or not.

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1. (1917) A.C. 607.
2. (1858) 28 L.J.Q.B 316 at page 318.
3. (1881) L.R. (Ireland) 8 ; C.P. 44 at pp. 48 and 49.
4. (1867) L.R. 2 Q.B. Cases 557 at 561.

We therefore hold that the special resolution "item 2 in the agenda" was not passed, that the meeting of the 7th November was not legal and that the members of the Managing Committee were not duly elected. From this it follows that the proceedings of the general meeting of 18th November, 1947, are void, and, in any event, the exclusion of proxies at that meeting was not warranted by the Articles, then in force. Differing therefore from the learned trial Judge we hold that the plaintiffs are entitled to the reliefs asked for.

The appeal is therefore allowed and the decree dismissing the suit is set aside. There will be a decree in favour of the plaintiffs as prayed for. The plaintiffs are entitled to the costs of this appeal and the costs of the suit, payable by the first defendant. Having regard to the trouble involved and the time taken we fix under rule 12 of Order 6, High Court Fees Rules, a fee of Rs. 2,500 for the plaintiffs' advocates in the appeal and Rs. 2,500 for them in the suit.

V.S. *Appeal allowed.*

[END OF VOLUME, 1949—I.]

GENERAL INDEX.

ADVOCATES' FEES—Suit for declaration of his rights by purchaser of insolvents' rights from Official Receiver—Advocates' fee—Governed by plaint valuation .. 249

AMENDMENT OF PLAINT—*See* C. P. Code, O. 6, R. 617. .. 589

ARBITRATION—Statements of plaintiff and defendant taken separately—Award given on the pleadings of parties and without taking any evidence—Proceedings, if misconducted by the arbitrator .. 462

ARBITRATION ACT (X OF 1940), S. 30—Award based on custom—When illegal. 467

BENAMI TRANSACTION—Onus—Duty of Court—Concurrent findings—Rule against interference with—Scope of —Adherence to the Rule by the Federal Court—Evidence—Suppression of —Effect (F.C.) .. 568

BIHAR MONEY-LENDERS (REGULATION OF TRANSACTIONS) ACT (VII OF 1939), S. 8—Nature of the provisions of—Interference by the Federal Court with the exercise of discretion by the High Court (F.C.) .. 565

BOMBAY LAND REVENUE CODE (1879), Ss. 73 and 74—Requirements. (P.C.) .. 172

CERTIORARI—Writ of—If can be issued by the High Court to quash the order of Madras Hindu Religious Endowments Board removing trustee of a temple in the mofussil purporting to exercise the powers of an Assistant Commissioner under S. 26 of the Madras Hindu Religious Endowments Act (II of 1927)—Jurisdiction. 187

CIVIL PROCEDURE CODE (V OF 1908), S. 11, *Expl.* IV and O. 21, R. 63—Suit by money decree-holders for declaration that charge decree for maintenance in favour of the judgment-debtor's mother was collusive and not binding filed before claim application by the mother was made and pending when adverse order on claim application was passed—Sale in execution and claimant filing no separate suit under O. 21, R. 63, within one year of adverse order—Effect —Creditors not setting up in their suit and appeals thereon the finality of the order on claim application and claimant succeeding in the suit —Claimant seeking to execute her maintenance decree and enforce the charge—Auction purchasers in the sale in execution of the money decree if barred from questioning the binding nature of the maintenance decree by a fresh suit for declaration to that effect—*Res judicata* if applies (F.B.) .. 593

———S. 39 and O. 21, Rr. 5 and 6—Scope .. 66

———S. 39 (1)—Person entitled to restitution under a decree because of the variation of the decree owing to its being scaled down under Madras Act IV of 1938—Right to have the decree transferred to another Court for execution .. 486

———S. 47—Purchaser of attached property—Representative of judgment-debtor .. 143

C. P. CODE (V OF 1908)—*Contd.*

———S. 51—Suit by sons of judgment-debtor for setting aside dismissal of their claim petition—Consent order that property should not be sold till disposal of suit—Grant of time to judgment-debtor for payment—Failure to pay—Arrest—Propriety .. 318

———Ss. 63 and 64 and Madras Co-operative Societies Act (VI of 1932)—Rules under, rule 22 (20) (*a*)—Sale under an award at the instance of a co-operative society—Not a private transfer" within the meaning of S. 64, Civil Procedure Code —Sale in contravention of rule—Not a nullity .. 393

———S. 64 and O. 21, R. 57—Attachment before judgment—Execution petition for sale of attached property "struck off"—If a dismissal for default—Effect on attachment before judgment—Private sale of attached property in the meanwhile and subsequent sale of same in execution of decree in suit in which it was attached—Execution sale, if prevails over earlier private sale—Attachment of undivided share in ignorance of prior partition—Attachment, if can be deemed to be of the share of the judgment-debtor .. 456

———S. 66—Applicability—Certified purchaser before 1908—Suit against person claiming under him alleging that the purchase was made benami for plaintiff—Maintainability .. 398

———S. 91, O. 1, R. 8—Obstruction to village pathway—If public nuisance—Suit in representative capacity for removal of obstruction—Proof of special damage—If essential—Village pathway—Representative suit—Maintainability .. 56

———Ss. 110 and 109 (*c*)—Valuation—Court of first instance—Meaning—Arbitrators, if can be described as such—Claim before arbitrators exceeding Rs. 10,000—Award of a lesser sum—Amount due with interest as per award less than Rs. 10,000 on the date of filing in the High Court of the petition to pass a decree in terms of the award—Decision of the High Court on the petition on the Original Side reversed on appeal —Leave to appeal to the Federal Court against the decision on appeal—If can be granted—S. 109 (*c*)—Substantial question of law—If sufficient for the granting of leave .. 518

———S. 115—Competency of revision—Amendment of decree consequent on amendment of decretal portion of judgment—Order not revisable—Amended decree appealable .. 171

———S. 115—Excusing delay under Limitation Act, S. 5—Interference in revision .. 144

———S. 115—Order holding suit bad for misjoinder—Revision—Competency .. 207

———S. 115—Orders of Collector acting under S. 44-B (2) (*d*) of the Madras Hindu Religious Endowments Act—Liability to revision by High Court .. 536

C. P. CODE (V OF 1908)—*Contd.*

———S. 115—Scope and applicability. (P.C.) .. 505

———S. 115—Subordinate Judge acting as appellate authority under Madras Building Control Act—Is *persona designata* and not Court subject to revisional jurisdiction of High Court. .. 419

———S. 144—Scope of powers of Court in ordering restitution—Defeated obstruction not filing suit under O. 21, R. 103, but succeeding in his appeal in suit for declaration of title—If can recover possession and mesne profits by way of restitution .. 286

———Ss. 148 and 151—Order to pay additional Court-fee with direction that petition should stand dismissed on failure to pay the same by a fixed date—Propriety—Order if revisable .. 233

———S. 151—Court auction sale and affixing of necessary stamp on the sale certificate—Sale subsequently set aside—Application for refund of value of stamp after six months of the setting aside of the sale—Court has no inherent powers to grant refund .. 179

———O. 1, R. 1, and S. 115—Issues common to all plaintiffs—Joining in one suit—Permissibility—Order holding suit bad for misjoinder—Revision—Competency .. 207

———O. 1, R. 8—Granting of permission under—Conditions—Application by a member of a society—Other members opposing applications and filing affidavits—No attempt by applicant to refute allegations in those affidavits—Leave under O. 1, R. 8, if can be granted .. 540

———O. 1, R. 8—Village pathway—Obstruction to—Representative suit for removal—Maintainability .. 56

———O. 6, R. 17—Leave to amend plaint by substituting fresh declaration after deficit court-fee was ordered to be paid—If can be allowed .. 331

———O. 6, R. 17—Amendment of Plaint—Plaint really within the jurisdiction of a higher Court—Court allowing amendment to bring it within its own jurisdiction—Propriety .. 569

———O. 6, R. 17—Written statement—Amendment—Discussion and finding against the allegations in the amendment sought before it is allowed—Refusal on the basis of such finding—Propriety .. 64

———O. 8, R. 6—Scope .. 330

———O. 8, R. 9—Effect of—Some defendants declared *ex parte*—Written statements filed by contesting defendants and issues framed—Application by *ex parte* defendants to set aside *ex parte* order—Dismissal—*Ex parte* defendants if entitled thereafter to file written statements as of right .. 147

———O. 9, R. 9; O. 32, R. 1 and O. 33, R. 5 (*d*-1)—Next friend of minor suing to set aside alienation by father—Previous suit by another next friend of the same minor for the same relief dismissed for default—Bar of—Desirability of some Court control over irresponsible suits by next friends .. 293

———O. 9, R. 9—Scope—Plaintiff in subsequent suit impleaded as defendant in prior suit on identical cause of action—Prayer in prior suit for decree in favour of plaintiffs and the particular defendant—Dismissal of prior suit

C. P. CODE (V OF 1908)—*Contd.*

for default—Subsequent suit by that defendant—If barred .. 240

———O. 10, R. 2—Scope—Summoning of first defendant as Court witness and examination and cross-examination of him before conclusion of evidence of first witness for plaintiff—Propriety .. 373

———O. 13, R. 1 and Civil Rules of Practice (Madras), R. 62—Refusal to excuse delay in filing some of the documents and excusing delay as to documents regarding which there was no opposition by the other party—Arbitrary exercise of discretion—Revision .. 484

———O. 21, R. 22—Applicability .. 249

———O. 21, R. 57 and S. 47—Attachment—When ceases—Dismissal for non-compliance with unnecessary direction of Court—If entails penal consequences—Purchaser of attached property—Representative of judgment-debtor .. 143

———O. 21, R. 57. *See* C. P. Code, S. 64 and O. 21, R. 57 .. 436

———O. 21, R. 57 (as amended in Madras)—Rejection of un-numbered execution petition on default in re-presenting with sale papers—Effect on attachment before judgment—Order of rejection not saying that attachment will cease—Effect—Alienee of property—How far bound by orders in the execution proceedings .. 320

———O. 21, R. 58—Person who failed in application under—Not barred from applying under O. 21, R. 89, to have the sale set aside.. 316

———O. 21, Rr. 63 and 103—Facts to be proved in suits under—Distinction .. 627

———O. 21, R. 84—Application under not barred by unsuccessful prior application under O. 21, R. 58 .. 316

———O. 21, Rr. 87, 98, 99 and 103—Application to remove obstruction—One day's delay in filing—Dismissal of application as "not pressed"—Fresh application for removal of obstruction on a later execution petition—Whether maintainable .. 656

———O. 21, R. 89—Application and deposit by third party under direction of judgment-debtor—Maintainability—Allowing of application—Payment of costs to applicant—If justified .. 579

———O. 21, R. 89—Deposit by a prior purchaser from the judgment-debtor of some items sold in execution sale—Statement in affidavit that the deposit was without prejudice to petitioner's contentions in another appeal and to his rights to recover the amount deposited in case of his success in that appeal—Deposit if a conditional one disentitling depositor to have the sale set aside .. 447

———O. 21, Rr. 98 and 103 and S. 144—Defeated obstructor's suit for declaration of title pending when order under O. 21, R. 98 is passed against him—Defeated obstruction not filing a fresh suit under O. 21, R. 103—If can recover possession and mesne profits by way of restitution on his succeeding in the appeal in his suit for declaration of his title—Scope of powers of Court in ordering restitution .. 286

———O. 21, Rr. 103 and 63—Facts to be proved in suits under—Distinction .. 627

———O. 22, Rr. 10 and 11—Assignment of interest during pendency of suit—assignor not defending appeal—Right of assignee to be brought on record to defend appeal .. 245

C. P. CODE (V. OF 1908)—*Contd.*

———O. 23, Rr. 1 and 2—Leave to withdraw suit with liberty to the fresh suit after arguments in appeal—No satisfactory reasons given—Legality .. 68

———O. 23, R. 1—Withdrawal of suit—Limits to the right of a plaintiff—Suit for partition—Plaintiff praying for sale of suit property under the Partition Act—Defendant applying for its purchase—Plaintiff, if can be allowed to withdraw his suit at that stage .. 515

———O. 26, R. 10 (2)—Appointment of a second Commissioner—No reasons given for ignoring the previous Commissioner's report—Legality .. 183

———O. 32, R. 1—Previous suit by another next friend dismissed for default—New next friend if can sue for same relief .. 293

———O. 32, R. 3 and O. 33—Person as next friend of minor applying for leave to file a suit as pauper—Competence of such next friend—If can be agitated and decided .. 184

———O. 33, R. 1—*Expl.* (iii) (Madras)—Leave to suit as pauper in a representative capacity—Test of pauperism .. 558

———O. 33, Rr. 5 and 6 (as amended in Madras)—Application for leave to sue *in forma pauperis*—Right of respondents to show suit was barred by limitation by adducing evidence—Shutting out of such evidence—Irregularity .. 61

———O. 33, R. 5 (*d*-1)—Previous suit by next friend dismissed for default—New suit by another next friend if barred .. 293

———O. 34, R. 8 ; O. 2, R. 2 and O. 43, R. 1—Mortgage with possession—Liability of mortgagee to account for profits between the date of the preliminary decree and the passing of the final decree—Appealability of order of refusal of final decree .. 116

———O. 37, Rr. 1, 2 and 4—Suit on Promissory note under the summary provisions of O. 37—Ten days' time allowed for leave to defend as per Form 4 in Appendix B, Civil Procedure Code—Application for leave to defend made beyond the time given—Condonation of delay—Jurisdiction of Court .. 514

———O. 41, R. 33—Relief under—Availability only in pending appeal—Right to apply under R. 33 of O. 41, after pursuit and failure of other remedies .. 425

CIVIL RULES OF PRACTICE (MAD.), R. 62—Scope. *See* C. P. Code (V of 1908), O. 13, R. 1 and Civil Rules of Practice, R. 62 .. 484

———R. 142—Mandatory nature of rule .. 66

COMPANIES—Meetings—Chairman—Applicability of maxim that no one can be a Judge in his own case .. 662

———Petition for compulsory winding up in the Original Side of the High Court—Oral evidence—If and how far admissible—Costs—Discretion .. 269

———Share-holders when entitled to bring an action against the Company .. 662

COMPANIES ACT (VII OF 1913), S. 81 (2) and Proviso—"Not less than twenty one days"—Meaning of—Day of service and day of meeting, if both to be excluded—Waiver of objection as to legality of notice of meeting—What would constitute .. 662

———S. 162 (*vi*)—Winding up—Mere difference of opinion among majority directors and minority directors—If sufficient for compulsory winding up .. 269

———S. 282—Gist of offence under—Auditors and directors signing balance-sheets of banking company—When criminally liable .. 438

COMPROMISE DECREE—Necessity for registration—Decree reciting that the defendant agreed to treat a will as valid and that he and his heirs would not question the will as they had no interest in the properties—Not a declaration of plaintiff's title requiring registration of the decree. .. 459

CONTRACT—Non-performance of the contract within a reasonable time—Right of the other party to repudiate—Jurisdiction—Mode of assessing damages .. 229

COSTS—Pauper minor plaintiff—Direction to pay costs of suit—If proper exercise of discretion (P.C.) .. 172

COUNTER-CLAIM—Limits to defendants' rights—Jurisdiction .. 110

COURT-FEE—Suit for partition—Defendant pleading that some of the family properties were purchased in the names of strangers by plaintiff fraudulently and collusively and benami and that they should be included in the suit—The benamidars added as parties—Defendant need not pay court-fee on his share of such items .. 648

———Two suits—Plaintiff in one sued as defendant in the other on the same transaction—Proper court-fees paid in the two suits on the respective plaint claims—Set off in the written statement in one suit—*Ad valorem* court-fee—If can be required to be paid—C. P. Code (V of 1908), O. 8, R. 66 .. 330

COURT-FEES ACT (VII OF 1870), S. 7 (*iv*) A) and (*iv*) (*c*)—Applicability—Order of Deputy Commercial Tax Officer levying tax—Not a "decree"—Suit for declaration that such order was illegal—Court-fee .. 379

———Ss. 7 (*iv*) (c) Proviso and 7 (*iv*) (a)—Suit for declaration that earlier decree obtained against the plaintiffs and their deceased elder brother was a nullity and for injunction restraining the defendant from executing that decree and recovering possession of the lands from plaintiffs—Proper Court-fee. .. 615

———S. 7 (v) and Sch. II, Art. 17-B and Madras Civil Courts Act (III of 1873), S. 14—Suit for setting aside order relating to immoveable property—Court valuation—Jurisdiction purposes .. 195

———S. 7 (v) (*v*) and (*e*)—Applicability—Suit by a Hindu reversioner to recover land—Plaint returned for presentation to proper Court—Non-compliance—But fresh plaint for the same relief filed in the same Court—Admission—Propriety .. 608

———S. 11—Order that petition should stand dismissed on failure to pay additional court by a fixed date—Propriety—Order if revisable .. 233

———Ss. 11 and 12 (1)—Suit for dissolution of partnership and accounts—Decree—Appeal by defendant on basis of the tentative valuation in plaint—Appeal directed to be numbered—Subsequent order for payment of deficient court-fee on the basis of decree amounts—Jurisdiction of Court to pass .. 513

COURT-FEES ACT (VII OF 1870)—*Contd.*

———Sch. II, Art. 17 (1)—Civil Court—Registrar of Co-operative Societies acting under S. 57-A of Madras Act VI of 1932—If 'Civil Court'—Suit to set aside order—Court-fee .. 107

CRIMINAL PROCEDURE CODE (V OF 1898), Ss. 145 and 528—Preliminary order by First Class Magistrate to whom application was transferred by District Magistrate—First class Magistrate found to have no territorial jurisdiction—Jurisdiction of District Magistrate to withdraw case to his own file .. 646

———Ss. 151 and 491—Arrest by police officer under S. 151—Questions whether police officer is justified in coming to the conclusion that cognizable offence is about to be committed and that there were no other means of prevention—Jurisdiction of Court to inquire into the justification in a petition under S. 491 .. 554

———S. 151—Arrest under—Subsequent detention under Madras Act (I of 1947)—Validity .. 583

———Ss. 154, 162, 226 and 227—Rough notes of statements to Police during investigation—Right of accused to insist on production—Cognizable offence—Names of accused mentioned in First Information Book—Need not be recorded in the General Diary—Charges framed by committing Court—Sessions Judge not bound and may alter—Charge under S. 147, Indian Penal Code—Charge of abetment unnecessary—Judgment—Section under which and offence of which found guilty must be given .. 152

———S. 188—How far extra-territorial. 395

———S. 197—Construction and scope (P.C.) 177

———S. 307—Reference under—Scope of powers of interference with the verdit of jury .. 182

———Ss. 403, 436 and 437—Charge sheet under S. 307, I. P. Code—Charge framed under S. 337, I. P. Code and conviction thereunder—Effect—Further enquiry—S. 403, Cr. P. Code, if a bar to the trial of the offence under S. 307, I. P. Code .. 145

———S. 411-A (introduced by Act XXVI of 1943)—Constitutional validity—Government of India Act, 1935—Sch. VII, List II, entries 2 and 15—Scope (F.B.) .. 258

———S. 429—Difference of opinion among the Judges hearing application under S. 491, Cr. P. Code—S. 429—Applicability .. 78

———Ss. 491 and 151—Arrest under S. 151—Justification—If can be gone into in petition under S. 491 .. 554

———S. 491—Jurisdiction under—Scope (F.B.) .. 1

———S. 411—Nature of proceedings under—Difference of opinion among judges hearing application—Duty to formulate the point on which they differed in the reference to a third Judge—Letters Pattent, Cl. 16 and not Cr. P. Code (V of 1898), S. 429, applicable .. 78

———S. 491—Power of Court to go into question of satisfaction of detaining authority under Madras Act (I of 1947) .. 583

———Ss. 528 and 145—District Magistrate transferring application to file of a First class Magistrate—Preliminary order by the First class Magistrate who is subsequently found to have no territorial jurisdiction over some of the properties—Jurisdiction of District Magistrate to withdraw case to his own file .. 646

CRIMINAL TRIAL—Confession by accused—Voluntary nature—Retracted before the Sessions Judge—No reasons given for retraction—Conviction on such confessions not bad. 386

———Evidence—Conviction on the strength of evidence of witnesses who have given totally different versions in the committing and Sessions Court—Propriety. .. 228

———Examination of medical witness—Desirability of medical witness being examined after the eye-witnesses .. 387

DEFAMATION—Privilege—Principles governing, in regard to publication in newspaper of the report of a statutory commission without any comments thereon—Report containing the alleged defamatory statements regarding the plaintiff's conduct as a witness—Absence of malice (P.C.) .. 135

DIVORCE ACT (IV OF 1869), S. 7—Appeal by husband against decree *nisi* for dissolution of marriage—Wife, if entitled to order for payment of costs in advance to enable her to contest the appeal .. 550

———S. 7—Husband's petition for dissolution of marriage—Right of wife to have an order for payment of an amount in advance to enable her to defend the suit .. 547

EASEMENT—Prescriptive right—Owners of adjacent plots—Mandatory injunction against one by the other to remove eaves—Prescriptive right to project eaves—Permanent injunction restraining one party from letting rain water on the land of the other—Proof of user.. 314

ELECTIONS—Petition challenging validity of election—Order for inspection of ballot papers—If can be made without notice to the successful candidates .. 616

EVIDENCE ACT (I OF 1872), S. 92—Applies only as between paries to an instrument, but not between one of the parties and a third party—Plea of discharge not hit though an agreement to give a discharge in future may be. .. 295

———S. 92, Proviso 2—Agreement for reconveyance of property sold—Oral evidence as to admissibility. (P.C.) .. 97

———S. 112—Proof of non-access—What would amount to .. 426

EXECUTING COURT—When can go behind decree and look into judgment—Sale of property as belonging to judgment-debtor—Defendants against whom suit has been dismissed—Right of, to object to sale (P.C.) .. 105

EXECUTION—Decree for costs against trustee suing on behalf of trust—Executable personally against trustee .. 384

EXECUTION SALE—Sale proceeds rateably distributed between creditors—Sale as to one item void—Right of auction purchaser to sue for refund—Limitation—Starting point—Limitation Act (IX of 1908), Article 97 .. 449

GOVERNMENT OF INDIA ACT (1919) S. 96-B (1)—Nature of restrictions under (P.C.) .. 222

GOVERNMENT OF INDIA ACT (1935)—Ss. 51 (4), 88, 104, 107 (2), 223 and Sch. VII, List II, items 1 and 2 and list III, item 2—Applicability (F.B.) .. 1

———Ss. 99, 100, 107 (1) and Sch. VII, List I, item 54; List II, item 42—The Punjab Urban Immovable Property Tax Act if beyond the

GOVERNMENT OF INDIA ACT (1935)—*Contd.*

powers of the Provincial Legislature—Tests to be applied for determination of question (F.C.) .. 213

———S. 100 and Sch. VII, List II, item 2—Delegation of power of legislation—Limits—Delegation of power of appointing authority involving extension of Courts' jurisdiction which can be done only by Legislature —Implied delegation of legislative power also .. 471

———S. 205 (1)—No final adjudication as to liability under Criminal law—Decision on a question of jurisdiction—Not enough to justify the grant of a certificate for leave to appeal to the Federal Court .. 395

———Ss. 240 (2) and 243—Restriction under S. 96-B (1) of (1919)) Act—Nature of—If could be affected by rules—Nature of the provisions of Ss. 240 (2)—" Conditions of service " in S. 243—If includes right of dismissal (P.C.) .. 222

———Ss. 244 and 246 and Rules framed under S. 246—Appointment to the Indian Police Service—Scope of the relative powers of the Secretary of State and the Governor-General—Suit for declaration of status and legal character of permanent Superintendent of Police—Facts to be proved to obtain relief (F.C.) .. 559

———Sch. VII, List II, items 2 and 15—Scope —Criminal Procedure Code, S. 411-A—Constitutional validity (F.B.) 258

GOVERNMENT TRADING TAXATION ACT (III OF 1926)—S. 2 (1) (*a*) and (*b*)—If covers case of income which is deemed to arise under Income-tax Act—Income-tax Act (XI of 1922), section 42 (1)—If *ultra vires* the Indian Legislature as being extra-territorial in operation—Money advanced in Indian State on mortgage of debentures over property in British India—Receipt of interest in Indian State —Liability to taxation—Advance on mortgages in British India by Indian State—Suits and decrees on mortgages and properties mortgaged bought in execution by the Indian State—Income from such properties—Liability to taxation—Income from shares taken in lieu of money advanced by the Indian State—Liability to taxation—Right of an Indian State to claim refund under Ss. 48 and 49-B (F.C.) .. 335

GRAMANATHAM LANDS—Suit for recovery of possession by landholder—Plaintiffs being one of the co-owners whether a bar—*Gramanatham* land whether communal property .. 290

HINDU LAW—Adoption by widow—Consent of nearest *sapinda*—Refusal on the ground that proposed boy was not a *sapinda, sagotra or gnati*—Propriety and effect .. 552

———Adoption—Widow—Adoption by widow of predeceased coparcener after property had vested in mother of last surviving coparcener who had also adopted a son to her husband—Effect—Right of the subsequently adopted son to property—Right to adopt—If can be given up by widow by agreement (P.C.) .. 94

———Custom—Kamma community in Andhradesa—Custom that in case of estrangement between husband and wife, all presents made by the bride's people at the time of marriage to the bride-groom was to be returned to the bride—If opposed to public policy—Award based on

GRAMANATHAM LANDS—*Contd.*

such custom—If illegal within the meaning of S. 30 of the Arbitration Act .. 467

———Gift by donor entitled in absolute fee-simple to estate—Donee a woman—Words indicating absolute gift—Clause of reverter in the absence of issue to the donee—Effect. 389

———Guardianshup—Girl aged two and a half years—Mother if can be preferred to father for appointment as guardian of person—Proper order to be made 248

———Impartible estate—Relinquishment by holder in favour of younger brother—Elder brother dying without leaving any male issue—Subsequent death of younger brother also without leaving any male issue—Property vesting in lineal heir of younger brother—Subsequent adoption by elder brother's widow—Rights of the adopted son (P.C.) .. 172

———Inheritance—Bandhus —Male and female —Preference—Brother's daughter and brother's daughter's son—Preference—Hindu Law of Inheritance (Amendment) Act (II of 1929)—Principle underlying —Extension — Permissibility .. 448

———Joint family—Debts—Suit against manager though not described as such and impleading of adult coparceners also as defendants—Decree—If binds joint family—Minor coparceners not impleaded *co nomine*—If bound by decree and sale in execution thereof .. 52

———Joint family—Promissory note in favour of son in respect of debt due to family—Death of the holder—The father as manager if can give a valid discharge—Wife as legal representative if can sue after father has given discharge. 189

———Pre-partition debt of father—Property in the hands of son after-partition—When liable —Running account—Balance due on—Signature of father in acknowledgment after partition—Suit on accounts and decree thereon—Execution—Property obtained by son on partition—Liability .. 185

———Widow—Decree against— Revisionary interest, if bound—Test—Construction of decree —Suit by endorsee of promissory note executed by widow—Decree against the estate if could be passed—Execution against estate in the hands of the revesioners, after her death—If can be had—Adjudication against widow—Estate, when bound .. 523

———Will—Construction—Provision that " my wife alone shall be kartha (owner) without having powers of gift, exchange and sale. After her lifetime, my nephews shall enjoy the property "—Provision for payment of two-thirds of income to nephews in case of disputes between wife and nephews—Nature of interests conferred on wife and the nephews .. 480

HINDU LAW OF INHERITANCE (AMENDMENT) ACT (II OF 1929)—Principle underlying—Extension—Permissibility .. 448

HINDU WOMEN'S RIGHTS TO PROPERTY ACT (XVIII OF 1937)—Agricultural land—Tests—Lands used as salt pans for producing salt—Non-agricultural in character .. 537

IMPARTIBLE ESTATES—*See* Hindu Law—Impartible estates, (P.C.) .. 172

INCOME-TAX ACT (XI OF 1922)—Ss. 2 (i) and 4 (3) (*viii*)—" Agricultural income "—

INCOME-TAX ACT (XI OF 1922)—*Contd.*

Forest trees growing naturally—Income from sale of—If agricultural income exempt from tax—Mortgagee in possession of agricultural land assessed to land revenue leasing out to mortgagor—Rent received by him is agricultural income exempt from income-tax—Malikana if agricultural income (P.C.) 165

———Ss. 4 (1) third proviso—Applicability to an assessment under R. 2 (*b*) of the Sch. to Income-tax Act. (P.C.) .. 149

———(As amended in 1939), S. 10 (7)—Indian branch of insurance company not resident in British India—Computation of profits and gains—Schedule to Act—Rr. 2 and 8—Applicability (P.C.) .. 235

———S. 42—Applicability to cases where income had already accrued outside British India. (P.C.) .. 149

———S. 42 (1)—If *ultra vires* as being extra territorial in operation. (F.C.) .. 335

———S. 42 (3)—Cases to which relief afforded by applies .. 623

———Ss. 48 and 49-B—Right of Indian State to claim refund under (F.C.) .. 335

———Sch. Rr. 2 and 8—Applicability (P.C.) .. 235

INDUSTRIAL DISPUTES ACT (XIV OF 1947)—Purpose and scope of—Dispute on matters outside the terms of contract and existing legal rights—Jurisdiction of Tribunal to consider—Trade disputes—Re-instatement of dismissed workmen, bonuses, gratuities, pensions and amenities like houses for workmen and schools for their children—Claim relating to—Jurisdiction of tribunal .. 119

———Ss. 7 and 10 (1)—Government notification giving jurisdiction to a particular Tribunal over the whole of the Province with regard to disputes arising in engineering firms and type foundries—Validity—Absence of reference to disputes or specification of parties—If makes notification invalid .. 231

INJUNCTION—Suit for—Plaintiff to prove probable prospective damage .. 297

JURISDICTION—Counter-claim in written statement—Limits of defendant's rights. 110

———Repudiation of contract for non-performance within a reasonable time .. 229

LAND ACQUISITION ACT (I OF 1894)—Ss. 9 (2) and 23—Sufficient compliance with S. 9 (2)—What would amount to—Compensation in respect of wet and dry lands—Number of years' purchase to be adopted for capitalisation—Different rule if applicable to case of dry lands having potential value as building sites. 283

LANDLORD AND TENANT—Suit based on tenancy—No denial of landlord's title—Subsequent suit on title—Maintainability .. 465

LEASE—Transferee from lessee—Recognition by lessor—Creation of privity of interest—Liability of heirs of a lessee—Joint liability—Partition *inter se*—Lessor not a party—Lessor if bound. 191

LEASE FOR AGRICULTURAL PURPOSES—Provision for period of grace for payment of rent and also provision for feiture for non-payment of rent—Power of Court to relieve against forfeiture for non-payment of rent .. 586

LETTERS PATENT (MAD.) Cl. 36—Difference of opinion among Judges hearing application under S. 491, Cr.P. Code—Cl 36 of Letters Patent if applicable .. 78

LETTERS PATENT (MAD.)—*Contd.*

LIMITATION—Vendor's failure to keep up the express and implied covenants of the title and quiet enjoyment—Suit for damages by vendee—Limitation runs only from the date of actual physical dispossession .. 456

LIMITATION ACT (IX OF 1908)—S. 5—Sufficiency of cause for and excusing of delay—Discretion of Court—Interference under S. 115, C.P. Code .. 144

———S. 14 and Art. 182 (5)—Applicability—Decree passed by District Munsiff as Small Cause Judge in 1939—Successive execution petitions on the Original Side of same Court in 1911 and 1942 successively dismissed and last execution petition pending in 1945—Decree-holder realising mistake and filing execution petition on Small Cause Side—Limitation. 432

———Art. 48—Official assignee taking possession of moveable property as belonging to insolvent—No step taken by alleged true owner to establish claim for 3 years—Claim barred by limitation .. 72

———Art. 74 and 75—Instalment bond with default clause—Default in payment of one instalment—Creditor if bound to sue for the whole amount—Limitation .. 112

———Art. 97—Sale proceeds of execution sale rateably distributed—Sale of one item void—Right of auction purchaser to sue for refund—Limitation .. 449

———Art. 142—Applicability—Adverse possession for twelve years by several persons in succession not claiming from one another—If bars true owner 428

———Art. 182 (5)—Applicability .. 432

———Art. 182 (5)—"In accordance with law."—Application for transmission of decree without filing certified copy of decree as required by R. 142 of the Civil Rules of Practice—Not one in accordance with law—Dismissal of such application as not pressed—Though a "final order" cannot save limitation—C.P. Code (V of 1908), S. 39 and Order 21, Rr. 5 and 6 .. 66

MADRAS AGRICULTURISTS RELIEF ACT (IV OF 1938)—Variation of decree by scaling down—Person entitled to restitution—Right to have decree transferred to another court for execution .. 486

———S. 19—Requirements—Relevancy of agriculturist character of the debtor—Crucial dates .. 658

MADRAS BORSTAL SCHOOLS ACT (V OF 1926)—S. 8—Scope of—Criminal tendencies and propensities—Indications .. 282

MADRAS BUILDINGS (LEASE AND RENT CONTROL) ACT (XV OF 1946)—Residential purpose—Test—Rule making the Court of Small Causes the authority to hear appeals—Validity—Competency of revision to High Court against orders of Judge of the Court of Small Causes. 74

———Ss. 7 and 12 (4)—Eviction application under S. 7 for non-payment of rent—Determination of tenancy by notice to quit as required by S. 111 (*h*) of the Transfer of Property Act, IV of 1882—Necessity—Question whether notice was necessary—Jurisdiction of Rent Controller and appellate authority to decide—Separate suit by defeated party questioning the decision—Barred by S. 12 (4) of Madras Act XV of 1946. 412

MAD. BUILDINGS L. & R. CONTROL ACT (XV OF 1946)—*Contd.*
———S. 7 (2) (1)—Default in payment of rent—Right to evict—Tenant not making tender of monthly rent after refusal of rent tendered for one month—Effect—S. 12 (4)—Order of applellate authority—Not subject of revisional jurisdiction of the Court—Proper remedy. 528
———S. 9—Petition for execution of order of eviction made under S. 7—Objection that notice terminating tenancy was not given and so order was without jurisdiction—Not sustainable. 417
———S. 12—Evicted tenant obtaining time from landlord to comply with order of eviction—If amounts to abandonment of right to appeal against eviction order .. 280
———S. 12 (1) (*a*) —Power of Government to constitute appellate authorities—Scope—Notification of 1st March, 1948, substituting the "of Small Causes" for the "Chief Judge of the Court of Small Causes"—Validity—Power of Chief Judge of the Court of Small Causes to transfer appeal to another Judge of the Court— 471
———S. 12 (1) and (4)—Subordinate Judge appointed as appellate authority under S. 12 (1) is a *persona designata* and not a Court—Revision to High Court—Competency .. 419
———S. 12 (4)—Order of appellate authority—Not subject to revisional jurisdiction of the Court —Proper remedy. .. 528
MADRAS CITY CIVIL COURT ACT (VII OF 1892)—S. 16 (2) and G.O. No. Ms. 4175 (Home), dated 11th November, 1948—Suits in which the value of the subject-matter is between Rs. 5,000 and Rs. 10,000 pending in the High Court on the date of the G. O. increasing the pecuniary limits of the jurisdiction of the City Civil Court—If can be transferred to the City Civil Court under S. 16 (2) .. 503
MADRAS CITY MUNICIPAL ACT (IV of 1919), S. 401 and Sch. IV, R. 7—Assessment of company—Return of income—Mistake in giving gross receipts instead of gross income —Appeal not filed —Suit to declare assessment to be illegal—Maintainability .. 108
———Sch. IV, R. 15 (*a*)—Appeal under—If maintainable without payment of the tax which is the subject-matter of appeal .. 455
MADRAS CIVIL COURTS ACT (III OF 1873), S. 14—Suit for setting aside order relating to immoveable property—Court valuation—Jurisdiction purposes .. 195
———S. 29 (1) High Court notification empowering a Subordinate Judge, to issue a succession certificate—Scope and effect.—Issue of succession certificate by Subordinate Judge—Jurisdiction —Appeal—Forum—Succession Act (XXXIX of 1925), S. 388 (2) proviso—Not applicable when Subordinate Court not invested with powers of High Court under that section .. 650
MADRAS CO-OPERATIVE SOCIETIES ACT (VI OF 1932), S. 57—Registrar of Co-operative Societies under—If "Civil Court"—Suit to set aside order—Court-fee .. 107
———S. 57-A—Mortgage decree obtained by Co-operative Society—Execution—Transfer of decree from Court which passed the decree—Necessity .. 199
———Rules under Rule XXII (20) (*a*)—Sale under award at intance of Co-operative Society—
MAD. CO-OPER. SOCIETIES ACT (VI OF 1932)—*Contd.*
Not a private transfer—Sale in contravention of the rule—Not a nullity .. 393
MADRAS COURT OF WARDS ACT (I OF 1902)—S. 49—Statutory notice required by the section—Waiver by Court of Wards—Competency—Effect of such waiver .. 602
MADRAS DEBT CONCILIATION ACT (XI OF 1936)—S. 10 (2) (*b*)—Discharge of debt under—Conditions necessary .. 194
MADRAS DISTRICT MUNICIPALITIES ACT (V OF 1920), S. 81 (4)—Lands within municipal limits used exclusively for purposes of agriculture—Levy of tax under S. 81 (2)—If prevented by S. 81 (4) .. 508
———S. 249—Prosecution for running an oil mill after licence to do so had been refused—Court if can go into legality or otherwise of the refusal of licence (F.B.) .. 488
MADRAS ESTATES LAND ACT (I OF 1908), S. 3 (2) (*d*), Explanation I "other tenure"—Personal inams—If comes under—Exclusion of porambokes in a grant—Explanation I of S. 3 (2) (*d*) if can be applied .. 520
———S. 192 (5)—Non-payment of admitted amount—Trial Court not passing order—Order by Appellate Court regarding admitted rent—When can be passed—Other pleas of tenant whether can be agitated .. 76
MADRAS GAMING ACT (III OF 1930)—Ss. 6, 8 and 9—Scope of the presumption under S. 6—Conviction under Ss. 8 and 9—Proof of gaming in a common gaming house—Necessity. 63
MADRAS GENERAL SALES TAX ACT (IX OF 1939), S. 8—Scope—Agent buying or selling for principal for a commission—Exemption from tax—Conditions essential for .. 530
MADRAS HINDU RELIGIOUS ENDOWMENTS ACT (II OF 1927)—S. 26—Order of Endowment Board removing trustee of a temple in the mofussal purporting to exercise powers of Assistant Commissioner under S. 26—If can be quashed by *certiorari* .. 187
———Ss. 4 4-B (2) (*d*)—Orders of Collector acting under—Liability to revision by High Court .. 536
———S. 58—Scope and effect—Swasthivachakam service inam—Succession—Woman—No disqualification—Partition of emoluments—If can be recognised in making appointment to office .. 545
———S. 76—Order of Endowments Board sanctioning an exchange of lands belonging to a temple for other lands belonging to a stranger—Petition in District Court by two persons interested in the temple for cancelling the order—Jurisdiction of the District Judge—Nature of—Power to cancel or modify order—If includes power to direct a sale of temple land to one of the parties and fix a price for it. 382
———(As amended by Act X of 1946,) S. 78—Scope—Certificate granted by the Board before any rules for the issue of such certificates were prescribed by the Local Government—Not sufficient to support an application under S. 78—Enquiry under S. 78 —Scope .. 200
MADRAS LOCAL BOARDS ACT (XIV OF 1920)—Rules under R. 5—Requirements of—Action against officer or servant of the Local Board—Charge against him, if should state

MAD. LOC. BOARDS ACT (XIV OF 1920) —*Contd.*
proposed action—Punishment—Interference by High Court in second appeal .. 422
MADRAS MAINTENANCE OF PUBLIC ORDER ACT (I OF 1947)—Arrest under S. 151 of the C.P. Code—Subsequent detention under Madras Act (I of 1947)—Validity—Power to pass final order after application under S. 491, C.P. Code—Power of Court to go into the question of the satisfaction of the detaining authority. 583
———Order made with the object of preventing a person in judicial custody coming out on bail—Legality of detention .. 581
———S. 2 (1)—Order of detention under—Jurisdiction to make—Foundation for—Ground on which detention will be proper under the Act—"Forthwith" in S. 2 (2)—Meaning. 78
———Ss. 2 (1), (2) and 3 (1)—Scope—Order for detention valid at its inception—If becomes invalid by reason of non-compliance of authorities with requirements of S. 2 (2) or S. 3 (1)—Grounds of detention—Antecedent conduct of detenu—If can be taken note of .. 90
———(As amended by Ordinance II of 1948), Ss. 16 and 16-A—Validity, scope and effect—S. 16-A if applicable to pending petitions under S. 491, C.P. Code. (F.B.) .. 1
MADRAS MARUMAKKATHAYAM ACT (XXII of 1933)—As amended by Act XXXII of 1947), S. 4—One of the parties to marriage not alive on date when Act came into force—Children of union if legitimate for purposes of succession .. 50
MADRAS NON-RESIDENTIAL BUILDING RENT CONTROL ORDER, 1942 (As amended on 11th July, 1944), Cl. 8—Decree for eviction passed before amendment—Execution petition—If can be filed .. 376
———Cl. 8—Scope and effect of—Institution of a suit in Civil Court for possession and passing of a decree, if prohibited. .. 452
MADRAS PREVENTION OF ADULTERATION ACT (III OF 1918)—S. 20 (2) (*f*) and Rr. 27-A and 29—Mixture of gingelly oil and groundnut oil kept for sale—Plea that it was kept for sale as lamp oil and not as food—If a good defence—R. 27-A, if *ultra vires* the Provincial Government .. 198
MADRAS PROBATION OF OFFENDERS ACT (III OF 1937)—Applicability to cases of grave offences under S. 436, I.P. Code. 152
MADRAS SALT ACT (VI OF 1889)—Sale of lease of salt pans not permitted by the Act—Proper course to adopt .. 400
MADRAS STAMP AMENDMENT ACT (VI of 1922), Sch. I-A, Art. 33 and 46—Security bond executed by guardian appointed under the Guardians and Wards Act for the due execution of his duties—Article applicable .. 323
MADRAS TENANTS AND RYOTS PROTECTION ACT (XVII of 1946)—Usufructuary mortgagee and sub-lessee—If "tenant" entitled to deposit arrears of rent and ask for stay .. 527
———S. 4—Person holding land under a *karaima* chit who has built a house-*cum*-shop in it—If a tenant entitled to benefit of S. 4 .. 62
———S. 4 (1)—*Othidar* or usufructuary Mortgagee who has in his turn parted with actual possession of the land to others—If "tenant"

MAD. T. & R. PROTECTION ACT (XVII OF 1946)
(under Malabar Tenancy Act) entitled under Madras Act (XVII of 1946) to have proceedings for eviction stayed .. 475
———S. 4 (5)—Extended time—If should be in continuation of the two months allowed. 556
MALABAR TENANCY ACT (XIV OF 1930), S. 3 (v) (j) "Tenant"—Meaning Othidar who has parted with actual possession to others—If "tenant" .. 475
MORTGAGE—Decree in suit by third mortgagee impleading fourth mortgagee but not the sub-mortgagee of the fourth mortgagee—Sale in execution—Sub-mortgagee how far bound. (P.C.) .. 101
———Mortgage by members of Hindu caparcenary—Insolvency of adult coparceners during pendency of suit to enforce mortgage—Final decree and sale in execution without impleading Official Receiver—How far binding on Official Receiver or purchaser of insolvents' rights from him—Doctrine of *lis pendens*—If applicable—Apprising receiver of date of proclamation of sale in executon of mortgage decree—Effect—Civil Procedure Code (V of 1908), O. 21, R. 22—If applicable .. 249
PARTITION ACT (IV OF 1893)—Ss. 2 and 6—Partition resulting in inconvenience and uneconomic segments—Paritition Act, Ss. 2 and 6 to be applied .. 622
PARTITION SUIT—*See* Will—Partition suit for residue (F.C.) .. 628
PARTNERSHIP—Death of partner—Rights of representatives and obligations of surviving partners—Nature of relationship—Surviving partners continuing business without winding up—Right of representatives of deceased partner to profit or interest—Election to claim profit or interest—When to be made .. 298
———Renewal of lease obtained by one of the partners in his own name—Presumption—Right of other partners—Trust Act (II of 1882), Ss. 88 and 90—Applicability—Constructive trust—Limits—Sale of lease (of salt pans) not permitted by Madras Salt Act (VI of 1889)—Proper course to adopt .. 400
———Sale of going concern—Power of Court—Preponderating interest in a going concern in one of the partners—His right to purchase the other partners' shares deserving of consideration .. 420
PENAL CODE (XLV OF 1860), S. 4 (1) and Cr.P. Code (V of 1898), S. 188, as amended by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948—If and how far extra-territorial—Offences committed in Travancore and Cochin when those States were outside British India—Initiation of proceedings after accession of such States—Jurisdiction of a Court in India to try the same—Law governing—Government of India Act, (1935, S. 205 (1)—No final adjudication as to liability under criminal law—Decision on a question of jurisdiction—Not enough to justify the grant of a certificate for leave to appeal to the Federal Court .. 395
———Ss. 95 and 504—Domestic quarrel—Desirability of applying S. 504 .. 445
———S. 498—Ingredients of offence .. 610
———Ss. 504 and 95—Ingredients of the offence under S. 504—Letter written by father from the

PENAL CODE (XXV OF 1860)—*Contd.*

moffusil to daughter in Madras constituting insult to her and to her husband—If constitutes an offence under section 504—Desirability of applying section 95, Penal Code, to cases of this kind .. 445

PRACTICE—Affidavit evidence—Admissibility .. 434

———Federal Court —Concurrent findings—non-interference—Rule of C.F. .. 568

———Federal Court—Interference with exercise of discretion by the High Court. (F.C.) .. 565

———Partition suit—Prayer in plaint for past mesne profits—Court-fee paid on the prayer—No provision made in the preliminary decree—Subsequent application by plaintiff—Order for provision in the final decree—Jurisdiction of Court to make .. 522

———Pauper minor plaintiff—If can be directed to pay costs of the suit (P.C.) .. 172

———Plaintiff coming to Court with extremely exaggerated and substantially false case based on a substratum of truth—Proper course for Courts to adopt when defence also is exaggerated or false .. 612

———Second appeal—Question whether sale in favour of plaintiff was real or nominal—Concurrent findings in lower Courts—No material error—Interference in second appeal—Burden of proof—Importance of—Affidavit evidence—Admissibility .. 434

———Suit for declaration of their rights by purchaser of insolvent's rights from Official Receiver—Advocate's fee—Governed by plaint valuation of the property and not the mortgage amount .. 249

———Suppression of evidence—Effect (F.C.) .. 568

PRELIMINARY DECREE—Time for payment fixed in—Power of Court to extend 181

PRESCRIPTIVE RIGHT—*See*—Easement. 314

PREVENTION OF CORRUPTION ACT (II OF 1947)—Sanction to prosecute Railway station-master for accepting illegal gratification—Full facts nor placed before sanctioning authority—No valid sanction and no jurisdiction to take congnizance of case .. 600

PROVINCIAL INSOLVENCY ACT (V OF 1920)—Powers of Official Receiver—Order of court to sell properties of insolvent subject to encumbrances—Right of Official Receiver to sell free from encumbrance .. 660

———S. 28-A (Inserted in 1948)—Retrospective operation and effect—Sale by receiver before introduction of new S. 28-A—Demand to include shares of sons of Hindu insolvents .. 249

———S. 37—Vesting under in Official Receiver after annulment—If continues the insolvency proceedings—Proof of debt after annulment Effect .. 209

———Ss. 53 and 67—Order setting aside an alienation by the debtor—Appeal—Compromise —Alienee depositing enough money to pay off the creditors and expenses—Balance left after payment to creditors—Preferential right of alienee to such balance .. 591

———Ss. 78 (2), Proviso—Debts to which it will apply—Vesting in Official Receiver unde

PRO. INSOLV. ACT (V OF 1920)—*Contd.*

section 37—If continues the insolvency proceedings—Exclusion of time between date of adjudication and annulment—When allowed—Proof of debt after annulment when property was vested in Official Receiver under S. 37—Proof of debts before him—Saving of time. 209

PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), S. 17 (1)—Review petition—Deposit of decree amount or security—Necessity .. 61

PRIVY COUNCIL—If competent to tender advice inconsistent with previous decision (P.C.) 177

———Practice—Issue of fact—Decision of trial Judge who has observed the wintesses—Weight to be attached to (P.C.) .. 97

———Practice—Suit for declaration of title and possession based on adoption—Defence of right to possession rested upon title conferred either by a gift or a will—Decree in favour of plaintiff—Plea in appeal on claim based upon possession—Maintainability (P.C.) .. 134

PUNJAB URBAN IMMOVABLE PROPERTY TAX ACT (XVII OF 1940)—If *ultra vires* the Provincial Legislature (F.C.) .. 213

RAILWAYS ACT (IX OF 1890), Ss. 58 (1) and 78—Scope and effect of—Description of consignment contemplated by—Loss of consignment—Liability—Value of goods more than that declared by consignor—Right of consignor to claim actual value .. 538

RECEIVER—Execution sale after decree on mortgage—Decree-holders with leave to bid and set-off purchasing—Sale if valid when one of the decree-holders had been appointed receiver in the suit .. 542

REGISTRATION ACT (XVI OF 1908), S. 77—Suit under—Scope of the powers of Court in .. 479

RIVERAIN RIGHTS—Non-tidal navigable river—Right to the bed—Applicability of English common law rule to India—Navigable river—Embanked river including a navigable channel (P.C.) 128

SECURITY BOND—Construction—Deposit in Court—Security bond by which property is mortgaged—Condition in bond to pay the party entitled to the amount interest till her death and to deposit amount taken, when required—Cancellation of bond term and release of property from encumbrance, whether possible before the term .. 468

SPECIAL MARRIAGE ACT (III OF 1872), Ss. 2, 4, 10 and 17—Hindu minor girl going through form of marriage under the Act—Consent of girl's parent or relatives not obtained—Proper form not complied with—Validity of marriage .. 511

SPECIFIC PERFORMANCE—Suit for specific performance of prior contract of sale—Defence of *bona fide* purchase by later purchaser—Onus 557

SUCCESSION ACT (XXXIX OF 1925), S. 388 (2) Proviso—Not applicable when Subordinate Court not invested with powers of High Court under that section. .. 650

T.P. ACT (IV OF 1882), S. 76—Mortgagee with Possession—Liability to account for profits

T. P. ACT (IV OF 1882)—*Contd.*

between date of preliminary decree and passing of final decree .. 116

TRANSFER OF PROPERTY ACT (IV OF 1882), Ss. 83 and 100—Procedure prescribed by S. 83—If can be extended to cases of charges 196

———Ss. 119, 120 and 55 (2) before amendment of 1929—Deed of exchange—Representatives of original contracting parties—Whether entitled to claim recovery of possession .. 620

TRUST—Tenant of trust property—Arrears of rent due from—Suit to recover by surviving trustee of three trustees—Maintainability—Trusts Act (II of 1882), sections 44 and 76 291

TRUSTS ACT (II OF 1882)—Ss. 44 and 76—Arrears of rent due from tenant of trust property—Suit by surviving of three trustees—Maintainability .. 291

———Ss. 88 and 90.—Applicability —Constructive trusts—Limits .. 400

USURIOUS LOANS ACT (X OF 1908)—Right to claim benefits of—Facts to be established—Fair dealing (F.C.) .. 565

WAR RISKS (GOODS) INSURANCE ORDINANCE (IX OF 1940), S. 7 (2)—Repeal of by Ordinance (XXXIV of 1945)—Effect on the right of Crown to initiate prosecutions. 605

WATER RIGHTS—Suit for injunction restraining defendants from using water in a tank—Plaintiff must establish probable prospective damage .. 297

WILL—Construction—" Sons of my said sons X and Y shall get all the properties "—Grandsons, if takes *per stirpes* or *per capita* (F.C.) .. 628

———Partition suit for residue—No specific prayer for administration but all material facts mentioned in plaint—Dismissal on ground that administration of estate was not completed—Propriety (F.C.) .. 628

WRITTEN STATEMENT—AMENDMENT—*See* Civil Procedure Code, O. 6, R. 17 .. 64

TABLE OF RECENT CASES.

		Page.
Abdul Azeez *v.* Basil Johnson	..	54
Adinarayana *v.* Jagannadha Rao	..	38
Ahmed Ali and Co. *v.* Commissioner, Corporation of Madras	..	35
Akkal Naicker *v.* Kumaraswami Reddiar	..	36
Amikutty Amma *v.* Ramchen Nedungadi	..	43
Amirtheen Rowther *v.* Ameena Bivi Ammal	..	10
Ammalammal *v.* Gnanammal	..	21
Ammanna *v.* Satteyya	..	6
Anandalwar *v.* Second Judge, Court of Small Causes, Madras	..	39
Andi *v.* Kunju	..	51
Andi Thevan, *In re*	..	3
Appavu Naicker *v.* Karia Koundan	..	26
Arunagiri Goundan *v.* Vasantharoya Goundan	..	9
Atchutan Nair *v.* Gopalan Nair	..	66
Ayyathurai Mudaliar *v.* Ibramsa Rowther	..	1
Bapanayya *v.* Bangarraju	..	35
Bapanayya *v.* Satyanarayana	..	18
Bapputhy, *In re*	..	7
Bhimavva *v.* Nagappa	..	59
Bhujanga Naidu *v.* Kristnama Naidu	..	12
Brahmayya, *In re*	..	15
Commercial Employees Association *v.* The Labour Commissioner	..	71
Chakrapani Aiyar *v.* Ammalu Amma	..	8
Chandappa Indra *v.* Jagathpala	..	52
Chathan *v.* Cheeru	..	64
Chelliah, *In re*	..	12
Chenchurama Reddi *v.* Ademma	..	33
China Varahalu *v.* Reddayya	..	63
Chinna Basamma *v.* Veerappa	..	15
Chinna Muthu Naidu *v.* Venkataswami Naidu	..	74
Chunilal *v.* Governor-General in Council	..	49
Clement Aaron *v.* Chathu Nayar	..	75
Dalayya Patrudu, *In re*	..	77
Dasappa *v.* District Magistrate, South Kanara	..	54
Denham *v.* Denham	..	47
Edward Mathuram *v.* Abdul Latiff Sahib	..	37
Easwara Ayyar *v.* Swetharanya Ayyar	..	43
Eswaran *v.* Superintendent, Central Jail, Vellore	..	13
Ganapathi Thevar *v.* Navaneetheswaraswami Devasthanam, Sikkil	..	20
Ganesan, *In re*	..	77
Gopala Marar *v.* The Third Judge of the Court of Small Causes, Madras	..	30
Govindan Nair *v.* Appukutty	..	26
Govindaraja Mudaliar *v.* Saravana Mudaliar	..	25
Hanuman Prasad Pragdos *v.* Nanjappa Chetty & Sons	..	3
Jalal Mohamed Ibrahim Sahib *v.* Arni Abdul Samad Sahib	..	19
Kaliappa Goundan *v.* Valliammal	..	19

	PAGE.
Kalla Surayya and Sons *v.* Province of Madras ..	27
Kalliammal *v.* Ramaswami Goundan ..	4
Kandaswami Goundan *v.* Krishnama Naidu ..	52
Kannaiah Gupta *v.* Subbarami Reddi ..	38
Karuppa Chetty Goundan *v.* Board of Commissioners for Hindu Religious Endowments ..	5
Karuppayee Ammal *v.* Periasami ..	65
Kasi *v.* Ramanathan Chettiar ..	11
Kasi Ammal *v.* Ramaswami Reddiar ..	9
Kayambu Servai *v.* Karuppaiah Servai ..	15
Kesavan *v.* The South Indian Bank, Ltd. ..	70
Kodalan *v.* Chinna Sennammal ..	27
Kommaran, *In re* ..	63
Kota Ananda Krishna Chetty *v.* M. K. and Company ..	72
Kotayya *v.* Devayya ..	6
Krishnamurthi Naidu *v.* Ramakrishna Naidu ..	18
Krishnaswami Reddiar *v.* Venugopala Reddiar ..	10
Kshatriya Sandarare Nadar Uravinmurai *v.* Manikkam ..	61
Kumar *v.* Choyi ..	1
Kunhaliyamma *v.* Kunhi Thayyi Mammod ..	41
Kunhammad *v.* Athermankutti ..	41
Kunhamutty *v.* Bavutty ..	57
Kunharmu *v.* Raman Nambisan ..	46
Kuppuswami *v.* Nagappa ..	30
Kuppuswami Asari *v.* Manikasari ..	73
Kuppuswamy *v.* Gopal Nair ..	40
Lakshmanan Chettiar, *In re* ..	47
Lakshmiamma *v.* Koyakutti ..	28
Lakshmi Ammal *v.* Srinivasa Ayyangar ..	42
Lakshminarasimhayya *v.* Sri Mahant Prayag Dossjee Varu ..	76
Madhavi Amma *v.* Achuthan Nair ..	42
Mahalakshmi Textiles, Ltd. *v.* Meyappa Chettiar ..	55
Mahalingam Asari *v.* Lakshmana Reddiar ..	45
Malaiperumal Pillai *v.* Deputy Registrar, Co-operative Societies, Madras.	77
Mangamma *v.* Venkata Mallikarjuna Varaprasada Rao ..	33
Mani & Sons, Ltd. *v.* Official Assignee, Madras ..	60
Manikya Rao *v.* Adenna ..	7
Manjunatha Vaikunta Shanboghe *v.* Francis Andrew Fernandes ..	6
Maria Pillai *v.* Muthukumaran ..	75
Ma-Unath-Ul-Islam Association, Ponnani *v.* Panchayat Board, Ponnani.	49
Merchant *v.* The Bank of Mysore, Ltd. ..	22
Merchant *v.* The Bank of Mysore, Ltd. ..	61
Mohammad Ibrahim Maracayar *v.* Ismail Maracayar ..	39
Muhammad Ibrahim *v.* Abdul Hafeez Sahib ..	71
Muhammad Sukur Sahib *v.* Madhava Kurup ..	17
Muhammad Unni *v.* Unniri ..	37
Munia Goundan *v.* Varadaraja Goundan ..	5
Murahari Rao *v.* Bapayya ..	51
Muruga Goundan, *In re* ..	12
Murugappa Chettiar *v.* Arunachala Goundan ..	17
Murugesan, *In re* ..	22
Mutyalamma *v.* Narayanaswamy ..	52
Nagamma *v.* Aghorapathi Sastri ..	32
Nagamma Shedthi *v.* Korathi Hensu ..	67
Narasamma *v.* Rana Naidu ..	62
Narayanan *v.* District Board, Salem ..	66

	Page.
Narayana Rao v. Official Receiver, Rajahmundry ..	67
Narayana Reddi v. Veerappa Chettiar ..	50
Narayanaswami Ayyar v. Muthurathnam Ayyar ..	61
Official Receiver, West Tanjore v. Sakkuwarbai Ammal ..	62
Om Prakasha Gupta, *In re* ..	47
Oosman and Company v. Abdul Malick Sahib ..	73
Padmaraya Shetty, *In re* ..	44
Palani Ammal v. Sethurama Ayyangar ..	14
Palaniappa Pillai, *In re* ..	78
Palaniyandi Mudaliar v. Palanivelu Mudali ..	2
Pappayyaswamy, *In re* ..	70
Paramanandaswami v. Shanmugham Pillai ..	25
Paramban Mammadu, *In re* ..	20
Parandamayya v. Navarathna Sikamani ..	35
Parvathi Amma v. Chathukutty Nair ..	69
Perumal Mudaliar v. The Province of Madras ..	74
Pichireddi v. Sri Vighneswara Swami Varu ..	51
Pothuraju v. Satyanarayana ..	31
Prabhakara Reddy, *In re* ..	63
The Province of Madras v. Firm of Kanlagolla Sivalakshminarayana ..	33
The Public Prosecutor v. Tirugnanam ..	45
Punnaiya v. Raghaviah ..	14
Rajam Aiyar v. Pavanambal ..	30
Raju Chettiar and Brothers v. Commissioner of Income-tax, Madras ..	67
Ramanathan Chettiar v. Seth Kotoomal Thanardas ..	24
Ramanathan Chettiar v. Subramanian Chettiar ..	5
Ramanna v. Suramma ..	69
Ramaswami Ayyar v. The Srirangam Municipal Council ..	27
Ramaswami Reddiar v. Chinnaswami Reddiar ..	36
Ramayya v. The District Board, Coimbatore ..	26
Ramayya Pantulu v. Kutty and Rao, Ltd. ..	16
Ramchandra Venkatakrishna Rao v. Balasuryaprasada Rao ..	44
Ramiah, *In re* ..	72
Ramunni Variar v. Narayannai Varasiyar ..	57
Rangaraja Rao v. Dulasibai Ammal ..	13
Rangaswami Iyer v. Madura Urban Co-operative Bank, Ltd. ..	28
Rangaswami Naidu v. The Second Judge, Court of Small Causes, Madras.	24
Ratnam Pillai v. Pakkirisami Naidu ..	48
Sambandam, *In re* ..	64
Sankara Pursa v. Govinda Bhatta ..	53
Sankaranarayana Iyer v. Sri Poovananan'thaswami Temple ..	69
Sastri Ammal v. Arunachalam Chettiar ..	66
Satyam v. Venkataswami ..	29
Satyanarayana Sreshti v. Ramamurti Sreshti ..	8
Sayed Hameed, *In re* ..	56
Seetan Naidu v. Appalaswami ..	29
Seethiah v. Venkatasubbiah ..	4
Seshachariar v. Pattammal ..	58
Seshayya v. Seetharamamma ..	3
Shanasuddin, *In re* ..	18
Shanmughavelayudam Pillai v. Ramanathan Chettiar ..	5
Sitharamamurthi Chetty v. Guruswami Chetti ..	9
Sivaprakasa Mudaliar v. Samarapuri ..	75
Sreenivasan, *In re* ..	34
Srinivasa Nadar, *In re* ..	58
Sriramulu v. Peda Rama Jogi ..	31

	Page.
Subbai Goundar *v.* Muthuswami Goundar ..	11
Subba Rao, *In re* ..	59
Subba Reddi *v.* Koti Reddi ..	34
Subramanyam *v.* Narayana ..	49
Sultan Badsha *v.* Celin Phillip ..	73
Sundara Babu, *In re* ..	53
Sundara Rama Rao *v.* Satyanarayanamurthi ..	76
Suryaprakasa Rao *v.* Satyanarayana Sarma ..	57
Tadulingam Mudaliar *v.* Sakuntala Bai ..	48
Tansukhari M. Karundia *v.* The Official Liquidator, Andhra Paper Mills Co., Ltd. ..	55
Thangiah *v.* Veerappa Mudaliar ..	32
Thathi Naicker *v.* The Co-operative Society, Kundalakuthur ..	28
Thayyal *v.* Baggyathammal ..	40
Thirumalai Iyengar *v.* Arunachala Thevar ..	25
Thiruvengadasami Naidu *v.* Municipal Health Officer, Karaikudi ..	45
Tiruchendur Sivathwaja Matam *v.* Sami Bhattar ..	36
Tirumal Rao *v.* Ranganatha Mudaliar ..	7
Tripurasundaramma *v.* Venkateswarlu ..	52
Tulasamma *v.* Buchiramiah ..	20
Vellingiri *v.* Sree Patteswaraswami Devasthanam ..	53
Unnooli *v.* Subramanian ..	43
Vajravelu Mudaliar *v.* Commissioner of Police, Madras ..	60
Velu Pillai *v.* Soundararajulu Naidu ..	68
Venkataperumal Naidu *v.* Ratnasabapathy Chettiar ..	55
Venkataramanappa *v.* Narayanamurthy ..	41
Venkataramana Rao *v.* Suryanarayana ..	65
Venkatarayudu *v.* Seshamma ..	50
Venkataswami *v.* Mahalakshmi ..	50
Venugopal Naidu *v.* The Third Judge, Court of Small Causes, Madras ..	23
Viriah *v.* Subba Rao ..	10
Visalakshi Ammal *v.* Alamelu Achi ..	62
West Coast Electric Supply Corporation, Ltd. *v.* Dinkar Rao ..	31

INDEX OF RECENT CASES.

ALIYASANTHANA FAMILY—Decree obtained against kartha—Cannot be held to be not binding on junior members merely on the ground of gross neglect or breach of duty on the part of the kartha—Civil Procedure Code (V of 1908), S. 11—Explanation VI .. 67

CERTIORARI—Writ of—If can be issued by the High Court to quash the order of Madras Hindu Religious Endowments Board removing trustee of a temple in the mofussil—Jurisdiction REP. 187 .. 5

CIVIL PROCEDURE CODE (V OF 1908), S. 39 (1)—Person entitled to restitution under a decree because of the variation of the decree owing to its scaling down under Madras Act IV of 1938—Right to have the decree transferred to another Court for execution REP. 456 .. 43

———S. 48—Execution petition returned as decree did not provide for subsequent interest from date of decree as claimed in execution—Delay in re-presentation excused subject to the question of limitation—Delay in re-presentation if can be re-agitated—Amendment of decree (providing for future interest) after twelve years from date of decree—Execution if barred under S. 48 of the Code .. 68

———S. 51—Suit by sons of judgment-debtor for setting aside dismissal of their claim petition—Consent order that property should not be sold till disposal of suit—Grant of time to judgment-debtor for payment—Failure to pay—Arrest—Propriety REP. 318 .. 25

———S. 60—Act XXV of 1942, Act V of 1943 and Act IX of 1937—Scope and effect—Salaries of private persons—Exempt from attachment in suits filed prior to 1st June, 1937, also. 76

———S. 64—Sale under an award at the instance of a co-operative society—Not a "private transfer"—Madras Co-operative Societies Act (VI of 1932)—Rules under R. 22 (20) (*a*)—Sale in contravention of—If nullity REP. 393 .. 28

———S. 66—Applicability—Certified purchaser before 1908—Suit against person claiming under him alleging that the purchase was made benami for plaintiff—Not maintainable. REP. 398 .. 15

———S. 64 and O. 21, R. 57, proviso—Applicability of proviso to r. 57 of O. 21—Order "struck off." on execution petition—If one of dismissal for default—Effect on attachment before judgment. REP. 436 .. 25

———S. 144—Restitution—Mesne Profits—When recoverable .. 66

———S. 151—Inherent power to order refund of Court-fee even where there are no specific provisions for the purpose .. 63

C. P. CODE (1908)—*Contd.*

———O. 1, R. 8—Conditions for the operation of—Representative suit—Leave to file—Criterion for granting REP. 540 .. 52

———O. 1, R. 8 and O. 33, R. 1, explanation (*iii*)—Application for leave to file a representative suit *in forma pauperis*—Test of pauperism. REP. 558 .. 53

———O. 6—Suit to recover leased property on the ground of non-payment of rent and denial of title—Leave to amend plaint by adding further ground of expiry of period of lease—If can be granted .. 20

———O. 6, R. 17—Amendment of plaint—Application made after remand of deficit court-fee—If can be granted REP. 331 .. 25

———O. 6, R. 17—Amendment which may help to bring a plaint really within the jurisdiction of a higher Court within the jurisdiction of the Court in which plaint is originally filed—Propriety of allowing REP. 589 .. 52

———O. 10, R. 2—Examination of party under—Nature and scope of—Defendant summoned as court-witnesses and examined before close of plaintiff's evidence—Not proper. REP. 373 .. 9

———O. 13, R. 1 and Civil Rules of Practice (Madras), R. 62—Refusal to excuse delay in filing some of the documents and excusing delay as to documents for which there was no opposition by the other party—Arbitrary exercise of discretion—Revision .. 40

———O. 21, R. 24 (2)—Requirements—Attachment warrant, sale proclamation and sale warrant signed by Deputy Nazir of District Court—Oral authorization through Sheristadar—Sufficiency—Seal of District Court as prescribed but having in addition word "Nazarat" affixed to the warrants—If renders the execution sale void. .. 62

———O. 21, R. 58—Person who failed in application under—Not barred from applying under O. 21, R. 89, to have the sale set aside. REP. 316 .. 10

———O. 21, R. 63 and 103—Distinction between what has to be proved in suits under. 59

———O. 21, R. 89—Deposit without prejudice to the depositor's contentions on appeal and his right to recover the amount from decree-holders in the event of success in appeal—If entitles the depositor to get sale set aside. REP. 447 .. 37

———O. 21, R. 89—Usufructuary mortgagee from decree-holder directed in the mortgage deed to pay money in Court and get attached house released—*Locus standi* to file application under O. 21, R. 89 REP. 579 .. 52

C. P. CODE (1908)—*Contd.*

———O. 21, R. 97—Application for removal of obstruction—Dismissal as not pressed—Effect—Subsequent execution petition—Fresh application under O. 21, R. 97—Not barred. REP. 656 .. 50

———O. 22, Rr. 10 and 11—Assignment of interest during pendency of suit—Assignor not defending appeal—Right of assignee to be brought on record to defend appeal REP. 245 .. 8

———O. 32, R. 3 (1) and (2) and O. 33—Competence of next friend of minor instituting the suit—Cannot be the subject-matter of investigation at the stage of granting leave to sue *in forma pauperis* or any other stage of the suit. REP. 184 .. 4

———O. 34, R. 1 and O. 1, r. 9—Suit by vendee from mortgagor for redemption—Vendor, if necessary party—Non-joinder of vendor—Effect. .. 55

———O. 37, Rr. 2 and 3—Application for leave to defend made after the time fixed for it in the summons—Court's discretion to condone delay and grant the relief even if there is no statutory provision REP. 514 .. 51

———O. 41, R. 33—Relief under can be granted only in a pending appeal and not after appeal has been disposed of—Party who has pursued his remedies and failed—Cannot apply under R. 33, of O. 41 REP. 425 .. 34

COMPANIES—Forfeiture of shares for non-payment of call money—Resolution, if should specify person to whom or the place at which call money was to be paid. .. 55

———Petition for compulsory winding up in the Original Side of the High Court—Oral evidence—If and how far admissible—Costs—Discretion. .. 4

———Private company consisting of only two shareholders appointed managing agents of another company—The two shareholders falling out and making it difficult to carry on their business—Appointment of receiver—Propriety. .. 75

COMPANIES ACT (VII OF 1913), S. 126—Debentures—Redemption before expiry of period fixed—Not permissible .. 31

COURT-FEES ACT (VII OF 1870), S. 7 (iv-A)—Applicability—Order of Deputy Commercial Tax Officer levying tax—Not a " decree "—Suit for declaration that order was illegal—Court-fee REP. 379 .. 27

———S. 7 (*iv*) (*c*) and Madras Proviso—Suit praying for declaration that plaintiff was entitled to suit properties and for permanent injunction restraining defendants from interfering with plaintiff's possession—Prayer for injunction if consequential relief to the prayer for declaration .. 65

———S. 7, clause (v) (*b*)—Suit for recovery of house site with valuable buildings standing on it—Cannot be valued as one for ordinary land REP. 608 .. 61

———S. 11 and Civil Procedure Code (V of 1908), S. 148—Order for payment of additional Court-fees in respect of mesne profits decreed—Direction that if Court-fee ordered is not paid in the time allowed petition for ascertaining

COURT-FEES ACT (1870)—*Contd.*

mesne profits would stand dismissed—Propriety REP. 233 .. 6

CRIMINAL PROCEDURE CODE (V OF 1898), S. 151 and Madras Act (I of 1947), secs. 2 and 4—Arrest under section 151, Criminal Procedure Code—Subsequent order of detention under Madras Act I of 1947—Propriety and validity REP. 583 .. 54

———Ss. 151 and 491—Preventive detention under S. 151—Discretion of Police Officer in making—If can be canvassed or questioned in proceedings under S. 491 of the Code of Criminal Procedure REP. 554 .. 47

———S. 523 and Madras Police Standing Orders, O. 669—Police seizing from accused's possession buffalo suspected to be stolen and handing it over to complainant who identified it as hers under Standing Order 669—Accused given the benefit of doubt and acquitted—Death of buffalow while in complainant's custody—Value of buffalow—If can be ordered to be paid by complainant to accused by Criminal Court. .. 58

CRIMINAL TRIAL—Committal Court—Powers and duties—Sessions Court—When can set aside order of discharge by Committal Court .. 99

———Confession—Elaborate manner of—Effect REP. 286 .. 15

———Evidence—Approver's evidence—Necessity for corroboration to sustain conviction—Criminal Procedure Code (V of 1898), S. 411-A—Appeal on facts—Scope .. 18

———Approver's evidence-Corroboration necessary—Confession of co-accused—Value of—Evidence Act (I of 1872), S. 30—Scope. 44

———Evidence—Approver's evidence—When reliable by itself—Expert evidence as regards foot-prints—Notice of .. 20

———Witness giving different versions before Magistrate's Court and the Sessions Court—Conviction on such evidence—When proper REP. 228 12

DEBTOR AND CREDITOR—Payment to one of two payees after death of other—If discharge of debt—Payment—If saves limitation for suit by representatives of deceased payee—Limitation Act (IX of 1908), S. 20—Scope and applicability .. 21

DECCAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), Ss. 11 and 3 (w)—Suit of the description mentioned in section 3 (w)—Cannot be filed in any other Court except the one within whose local limits the agriculturist defendant resides .. 6

DEFENCE OF INDIA RULES, R. 90-B—Validity of—If in conflict with Defence of India Act, S. 2 (2), cl. 26—Contravention of rule—Offence—Complaint of by Customs Collector though not subscribing himself as such—Sufficiency to enable Magistrate to take cognizance of the offence .. 56

ELECTIONS—Petition challenging validity of election—Order for inspection of ballot papers—If can be made without notice to the successful candidates REP. 616 .. 48

ESSENTIAL SUPPLIES TEMPORARY POWERS ACT (XXIV OF 1946), S. 17 (ii)—Act received assent of Governor-General on 19th November, 1946, repealing Ordinance XVIII of 1946—G. O. No. 1026, dated 19th November, 1946—purporting to be issued under Ordinance XVIII of 1946—Validity—Contravention of notification—If offence .. 7

EVIDENCE ACT (I OF 1872), S. 32—Dying declaration not separately recorded as such but in the police case diary—Admissibility—Requirements .. 78

———S. 112—Evidence of husband that he had no intercourse with mother of his alleged child—How far proof of "non-access." REP. 426 .. 9

EXECUTION—Decree for costs against trustee suing on behalf of trust—Executable personally against trustee REP. 384 .. 28

———Orders on defective petition—Subsequent application for execution—Question whether earlier petition was in accordance with law—If can be re-opened for deciding question of limitation .. 30

EXTRADITION—Indian Dependencies of France—Accused in criminal cases pending in French territory—Extradition—Procedure—Indian Extradition Act does not apply.. 60

FEDERAL COURT ENLARGEMENT OF JURISDICTION ACT (I OF 1948)—Judgment delivered on a reference made under S. 66 of the Indian Income-tax Act—Appeal to Federal Court—If lies .. 67

GOVERNMENT OF INDIA ACT (1935), S. 100 and Sch. VII, Rule VII, List II, item 2—Delegation of power of legislation—Limits—Delegation of power of appointing authority involving extension of Courts' jurisdiction which can be done only by Legislature—Implied delegation of legislative power also. REP. 471 .. 23

———S. 175 (3)—Contract by Government—Requirements—Contract entered into by Superintendent, Kerala Soap Institute with the permission of the Director of Industries who alone was authorised to enter into contracts—If valid and enforceable .. 74

HINDU LAW—Adoption—Burden of proof—Adoption of orphan—Invalid .. 10

———Adoption by widow—Consent of nearest sapinda—Refusal on the ground that proposed boy was not a *sapinda, sagotra or gnati*—Propriety and effect .. 50

———Custom among kammas of Andhra Desa—Custom that in case of estrangement between husband and wife all presents made to bridegroom at the time of marriage should be returned to wife—Valid and not opposed to public policy—Award based on such custom—Legality—Arbitration Act (X of 1940), S. 30. REP. 467 .. 35

———Debts—Costs ordered against father for unsuccessfully defending a suit by a widow challenging the adoption of his son to her husband—Whether *avyavaharika* .. 41

———Guardianship—Girl aged two and a half years—Mother if can be preferred father for appointment as guardian of person—Proper order to be made REP. 248 .. 19

HINDU LAW—*Contd.*

———Illegitimate sons of Sudra—If coparcener of his father—Nature of rights—Will by father—Validity—Burden of proof—Appellate Court—Powers of in respect of finding of fact .. 32

———Inheritance—Bandhus—Brother's daughter and brother's daughter's son—Preference REP. 448 .. 36

———Joint family—Adoption by widow—Consent of coparceners improperly refused—Adoption with consent of divided sapinda—Validity .. 76

———Liability of father endorsing a promissory note after receiving valuable consideration to make good the amount when the promissory note is found to be unsupported by consideration—Not an *avyavaharika* debt—Death of father—Decree against assets of father in the hands of his sons—Executability—Pious obligation of sons—Property that can be proceeded against—Limits .. 75

———Religious and charitable trusts—Suit on behalf of by *de facto* trustee for recovery of property belonging to the idol or mutt held adversely to the trust by a stranger—Maintainability. .. 69

HINDU LAW OF INHERITANCE (AMENDMENT) ACT (II OF 1929)—If applicable to succeed to stridhanam property of a Hindu lady .. 73

HINDU WOMEN'S RIGHTS TO PROPERTY ACT (XVIII OF 1937)—Lands used as salt pans for producing salt under a licence from the Government—Not agricultural lands, and are therefore governed by the Act for purposes of devolution. REP. 537 .. 49

HUSBAND AND WIFE—Decree for dissolution of marriage—Appeal by husband against decree *nisi*—Wife supporting the decree appealed against—If entitled to order against husband for payment of costs in advance to enable her to contest the appeal REP. 550 .. 47

INAM VILLAGE—Gramanatham—Right of inamdars—Right of one of the co-owners to sue for recovery of possession from a trespasser REP. 290 .. 14

INDUSTRIAL DISPUTES ACT (XIV OF 1947), Ss. 7 and 10 (1)—Government notification giving jurisdiction to a particular Tribunal over the whole of the Province with regard to disputes arising in engineering firms and type foundries—Validity—Absence of reference to disputes or specification of parties—If makes notification invalid REP. 211 .. 16

INDUSTRIAL DISPUTES ACT (XIV OF 1947), S. 34—Failure of management to implement award—Government if can delegate its power to file the complaint to a Magistrate .. 47

INJUNCTION—Person acquiring title to project eaves by possession for more than 12 years—Cannot be asked by injunction to remove the eaves or restrained from letting rain-water in neighbour's house property REP. 314 .. 20

LEASE—Lease for agricultural purposes—Court's discretion to relieve against forfeiture for non-payment of rent even where the lease provides for a period of grace for payment. REP. 586 ... 52

LEASE—*Contd.*

———Surrender of property covered by registered lease deed—Requirements—Evidence of subsequent oral lease—Admissibility.. 51

LEGAL PRACTITIONERS ACT (XVIII OF 1879), Rr. 30 and 31—Senior engaged becoming ill and another senior engaged—Both certifying for fees received by each—Juniors if entitled to one third of the aggregate amount .. 10

LETTERS PATENT (MADRAS), Cl. 15—Order dismissing a defendant's application to implead a stranger as a party to the suit—Not a "judgment" which is appealable .. 54

LIMITATION — Execution applications against principal judgment-debtor—Will save limitation as against the sureties .. 10

LIMITATION ACT (IX OF 1908), S. 14 and Art. 182 (5)—Applicability—Decree passed by District Munsiff as Small Cause Judge in 1939—Successive execution petitions on the original side of same Court in 1941 and 1942 successively dismissed and last execution petition pending in 1945—Decree-holder realising mistake and filing execution petition on small cause side—Limitation REP. 433 .. 37

———Arts. 74 and 75—Applicability—Instalment bond—Default in payment of one instalment—Creditor if bound to sue at once for the whole amount—Limitation REP. 112 .. 1

———Arts. 110—Starting point of limitation for suit for recovery of arrears of rent .. 28

———Art. 142—Applicability—Adverse possession for twelve years by several persons in succession not claiming from one another—Bars true owner REP. 428 .. 33

———Art. 182—Agreement registered under S. 14 (2) of Madras Act XI of 1936—Taking effect as a decree—Whether governed by the 3 years or 6 years rule of limitation .. 26

———Art. 182 (5)—Order strking of execution petition for want of bidders at the execution sale —Not an order finally dismissing the petition—Fresh execution petition can be treated as continuation of prior petition .. 27

LIMITATION (WAR CONDITIONS) ORDINANCE (XXXIII OF 1945), S. 3—Applicability to execution proceedings also.. 41

LUNACY ACT (IV OF 1912), Ss. 40, 41 and 42—Duty of Court to be *prima facie* satisfied that alleged person was of unsound mind before ordering inquisition .. 62

———S. 62—Application under for directing inquisition—Jurisdiction—Legal residence by having permanent resident in family house and property within jurisdiction—Removal of lunatic out of jurisdiction—Effect on jurisdiction to entertain the application for inquisition. 71

MADRAS AGRICULTURISTS' RELIEF ACT (IV OF 1938), S. 8—Principal amount of promissory note consisting of sums originally advanced and interests that has accumulated from time to time—Payments towards principal —If to be appropriated to the principal of the promissory note or the amount originally advanced .. 73

———S. 8, Expl. 1 as amended by Act XXIII of 1948—Mandatory nature and effect—General endorsement of payment "towards principal and

MADR. AGRIC. RELIEF ACT (1938)—*Contd*

interest" can be appropriated towards principa only—Amendment is retrospective .. 6

———S. 9—proviso—Scope—Debts in renewa of prior debts arising after 1st October, 1932—Ascertainment of principal—Proper procedur .. 5

———S. 19—Requirements to enable a debto to apply under—Should be "agriculturist" o date of application also REP. 658 .. 6

MADRAS BORSTAL SCHOOLS ACT (V OF 1926), S. 8—Scope—Adolescent offende with criminal tendencies—Covered by section 3—Offender guilty of causing grievous hurt o death—If can be sent to Borstal institution. REP. 282 .. 1

———S. 9—Petition for execution of order o eviction made under S. 7—Objection that notic terminating tenancy was not given and so orde was without jurisdiction—Not sustainable REP. 117 .. 2

MADRAS BUILDINGS (LEASE AND RENT CONTROL) ACT (XV OF 1946)—Small Cause Court acting as appellate authorit —Dismissal of appeal for default when appellant had an acceptable explanationfor non-prosecutior —Error of law—High Court's power tc correct. .. 40

———Small Cause Judge as Appellate Tribunal —Has no jurisdiction to set aside order of Rent Controller directing eviction of a tenant on a ground involving questions of fact and law raised for the first time before the Appellate Tribunal .. 19

———Tenant passing letter that he would give complete possession by that night when faced with a warrant of possession in execution of the Rent Controller's order for eviction—If bars an appeal against the order or eviction REP. 280 .. 7

———S. 7—Case falling within the purview of —Not governed by S. 111 of the Transfer of Property Act (IV of 1882)—Question of want of notice to quit—If can be agitated before executing Court .. 61

———S. 7 (2) (i)—Default in payment of rent—Right to evict—Tenant not making tender of monthly rent after refusal of rent tendered for one month—Effect—S. 12 (4)—Order of appellate authority—Not subject of revisional jurisdiction of the Court REP. 528 .. 39

———S. 7 (3) (*a*) (ii)—Landlord in occupation of residential buildings in which he carries on his business—If ground for denying right to recover possession of his non-residential building for his use from his tenant .. 72

———S. 12 (1) (*a*)—Power of Government to constitute appellate authorities—Scope—Notification of 1st March, 1948, substituting the "Court of Small Causes" for the "Chief Judge of the Court of Small Causes"—Validity —Power of Chief Judge of the Court of Small Causes to transfer appeal to another Judge of the Court REP. 461 .. 23

———S. 12 (3)—Appellate authority—Powers of —If can remand a case to the controller after disposing of the appeal. .. 24

MAD. BUILDINGS (L. & R. CONT.) ACT (1946)—*Contd.*

———S. 12 (4)—If takes away jurisdiction of High Court to interfere by writ of certiorari .. 30

———S. 12 (4)—Subordinate Judge appointed as appellate authority for purposes of Act—If *persona designata* and not a Court subject to the revisional jurisdiction of the High Court REP. 419 .. 30

MADRAS CITY MUNICIPAL ACT (IV OF 1919), Sch. IV, R. 15—Appeal against order levying extra tax on property—Not maintainable without payment of the tax demanded—Amendment of property tax assessment books under which additional tax is to be levied—Provision under which additional tax is to be levied .. 36

MADRAS CIVIL COURTS (ACT III OF 1873), S. 29 (1)—Notification under by the High Court empowering a subordinate Court to issue a succession certificate—Scope and effect—Issue of succession certificate by Subordinate Judge—Jurisdiction—Appeal—Forum— Succession Act (XXXIX of 1925), S. 388 (2), proviso—Not applicable when subordinate Court not invested with powers of High Court under that section REP. 650 13

MADRAS CO-OPERATIVE SOCIETIES ACT (VI OF 1932), S. 51—Deputy Registrar on whom the powers of a Registrar under S. 51 (1) and (2) have been conferred himself acting as arbitrator and giving award on a reference—Validity of award .. 77

MADRAS COURT OF WARDS ACT (I OF 1902), S. 49—Notice required by—Waiver by Court of Wards—Competence and effect REP. 602 .. 50

MADRAS DEBT CONCILIATION ACT (XI OF 1936), S. 10 (2) (B)—Discharge of debt under—Conditions necessary for REP. 194 .. 5

MADRAS DISTRICT MUNICIPALITIES ACT (V OF 1920), S. 81 (4)—Lands within municipal limits used exclusively for purposes of agriculture—Levy of tax under S. 81 (2)—If prevented by S. 81 (4) REP. 508 .. 27

———S. 249—Prosecution for running an oil mill after licence to do so had been refused—Court if can go into legality or otherwise of the refusal of licence REP. 488 .. 45

MADRAS ESTATES LAND ACT (I OF 1908)—Landlord obtaining decree against a tenant afterwards ceasing to be his landlord—If can execute the decree in a revenue Court and realise his arrears in a revenue sale .. 62

MADRAS GENERAL SALES TAX ACT (IX OF 1939), S. 8—Scope—Agent buying or selling for principal for a commission—Exemption from tax—Conditions essential for REP. 530 .. 33

MADRAS HIGH COURT ORIGINAL SIDE RULES—O. 7, R. 6—Unconditional leave to defend—When granted—Tests .. 70

MADRAS HINDU RELIGIOUS ENDOWMENTS ACT (II OF 1927), S. 44-B (2) (*d*)—Collector acting under—Not a Court whose orders are liable to revision by the High Court REP. 536 .. 51

MAD. H. R. E. ACTS (1927)—*Contd.*

———S. 58—Scope and effect—Swastivachakam service inam—Succession—Woman—No disqualification—Partition of emoluments—If can be recognised in making appointment to office REP. 545 .. 3

———S. 78—Petition filed with certificate by the Board but not in the prescribed form—Production of certificate before passing orders—Sufficiency .. 33

———S. 78—Summary order on *prima facie* title ordering possession to be delivered to trustees—How far binding .. 6

MADRAS LOCAL BOARDS ACT (XIV OF 1920)—Rules under—R. 5—Requirements—Punishment of officers and servants—Notice of proposed action if to be given along with the charge REP. 422 .. 26

———S. 99—Registered association the objects of which are to provide religious instructions for new converts to Islam—Building used for housing feeding and clothing the converts and imparting religious instruction—If exempt from tax—Repeal of S. 99 by Madras Act XI of 1946—Effect .. 49

———S. 225 (2)—Limitation under—Applicability—Tests—Employment under a contract as medical officer in discharge of a rural dispensary—Claim for wrongful dismissal—Claim for damages—If to be brought within six months of arising of cause of action .. 66

MADRAS MAINTENANCE OF PUBLIC ORDER ACT (I OF 1947)—Order for detention not specifying place of detention—If renders detention illegal .. 63

———S. 2 (1)—Delegation of power to Commissioner of Police to order detention—If deprives the Governor of the power to make orders for detentions .. 72

———S. 2 (1)—Order of detention—Grounds of satisfaction—Object with which detention was ordered—If can be looked at in considering *bona fides* of exercise of power—Order made with object of preventing a person who was in judicial custody coming out on bail—*Mala fides*—Illegality of detention REP. 581 .. 34

———S. 2 (1) (*a*)—Grounds of detention within purview of Act combined with grounds outside the purview of the Act—Effect—Continuance of detention cannot be justified .. 63

———S. 2 (1) (*a*), 3 (5) and 4 (2)—Detaining authority not applying his mind to fact whether the person concerned was acting or was about to act in a manner prejudicial to public safety——Effect—Order illegal at inception—If rendered legal by the fact of Government confirming it under section 3 (5) or extending the period of detention under S. 4 (2) of the Act .. 64

———S. 3 (1)—Discretion of authority as to particulars to be provided to detenu—Irregularity in compliance with provisions of S. 3 (1)—Effect .. 53

———S. 3 (1)—Imperative duty of Government to serve all the grounds on which the detention was based .. 77

———S. 3 (5)—Duty of Government to pass a final order under after report of Advisory Council—Failure to pass final orders—Makes detention unlawful .. 13

MAD. MAINT. OF PUB. ORD. ACT (1947) —*Contd.*

———S. 3 (5)—Order that if detenu gives an undertaking that he will not take part in subversive activities he would be released—Legality—If one under S. 3 (5) or modification of original order under S. 2 (1) of the Act. 22

MADRAS NON-RESIDENTIAL BUILDINGS RENT CONTROL ORDER (1942), Cl. 8—Scope—Suit for eviction in civil Court—If barred REP. 452 .. 37

MADRAS SHOPS AND ESTABLISHMENT ACT (XXXVI OF 1947), S. 51—Application by labour association to Labour Commissioner for decision of certain questions — Letter addressed by representative of company to the Labour Commissioner without notice to the applicant association giving a precis of arguments after closing of hearing in which both sides were represented by legal practitioners—Decision of Labour Commissioner—If vitiated by the irregularity .. 71

MADRAS TENANTS AND RYOTS PROTECTION ACT (XVII OF 1946)—*Panaya Kychitdar*—Not a "tenant" under the definition in Malabar Tenancy Act .. 46

———Sub-lessees under a lessee whose term of lease has expired and who does not claim a stay —If 'tenant' entitled to ask or stay of suit for eviction against main lessee .. 1

———Usufructuary mortgagee and sub-lessee —If "tenant" entitled to deposit arrears of rent and ask for stay REP. 527 .. 43

———S. 4 (1)—Othidar or usufructuary mortgagee who has in his turn parted with actual possession of the land to others—If "tenant" (under Malabar Tenancy Act) entitled under Madras Act (XVII of 1946) to have stay of proceedings for eviction—Malabar Tenancy Act (XIV of 1930), S. 3 (v) (i) "Tenant"—Meaning REP. 475 .. 26

———S. 4 (2) (i) and (5)—Construction—Arrears of rent—Amounts payable .. 57

———S. 4 (5)—Power to grant "further" time —If can be beyond 4 months from the date rent accrued due or otherwise than in continuation of prior period REP. 556 .. 57

MALABAR LAW—Property acquired by members of *tarwad*—If joint or separate property —Test—Presumption and onus—*Karnavan*—Alienation by—When valid—Renunciation—When valid .. 42

———Tarwad—Property standing in the name of a junior member—Presumption is that it belongs to him and not to the tarwad .. 69

MALABAR TENANCY ACT (XIV OF 1930), S. 3, cl. (v)—Lessee taking land for the purpose of constructing a smithy—Is a tenant within the meaning of the Act .. 75

MOPLAH MARUMAKKATHAYAM ACT (XVII OF 1939), Ss. 13, 14, and 17—Severance of status—When effected .. 41

MORTGAGE—Provision that it should be for a period of 26 years—Clause that if before the expiry of the period mortgagors paid before cultivation season of any year the amount of principal the land and document should be put back in the possession of the mortgagors immediately—Assignee from mortgagors—If can redeem before expiry of the term .. 29

———Puisne mortgagee's suit in which first mortgagee has not been impleaded—Sale on foot of decree in—If bars right of puisne mortgagee to redeem first mortgage .. 48

MORTGAGE DECREE—Costs—Mortgagor can be made personally liable for only after exhausting the mortgaged properties—Mortgagor —When can be proceeded against personally .. 14

MOTOR VEHICLES ACT (IV OF 1939), S. 116—Gist of offence under—Motor driver through error of judgment taking risk in driving in a narrow place and knocking down a person —If criminally liable .. 77

PARTITION ACT (IV OF 1893), Ss. 2 and 6 —Decree for partition of a very small house and garden incapable of equitable and practicable division—Proper course REP. 622 .. 64

PARTNERSHIP—Death of partner—Rights of representatives and obligations of surviving partners—Nature of relationship REP. 298 .. 11

———Renewal of lease obtained by one of the partners in his own name—Presumption—Right of other partners—Trusts Act (II of 1882), Ss. 88 and 90—Applicability REP. 400 .. 9

———Suit for dissolution by partner having a small share—Power to sell going concern—Exercise of—Principles to be borne in mind REP. 420 .. 31

PARTNERSHIP ACT (IX OF 1932), S. 69—Scope—Suit for rendition of accounts of a dissolved partnership which was not registered before dissolution—Maintainability .. 31

PENAL CODE (XLV OF 1860), Ss. 465 and 471—Person posting application at Vizagapatam for admission to competitive examination along with three forged documents—Application addressed to Madras Public Services Commission who considered it—Offence where committed —Territorial jurisdiction .. 70

———S. 504—Gist of offence under—Letter written by father from Vellore to his married daughter in Madras—Insults to daughter and her husband contained in the letter—If constitutes offence under S. 504—Domestic quarrel—Desirability of applying S. 95, Penal Code REP. 445 .. 39

PRACTICE—Petition for adjudication alleging act of insolvency—Counter-affidavit not admitting acts of insolvency alleged in affidavit —Final order of adjudication without taking evidence adduced by both parties—Propriety .. 24

———Plaintiff coming to Court with extremely exaggerated and substantially false case based on a substratum of truth—Proper course for Courts to adopt when defence also is exaggerated or false REP. 612 .. 45

———Issue whether a sale deed was nominally executed in fraud of creditors—Onus—Affidavit evidence—Admissibility—Relevancy of evidence —If can be questioned for first time in second appeal REP. 434 .. 29

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), S. 52 (2) (*c*)—Reputed ownership—Doctrine of, how far applicable to commission agents in possession of goods of others for sale .. 60

PREVENTION OF CORRUPTION ACT (II OF 1947)—Sanction to prosecute—Essentials for validity of .. 59

———S. 3—Investigation by Circle Inspector into cognizable offence instead of by Deputy Superintendent—Effect of irregularity on jurisdiction of Court to take cognizance of offence and convict .. 45

PROVINCIAL INSOLVENCY ACT (V OF 1920), Ss. 4 and 53—Application for declaration that a sale deed by the insolvent was without consideration and for defeating the claims of the creditors of the insolvent—Barred by decision in prior suit under S. 53 of the Transfer of Property Act in which the Official Receiver though added as party remained *ex parte* .. 69

———Ss. 38 and 39—Scheme of composition duly approved but adjudication not annulled by some oversight—Administration of estate on the ground that there was no annulment—Subsequent application for annulment—Sustainability .. 18

———Ss. 53 and 67—Appeal against order under S. 53 setting aside alienation—Alienee entering into compromise agreeing to deposit sufficient money to pay off the creditors and expenses—Balance left after disbursements from deposit—Alienee has more equitable right to it than insolvent REP. 591 .. 67

———S. 78—Period between date of adjudication and date of its annulment—When excluded in computing limitation for recovery of a debt due by the debtor—Vesting of insolvent's property after annulment in appointee under S. 37 of the Act—Creditor if entitled to prove his debt before him REP. 209 .. 2

RAILWAYS ACT (IX OF 1890), Ss. 78 and 58 (1)—Scope and effect—Consignment of pencils, nibs, needles, etc., described in forwarding note as "stationery-pencils"—Loss of consignment—Liability—Value of goods more than that declared by consignee—If can be relevant REP. 538 .. 49

RECEIVER—Execution sale after decree on mortgage—Decree-holders with leave to bid and set-off purchasing—Sale if valid when one of the decree-holders had been appointed receiver in the suit REP. 542 .. 53

REGISTRATION ACT (XVI OF 1908), S. 17—Compromise decree reciting that the defendant agrees to treat a will as valid with a statement that the defendant and his heirs would not question the will and that they had no interest in the properties—Not a declaration of plaintiff's title necessitating registration of the compromise decree REP. 459 .. 18

———Ss. 35 and 87—Father and mother jointly entitled to sell executing sale deed—Death of mother—Registration on admission of execution by father and not the heirs of the mother—Defect curable under S. 87 .. 8

———S. 77—Suit under—Powers of Court .. 35

SALE OF GOODS—Contract for—Arrangement for despatch of the goods by seller F. O. R., Mirzapur and that Railway receipt should be negotiated through a named Bank of Madras—Breach of contract by seller—Suit for damages in Madras—Jurisdiction—Damages—If to be based on market rate at Mirzapur or at Madras on date of breach REP. 229 .. 3

SALE OF LAND—Agreement for sale by members of joint family—One of them not signing agreement—Effect—Contract if incomplete or inoperative—Question of fact which cannot be subject-matter of second appeal .. 38

———Right to repurchase within a fixed period—Time if of the essence of the contract. 36

SPECIFIC RELIEF ACT (I OF 1877), S. 27—Specific performance—Suit for—Defence—Subsequent purchase for value without notice—Onus of proof REP. 557 .. 38

———S. 27 (*b*)—Subsequent alienee who has not paid the entire amount of consideration—Not entitled to resist claim for specific performance of earlier agreement to sell REP. 298. 11

TRADE MARK—Nature and essence of—Assignment—Essentials for validity—Transfer of trade mark separate from goodwill or the business—If creates a right in the assignee to the use of the mark .. 73

TRANSFER OF PROPERTY ACT (IV OF 1882), Ss. 119 (before its amendment in 1929), 120 and 55 (2)—Scope—Purchaser from one of the parties to an exchange—Not entitled to enforce statutory right to recover the property exchanged on being dispossessed of the property. REP. 620 .. 61

TRUST—Founder of charity—Provision made by for devolution of trusteeship—Founder if can subsequently modify or alter .. 42

———Lease by all the trustees—Death of some trustees—Surviving trustee if can sue for arrears of rent without impleading legal representatives of the deceased trustees REP. 291 .. 7

TRUSTS ACT (II OF 1882), S. 5—Scope—Shares—Expression of wish by testator as to disposal of——If creates a trust .. 74

VENDOR AND PURCHASER—Sons of Hindu vendor challenging alienation and obtaining decree for possession and actual possession in execution—Suit by purchaser for damages for dispossession against sons of vendor—Limitation—Date of "dispossession"—If that of decree or actual physical dispossession REP. 456 .. 32

WATER RIGHTS—Ryot of particular village entitled to take water from tank for irrigation—Cannot get injunction restraining the landholder from taking water for irrigating lands in another village unless damages actual or prospective have been established REP. 297 .. 15

WILL—Validity—Motive and intention—Difference—Relief as to existence of enmity of brothers based on exaggeration of facts—If hallucination invalidating will .. 44

WINDING UP—Mere difference of opinion among majority directors and minority directors—If sufficient for compulsory winding up REP. 69 .. 4